Submission from Scottish Association of Law Centres (SALC) for the Legal Profession and Legal Aid (Scotland) Bill

The Scottish Association of Law Centres (SALC) is the representative body for Scotland’s community law centres. Community law centres employ qualified solicitors, paralegals, money advisors, and social care workers. They utilise the assistance of law student volunteers. Each law centre has its own independent legal practice led by a Principal Solicitor. All income generated by the legal practice is the property of the law centre, which is a registered Scottish charity. Overall law centre policy and finance is controlled by a management committee which comprises of ordinary members of the local community. Our services are generally free at the point of delivery to the public.

Law centres have particular expertise in the fields of defending evictions and mortgage repossessions, housing disrepair, preventing homelessness, employment law, sex, race and disability discrimination, mental health law, asylum and refugee law, criminal injuries compensation, education law, child law, debt and diligence, and social security law. Law centres are responsible for a large volume of free legal representation within these fields of law before the courts and tribunals. Over the last twenty-five years, Scottish law centres have been responsible for a significant volume of test case and campaign work to improve the rights and remedies of citizens who are vulnerable, in poverty or social disadvantage.

Full members of SALC include: Castlemilk Law and Money Advice Centre, Govan Law Centre, Legal Services Agency, Eastend Law & Money Advice Centre, Drumchapel Law and Money Advice Centre, Paisley Law Centre, and the Ethnic Minorities Law Centre. Associate members include: Dundee North Law Centre, Scottish Child Law Centre, Shelter Scottish Housing Law Service, Disability Rights Commission, Equal Opportunities Commission, Enable, and the Scottish Refugee Council.

Comment

In principle, SALC welcomes and supports the policy aims of the Legal Profession and Legal Aid (Scotland) Bill (the ‘Bill’). However, we believe that the Bill as currently drafted is not capable of delivering those policy aims. SALC has two main areas of concern as regards the Bill, which are summarised below. Where appropriate, we suggest workable and equitable solutions. If so advised, we would happy to elaborate further on this submission and proposed solutions, by providing detailed case studies, suggested draft amendments and/or oral evidence etc.,

[1] The Scottish Legal Complaints Commission – does the proposed Commission balance the rights of complainer and practitioner fairly and equitably?

(a) The ‘Complaints levy’. Section 18 of the Bill makes provision for an annual general levy to cover the administrative costs of the Commission. SALC would hope this levy will not be significantly more than the current Law Society of Scotland levy. Of more concern is the terms of section 19 of the Bill which introduces a ‘Complaints levy’. Where a complainer pursues a complaint which requires mediation or an investigation by the Commission, the practitioner will be liable to pay a financial ‘contribution’ to the Commission with respect to those costs. The cost of that contribution is not known. More worryingly, liability will arise regardless of innocence or blame. That is inequitable and unfair.

Why should an innocent practitioner have to pay costs? It is the equivalent of winning a case but having to pay the losing side’s expenses. SALC believes that practitioners should not have to pay costs where a complaint is found to be unproven or without merit.

If section 19 of the Bill is not amended we believe it may give rise to an unintended consequence. A small minority of complainers may take advantage of section 19. If it becomes apparent that lodging a prima facie competent complaint to the Commission will always result in a financial cost to a legal firm – win or lose – then a small minority of
complainers might use this process to secure an economic settlement. That would be an unwelcome and unintended policy consequence.

Scottish law centres are funded from public funds. In general, law centre funding is often tight and insufficient to meet demand. We do not believe that it would be in the public interest for public funds to be diverted to subsidise the proposed ‘Complaints levy’. As noted, this problem could be easily remedied by amending section 19 to provide that where a complaint is not upheld, no costs will follow for the practitioner.

(b) Who can complain? Section 2 of the Bill provides that the Commission can determine a complaint ‘by or on behalf of any person having an interest’. Section 2(3) defines ‘person having an interest’ to mean ‘any person who appears to the Commission to have been directly affected by the suggested inadequate professional service’. This means that it is not only clients who can complain to the Commission.

At present someone who is not a client cannot secure a financial award for inadequate professional service. If there is no contractual relationship (or no reasonably duty of care) between a solicitor and complainer, then there is no legal justification for a financial award. However, a non-client complainer could be awarded financial compensation up to £20,000 as the Bill is currently drafted. We would respectfully suggest more precise drafting in order for the Bill to deliver the Scottish Ministers stated policy intentions.

(c) Compensation up to £20,000. The current upper limit for inadequate professional services (IPS) is £5,000. This limit was up-rated to £5,000 by The Solicitors (Scotland) Act 1980 (Compensation for Inadequate Professional Services) Order 2004 (SSI 2004/550) on 1 April 2005. Prior to 1 April 2005 the upper limit for IPS was £1,000. SALC queries the need and justification for such a substantial increase, particularly when the upper limit was only recently increased.

For example, the general compensatory award for a child whose asthma has been severely exacerbated (life threatening) from living in damp, cold and mouldy living conditions is between £500 and £1,000 per annum: see Scott & Scott v. Glasgow District Council 1997 Hous LR 97. The general range of awards for inconvenience and distress that a tenant could expect for having to endure living conditions not reasonably fit for human habitation are also in the range of £500 to £1,000 per annum: see Buchan v. North Lanarkshire Council 2000 Hous LR 98 Burns v. Monklands District Council 1997 Hous LR 34 Kearney v. Monklands District Council 1997 Hous LR 39.

Why as a matter of principle should a complainer obtain more than a sick child when they may have no actual loss other than IPS? This does not appear just and equitable.

If as a matter of policy the Scottish Ministers believe a substantial increase in compensation for IPS is deserved then who will pay for this? Industries such as the banking or insurance professions can pass on additional operational costs to their customers through increased fees or premiums. Law centres and other legal aid practitioners operate with set public grants or fixed rates of payment for legal aid. There is little scope to pass on extra costs.

SALC is concerned that the Law Society of Scotland’s Master Policy insurers (Marsh UK) have indicated that they will not provide additional cover for increased IPS awards. The reasons for this are discussed below at paragraph (d). This means that a law centre could potentially be put out of operation through an adverse IPS award. We do not believe that is in the public interest; and as previously noted there is no apparent justification for IPS awards over £5,000.

Following our meeting with the Bill’s Team Leader it is understood that the £20,000 upper limit is not intended to cover IPS, but rather professional negligence claims where there is an actual financial loss and/or serious financial disadvantage. However, as currently drafted section 8 of the Bill does not make that distinction. A possible solution would be to amend section 8 to provide that successful IPS complaints would attract an award not exceeding
£5,000, while successful negligence claims would attract an award not exceeding £20,000, subject the caveats as set forth in paragraph (d) below.

These issues are of particular concern to law centres because of our client profile. We often assist clients when no-one else is willing or able to help. Sometimes our clients have been to several firm of solicitors without satisfaction, or have intractable, complex, unusual or novel problems. Many of our clients have mental health problems and are under considerable stress and anxiety. All of these factors add up to clients being more likely to complain if they do not perceive that we have obtained a result to their satisfaction – as opposed to the best possible result when one applies the law to the facts of their case.

Accordingly, we believe law centres by the nature of their difficult work are particularly vulnerable to complaints. As the Bill is currently drafted, a law centre could be forced to close simply from the requirement to pay for the cost of several ‘Complaints levies’, let alone the extra irrecoverable costs of IPS awards.

(d) **Human Rights Act 1998 compliance.** It would appear that the Bill effectively creates a quasi-judicial forum for clients to pursue a claim of negligence. The benefits to the client are obvious. A complaint can be pursued without fear of cost or expense. However, there is little in the Bill which makes provision for a robust inquisitorial or adversarial system of dispute resolution. Section 7 simply states that where the Commission does not refer a complaint back to the practitioner for resolution or a negotiated settlement or does not proceed with mediation, it must ‘investigate the complaint and after giving the complainer and practitioner an opportunity to make representations determine it’.

Is there to an evidential hearing; an opportunity to lead witnesses, cross-examine and test the evidence? Schedule 3 envisages the possibility of no hearing, and the possibility of written submissions only. No express right to a proof is given. There is no provision for an appeal (other than an appeal to a sub-committee of the Commission itself: schedules 1 and 3). Indeed, section 10(1) expressly provides that a determination upholding a complaint may not be founded upon in any proceedings. This causes three key problems.

Firstly, as Schedule 1 of the Bill gives the Scottish Ministers the direct power to hire and fire Commission members, it is questionable whether the Commission is Article 6 compliant: see *Starrs v Ruxton* 2000 SLT 42 (a case where the appointment of temporary sheriffs fell foul of Article 6 of schedule 1 of the Human Rights Act 1998).

SALC believes that where the Commission is sitting in a quasi-judicial capacity (i.e. determining negligence claims up to £20,000 in value) then the appointment and tenure of those Commission members must meet the criteria required for judicial appointments; otherwise the Bill must allow an appeal to a court of law (see: *Begum v. London Borough of Tower Hamlets* [2003] UKHL 5). As presently drafted, it is possible that the Bill falls foul of section 29 of the Scotland Act 1998; and as such, would be subject to challenge before the Court of Session.

Secondly, it is not apparent why the Bill should permit a claimant the right to pursue a cost free negligence claim through the Commission, and thereafter still have the right to raise court proceedings against a solicitor for the same matter. While it is accepted that section 10(2) provides that a court ‘may take into account’ an award of damages made by the Commission, it is not in the public interest to create a system of double jeopardy.

Thirdly, as noted above, it is understood that the Master Policy insurers (who indemnify all legal practitioners for inadequate/negligent service claims) are not willing to cover the additional cost of claims under the Bill. This is due to the Bill not providing for an independent, impartial, robust and adequate dispute resolution scheme. Without full insurance cover, a law centre could be forced to close in the event of just one adverse determination by the Commission at the full compensatory award level.
[2] Legal Aid – will the Bill’s legal aid reforms improve access to civil justice?

(a) **Advice & assistance reforms.** SALC has no objection in principle to non-lawyers (‘registered advisers’) accessing the advice and assistance and ABOWR schemes. However, we believe that if registered advisers are going to be paid from the same legal aid fund, and at the same rates as qualified solicitors, they must be subject to the same robust quality assurance schemes as legal aid practitioners.

That would mean a requirement for registered advisers to have adequate professional indemnity insurance, a guarantee fund scheme for those likely to handle client’s money, and to meet the peer review quality assurance standards as apply for the Civil Legal Aid Register.

Most importantly, members of the public who use registered advisers must have the right to have inadequate professional service complaints determined by the Bill’s Commission. As currently drafted, the Bill would extend the Legal Advice and Assistance scheme to non-lawyers, but with none of the responsibilities that come with that scheme.

It is not in the public interest to have a two-tier legal aid scheme, where members of the public can seek statutory redress for solicitor complaints, but have no statutory right of redress and recompense for registered adviser complaints. SALC would suggest amending the Bill to extend the Commission’s jurisdiction to include complaints against registered advisers.

(b) **Improving access to civil justice.** Presumably one primary intention of Part 4 of the Bill is to improve access to civil justice across Scotland. SALC is concerned that simply permitting suitably qualified non-lawyers to access the Advice and Assistance Scheme will not of itself improve access to civil justice.

More likely than not, this initiative would have a restricted take up (due to the limited number of potentially eligible candidates) and would modestly improve the income of advice agencies with a registered advisor. While that may be fair and reasonable, it will not improve access to civil justice. For example, advice agencies may rightly use additional income to improve their pay and conditions, or recruit more paid staff (which typically could mean experienced volunteers being paid).

If the policy intention of Part 4 is to dramatically improve access to civil justice then SALC would suggest that this Part be amended to enable the Scottish Legal Aid Board (SLAB) to provide grants (or service level agreements) to law centres, solicitors and advice agencies to meet particular strategic access to justice objectives. For example, the public in many of Scotland’s rural communities cannot access free legal advice or representation on a range of housing, employment and social welfare matters. Such problems could be tackled quickly and easily if SLAB were empowered to issue strategic grant funding.

Likewise, many citizens in Scotland do not have access to free legal representation from a specialist law centre solicitor on a legal matter which may prejudice and threaten their home, quality of life, health, employment or children. For example, while Glasgow has six community law centres Aberdeen City has none. An amendment to Part 4 of the Bill could empower SLAB to provide core funding to establish a new city or rural community law centre; and in so doing directly and substantially improve access to civil justice for all of Scotland’s citizens.