Submission from John Thom for the Legal Profession and Legal Aid (Scotland) Bill

I write as part of the consultation process upon the above Bill.

I am writing to you as a practicing solicitor. I have no problem with any mechanism that monitors and encourages delivery to the public of legal services to a high standard. However, any mechanism should be fair in all the circumstances, not only to the public in receipt of that service but the individual practitioner responsible for the case, his/her firm, and to the legal profession as a whole.

Clearly any change to the current position should be effected only if it brings real improvements to the process. I am extremely concerned to note that the proposals are such that the Scottish Legal Complaints Commission will not be independent. There is to be no proper right of appeal for solicitors against any finding of the Commission. The new Commission to be set up under the legislation is not independent from the government in that appointments to the Commission/Board will be made by Scottish Ministers. There is no guarantee of any solicitor representation on the Commission/Board. For all these reasons I believe that this new proposed legislation is in conflict with the human rights legislation and in any event is contrary to the principles of natural justice.

The increase in compensation to be awarded in cases of inadequate professional service currently suggested to be up to £20,000 is unreasonable and excessive. This is all the more so when there is no effective right of appeal against a decision of the Commission. It is likely that the costs of setting up the new Commission and the annual running costs will be far in excess of the current costs incurred in the existing system. I understand the proposal is that the running costs will be met by a general levy on the legal profession as well as a case specific fee to be charged to the solicitor for every case considered. It is surely unfair that a solicitor be charged for an investigation whether or not the case is upheld. It is equally unfair that the complainer is not expected to meet any costs associated with an investigation even when the investigation shows that the complaint was unjustified. This may well encourage frivolous and speculative claims to be made by vexatious complainers, an entirely unacceptable situation.

It seems disproportionate to allow awards up to £20,000 for an inadequate service where in fact there may be no negligence involved or indeed ultimate loss to the consumer. This level of potential award is disproportionate and oppressive especially when viewed against the background of no right of appeal and no cost consequence to a vexatious complainer.

Negligence claims are adequately dealt with in the current Court system and indeed of course we as Scottish Solicitors already have mandatory insurance cover in place under the Master Policy Scheme backed up by a Guarantee Fund. When taken together the existence of the Master Policy for professional indemnity insurance purposes backed up by the Guarantee Fund provide a unique protection to consumers when utilising the services of Scottish solicitors.

All surveys suggest that the vast majority of the public are happy with the service they get from Scottish solicitors. There will always be cases where an inadequate service is provided, mistakes made etc but they must not be used to bring in additional regulation and costs which far outweigh any benefit provided by the proposed changes. On any realistic cost benefit analysis the proposals are unnecessary.

On the basis of the ever increasing regulation being imposed on the profession there are many many solicitors considering whether or not they in fact require to remain practicing as Scottish solicitors. There are many many areas of work carried out by Scottish solicitors which they could in fact carry out without being so registered. As the regulations increase together with the attendant costs many solicitors will simply “de-register” and thus withdraw from the public the significant advantages of the current regulatory system and the protections afforded by the Master Policy and Guarantee Fund. Perversely by increasing the regulations and attendant costs the consumer may well lose out because of the withdrawal of services rendered by Scottish solicitors.
In summary I have no difficulty with the principle of an Independent Scottish Legal Complaints Commission but it must be truly independent, there must be a right of appeal to an independent body and finally there should be a proper cost benefit analysis carried out before the imposition of such additional regulation and regulatory bodies.

Ultimately this additional regulation will drive up costs which will be passed on to the consumer without any real additional benefit to the public. It may drive many Scottish solicitors to change their business models and withdraw from practicing as Scottish solicitors thus withdrawing from the public the considerable advantages of dealing with Scottish solicitors as mentioned above by way of the protections of the Master Policy, the Guarantee Fund and the effective regulation imposed upon them by The Law Society of Scotland.

Ultimately what you may well achieve by increasing regulation and costs is a more expensive service to the public with less protection.