Submission from Alistair Beckett for the Legal Profession and Legal Aid (Scotland) Bill

GENERAL

The changes proposed in the Bill will have a disastrous effect on the ability of members of the public to have Access to Justice.

It is a fundamental part of any democratic society that citizens should not only have rights, but that they should have the means of defending and upholding these rights: even when the citizen’s opponent is the state.

It is universally accepted that the law is more complex now than it ever has been. Why this is so, and whether it needs to be this way is another question. The fact remains that it is practically impossible for the average citizen to know or find out (a) what all of the law is, and (b) how to go about using that law without specialist help.

Citizens therefore need access to trained, knowledgeable and skilled people who are able to guide them through the law.

There is no point in having rights if one cannot do anything about them.

While advice agencies do a sterling job, it is not possible for them to cover all the areas in which citizens require advice, assistance or representation. It is simply not realistic to expect their staff to amass the knowledge and skills acquired during
(a) four to five years’ study at university undergraduate level,
(b) one year’s compulsory postgraduate study,
(c) two year’s practical training
(d) experience acquired.

Asking them to do so would be like asking a volunteer first-aider to work as a OP or a general surgeon at a hospital.

In the same way that citizens need doctors for their physical and mental health, they also need solicitors for their social, constitutional and democratic health.

Any system which limits or restricts access to justice for society as a whole or for identifiable parts of society is therefore a bad system and one which runs counter to any well-reasoned and socially just political policy.

What is the current situation for high street solicitors in areas such as Dumfries & Galloway?

In the main, access to justice through qualified legal advice and representation in Scotland is uncoordinated and entirely dependent on private practice fulfilling the social need. Private practice law firms can only be run as commercial organisations. They do not receive any regular or predictable funding from any source. Their predominant sources of income are case or transaction-based. In an area such as Dumfries, when acting for ordinary citizens, these come either from
(a) the client,
(b) any funding arrangement or rights which the client may have (such as legal expenses insurance), or
(c) state funding through the Scottish Legal Aid Board for the poorest (and, by definition, most vulnerable and most in need).

Market forces work on (a) in the same way as any other business. (b) is of limited extent for the most common forms of legal assistance required by the ordinary citizen (wills and estates, conveyancing, family law and divorce, and court representation), due to the unpredictable nature and extent of the amount of work and therefore funding required. It has been said that insurance companies have too much sense and financial acumen to allow themselves to be drawn into that!

Legal Aid is the poor relation of the law. In some areas (for example children’s cases), the remuneration paid has remained unchanged since 1992. Solicitors have no control and or influence over what is paid under the legal aid system, and rates are extremely low compared
to the rates which can be claimed from an unsuccessful opponent in expenses (costs) in a civil court case.

Most solicitors in private practice in this area are self-employed, either in partnership or as sole traders. Their only income comes from profit from the business. Typical costs include:

a. Staff costs. Each solicitor in private practice in this area supports not only their own job but between one and two others. Shortage of trained staff means that solicitors in this area have to compete with local authorities and city practices to attract and retain staff. There is therefore no particular difference between wages earned by staff in offices in this area and those earned in the public sector or in more lucrative areas of business (e.g. city commercial work).

b. Premises cost. Firms in this and similar areas tend to be small. The more accessible or central an office is, the higher the costs in rent and rates. This means a proportionately higher financial burden on each solicitor.

c. Insurance. All solicitors are obliged to have insurance to cover amounts up to £1.5 million. The premiums, even with full no-claims discount, come to several thousand pounds per solicitor.

d. Professional subscriptions and guarantee fund contribution. The guarantee fund is a “kitty” to which all solicitor principals (partners and sole traders) in private practice contribute. It provides a fund from which compensation can be paid to clients who have lost out as a result of dishonesty on the part of a solicitor. In effect, it is privately-run criminal injuries compensation for financial loss. These two items add over £1000 per solicitor to the annual costs bill.

Earning capacity is finite. Despite the introduction of block fees for some forms of legal aid work, most work is still charged on the basis of a time charge. A rate is set (or agreed with the client) for the work and time spent on the case or transaction has to be accounted for. Only work spent on the case is paid, therefore a solicitor’s earning capacity is limited by the amount of time he can work. This is why work-life balance is such a major issue in the legal profession. In order to make up for low rates (for example legal aid), where it is not possible to charge more per hour, solicitors can only work more hours, which affects family and other non-work areas of their lives.

This leads back to the point about non-qualified staff. Solicitors have to do most of the work. If it was possible to have the work done by non-qualified staff, solicitors would have been doing it already as a matter of commercial sense.

The situation is that many solicitors firms are operating on extremely tight profit margins. It is well known that high-street practice is the least profitable area of the law these days, and that it carries the most stress. The client are all ordinary people dealing with some of the most stressful situations they will ever encounter in their lives (bereavement, divorce, losing children, moving house) and, as a result require considerable support. Given ordinary people’s lack of knowledge as to how the law operates, expectations can be unrealistic and a high level of communication is required if problems (and therefore complaints) are not going to arise simply through misunderstanding and lack of communication. Misunderstandings lead to friction and complaints.

High street clients are therefore high-maintenance, high-risk clients and take up a significant amount of the time a solicitor has to try to earn what he or she needs to cover costs and make a living.

Because of these factors, together with unrealistically low rates, many legal firms are, for example, withdrawing from legal aid. As an illustration, at Kirkcudbright Sheriff Court, there are only two firms prepared to sign up to the duty scheme. One of them is from Dumfries. We therefore have the situation where, out of five firms practising in the Stewartry, only one is prepared to carry out that form of legal aid.

At the moment the main factors behind such decisions are:

a. Low pay
b. Low or non-existent profit (affecting personal income)
c. High time commitment and work level

If, in addition to these commercial factors, a much higher risk profile is added, then the balance will be tipped even further away from legal aid work for many more firms.

What is the extent and what are the consequences of the risk imposed by the Bill?

There are three aspects to this:

1. The widening of the category of complainers;
2. The possible financial consequences of complaints; and
3. The inevitable financial consequences of the levy.

The Bill proposes to enlarge the capacity of persons who can complain to anyone affected by the actions of a solicitor. In an adversarial (client against opponent) area of work, such as family law and divorce, this means that the opponent can complain that a solicitor’s actions has affected them even when the solicitor has been doing their job properly and following their client’s legitimate instructions. Quite apart from the private practice implications, Procurators Fiscal would also be affected. Solicitors in local government would be affected.

Widening the capacity of persons who can complain will automatically mean

a. the number of people complaining will grow,
b. the time required to deal with complaints will grow, thus eating further into the number of hours there are in the day to do one’s job,
c. the chance arises that one can be complained about for doing one’s job correctly and properly.

This last in particular, is patently a ludicrous situation in which to place anyone. It is shortsighted in the extreme to introduce an unfair system and simply hope that it will “sort itself out”.

The financial consequences are potentially fatal for many firms already on the edge of what is financially tolerable in the high street.

1. More complainers means more cost in dealing with these complaints.
2. While at the moment, complaints are funded by the legal profession, much of the work is done by unpaid volunteers — solicitors and lay people in equal proportions — who do not charge for their time. This option is not going to be available to a state-run body. This means yet more cost.
3. Having to pay a levy just because someone has complained — right or wrong — about you is a situation that the vast majority of solicitors (and probably the vast number of ordinary citizens if they were put in a similar position) find grossly unfair. In effect solicitors would be penalised even when they had done nothing wrong. Describing this as “polluter pays” may be a catchy piece of propaganda, but it is grossly misleading. It will not even be established that the person paying has polluted anything, and even if they are completely exonerated, they will still have to pay, with no refund.
4. The consequences of compensation — a direct import from English proposals — are horrifying to virtually all solicitors in this area. Given the current system as proposed in the bill, the insurers who provide cover for the profession are questioning whether it would make any sense for them to provide cover for such “compensation”. They feel that they would be signing a blank cheque without further details of how this “compensation” is to be assessed and what principles are to be applied in determining liability. This leaves the situation where solicitors could be left with no insurance cover for an amount which would bankrupt the overwhelming number of firms in an area such as Dumfries and Galloway. Few solicitors (and none in this area) enjoy limited liability. Whatever happens financially to solicitors’ firms happens to individual solicitors and to their families.

Faced with the costs and a risk profile such as this, the cost-benefit analysis of working as a solicitor in the high street is tipped decisively. The costs and risks become enormous and the benefits are already marginal.
Commercialsly, only one decision makes sense: move out of the high street.

It has been stated that additional costs can be passed on to the client. While this may be true (depending on market forces for privately-funded work), it is totally misleading for legal aid. Legal aid rates do not even keep pace with inflation and solicitors have no say on what the will or will not charge. The choice is black or white: do the work at the existing low rates, or stop doing the work.

1 am happy to challenge the committee to think of one good reason why solicitors should continue to offer high street legal work.

What are the consequences of solicitors moving off the high street?

Clients

The prognosis is simple: people will be unable to find and obtain the services of a solicitor to deal with their legal affairs. A situation on a par with the current crisis with dentistry will be repeated all over Scotland.

“High street” firms, particularly outwith the cities earn their living from the following types of business:

a. Conveyancing. Local knowledge is essential in this area to safeguard people’s interests in what and where they buy. With increased regulation regarding environmental issues and the increased risk of environmental change on housing, this knowledge is going to become even more important. The very conveyancing system in Scotland itself relies on solicitors accepting personal responsibility for completion of transactions (through letters of obligation) and further relies on the fact that the person on the other side of the transaction being able to rely on the solicitor’s professional integrity and reliability. Conveyancing represents the legal side of the largest financial transaction most people will ever make on their own account. Accordingly the stress factor for clients is high and the risk of complaints is high.

b. Family law. This is seen as one of the lowest paid sectors in the legal profession and a disproportionate number of practitioners are women. Family law practitioners are subject to enormous pressure as they try to guide anxious and often distraught clients (often going through the most stressful time of their life) through the case. In this area more than any, expectations are based on rumour, gossip and what someone’s friend got from their divorce. Further much of family law relates to the care and welfare of children. Something going wrong in this area could have huge ramifications to a child’s development. The responsibility is therefore enormous. A huge amount of work is needed to educate the client in what courts can and cannot do. The risk of complaints in this area is disproportionately high.

c. Executries. Again, this area requires dealing with clients when they are at their most vulnerable (through bereavement) and therefore under enormous stress.

d. Criminal law. Again, another are of law dealing with stressed individuals, many of whom are facing life-shattering consequences. In this area, the constitutional implications of citizens being able to defend themselves against criminal allegations are most acute. Again, however, this area is predominantly funded by legal aid, and therefore income levels are unrewardingly low.

It can thus be seen that the high street practice is the main gateway for people to access information and services

affecting the law as it relates to the average person in the street.

The simple fact is that if firms are squeezed out of provision of this sort of service — either financially or through the risk of personal financial ruin — then for most citizens, many of their rights might as well not exist.

“Access to Justice” would be a meaningless abstract concept.

The Public Sector

There are four main public sector organisations which rely on private sector high street legal firms in order to carry out their functions, namely:
a. The Procurator Fiscal Service  
b. The Sheriff Courts  
c. Local Government  
d. The Registers of Scotland

Procurators Fiscal are concerned about the impact on the way in which criminal cases are dealt with in court. They have spent a considerable amount of time and effort in implementing recent reforms in criminal court work. All of these reforms are predicated on the assumption that there will be a solicitor representing the accused person (in cases involving some sexual offences, it is compulsory that a person be represented rather than conduct their own defence).

Many of the reforms require active co-operation between Fiscal and defence in order to prepare the case and avoid wasted time at court for the courts and for witnesses. Witnesses are now rarely interviewed by the defence as papers are disclosed at an early stage. Fiscals can be confident that such sensitive material does not reach the accused. Witness statements cannot be disclosed to an accused person and the crown authorities would vehemently oppose any provision which would allow this. Fiscals have large numbers of cases to conduct. Courts have to fit these in. This means that the majority of criminal cases in Scotland take very little time in court. The issues in each case have been distilled down by work done behind the scenes by Fiscal and defence. If every matter arising in a criminal case had to be dealt with in court, waiting lists would explode and delays would reach biblical proportions. Fiscals see this happening in cases where an accused chooses to be unrepresented.

Fiscals are therefore concerned that the current court system would break down if there were no experienced private practice solicitors to do the background work necessary to keep the justice system working.

Local government solicitors in this area are concerned that (a) their workload will increase beyond their ability to deal with it through similar factors, but more importantly (b) that cases will not be properly dealt with. Many of their cases involve social work or education departments dealing with children — usually particularly vulnerable children — as well as adults with special needs and people with mental illness. They cannot represent the local authority with all its duties and responsibilities and, at the same time, be aware of all the factors affecting the person at the centre of the dispute and safeguard their interests as well. They see their role as trying to bring cases to a conclusion in the best interests of the person with whom their client department is concerned. They are therefore acutely aware that the individual’s perspective on matters needs to be properly represented if a proper solution is to be found.

Local government solicitors are therefore concerned that the vulnerable will be prejudiced if there is no one to advise and represent them properly.

The Registers of Scotland are responsible for the Land Register which determines ownership of land in Scotland. Currently they are in the middle of an enormous exercise (at considerable public cost in terms of time, effort and resources) to modernise the registration of title to land. Known as ARTL (Automatic Registration of Title to Land), this will, it is claimed provide Scotland with a modern, reliable and fast system of land registration. However, as currently planned, it will need solicitors who are qualified and experienced enough to use it.

Conclusion

I regret the length of this submission. Unfortunately, the Bill has the advantage of glib and easy solutions to a perceived problem. However as the committee will be aware, there are rarely easy answers to difficult situations. The manner in which citizen’s rights are enforced in Scotland is far from simple: to think otherwise is wrong — even dangerous — and those who try to pretend it is simple tend to be missing the point. The danger is that the difficulties of the situation will be discounted or not believed until it is too late and the damage is done. As with any other area of expertise, once that expertise is lost, it is hugely difficult to recover it. This country has seen that with many industries and economic sectors. It is therefore essential that the committee has the full facts before it to come to a reasoned and balanced view.
There is no legal equivalent in Scotland of the NHS. While a system (for which the state accepts responsibility) exists for the physical and mental health of citizens, no such coordinated system exists for the social, legal and constitutional health of the average Scot. The state takes no responsibility for such a system rather than through the inadequate medium of legal aid. Instead the state is content to rely on private practice filling the void, but taking no responsibility itself for supporting such essential provision. This Bill is the ultimate expression of trying to claim public authority over the legal profession without any public responsibility. Authority and responsibility are two sides of the same coin and to have one without the other is simply unfair.

This Bill is fundamentally flawed and needs to be drastically amended.