Submission from Scottish Women’s Aid for the Legal Profession and Legal Aid (Scotland) Bill

FOREWORD

Scottish Women’s Aid (“SWA”) is the national, co-coordinating body for the 40 affiliated, local Women’s Aid groups in Scotland providing information, support and safe refuge to women, children and young people experiencing domestic abuse. The National Office in Edinburgh both services and supports the network of local groups and brings issues to a national forum on their behalf.

INTRODUCTION

SWA welcomes the opportunity to comment on this Bill. Our comments are detailed below in the order that the relevant sections appear in the Bill:

Section 2 Receipt of complaints: preliminary steps
Section 4 Determining nature of complaint

We are concerned as to how the Commission will interpret “frivolous or vexatious” and what they will use as their benchmark in this matter. What may seem “frivolous” to the Commission may represent the valid feelings and concerns of the complainer and should not be casually dismissed as being trivial or of no account in the Commission’s eyes.

In carrying out their functions in relation to so-called “frivolous” complaints, the Commission must consider the complaint from the complainer’s point of view and their perception of an apparent failing in conduct or service. In this case, the Commission should politely advise the complainer that they have considered the matter and fully explain that there is no case to answer, for whatever reason.

Similarly, what is a “vexatious” complainer- someone with a series of genuine grievances who complains too often for the Commission’s, practitioner’s or firm’s liking, or a person who apparently has another agenda or a vendetta against a practitioner or firm? It should be remembered that the person may have cause to continually complain about services or conduct and the complainer must be treated with respect. There should be no list of “usual suspects” whose complaint is summarily dismissed and each instance of a complaint should be investigated without prejudice as to previous events.

Section 4 Determining nature of complaint
Section 7 Services complaint: Commission’s duty to investigate and determine

Section 4 states that the Commission must,  "… consult, co-operate and liaise with the relevant professional organisation and have regard to any views expressed by the organisation on the matter before making a determination under subsection (1) as respects the complaint." It does not, however, state that the same courtesy or service will be extended to the complainer and the section must be amended to reflect this, or the Commission will be carrying out investigations in a process weighted against consultation with the complainer. Section 7 says,  "the Commission must, subject to section 11(2) and (5), investigate the complaint and after giving the complainer and the practitioner an opportunity to make representations determine it “ but this does not convey that the same level of interaction with the complainer, as afforded to the practitioner under section 4 above. Consequently, section 7 must say that these representations are those stated in section 4, which, as we have pointed out, requires the appropriate amendments outlined above.

Section 8- Commission upholds services complaint

There is an issue that the prospect of incurring a fine of up to £20,000 will result in solicitors no longer doing work which they consider could attract complaints, genuine or otherwise, and that that this will, in turn, further impact on women, children and young people experiencing domestic abuse.

Local Women’s Aid groups are already reporting that solicitors previously used for family law matters are no longer doing legal aid work and that they are often finding it impossible to locate another local solicitor who will do this work. We are greatly concerned that this proposal may make the situation worse.

One concern is that in civil cases where domestic abuse is an issue, if the court finds in favour of the woman and grants a civil protective order, or refuses a contact order, under the proposals, the abuser, as “any person having an interest” in terms of the Bill, could retaliate
by taking action against the woman's solicitor for a dereliction of duty by way of professional conduct or in service provision in not representing facts, etc.

Section 9 - Services complaint: notice where not upheld or upheld

There is nothing in Bill stating to which external court or tribunal either the complainer or the practitioner can then appeal a decision of the Commission. The suggested avenue seems to be an Appeals Committee constituted from Commission members. For the reasons below, this is not appropriate and the Bill must be amended to reflect this.

- While we agree with the establishment of the Commission, it is necessary that their proceedings are transparent and that any appeals body and procedure is independent of the Commission and equally accountable and transparent.
- The provisions of the Bill do not instil confidence in this matter; in terms of Schedule 1 to the Bill, the Commission will be appointed by Scottish Ministers who may also regulate the Commission’s procedure. The Commission will, in turn, appoint and establish from their number, their own internal Appeals Committee. This does not constitute an independent and transparent appeals process.
- Under Schedule 3, the Commission is given power to decide when it will and will not give a reason for a determination, directions, and recommendations and, further, when reasons will be given for the Committee’s decision; this is a most unacceptable proposal as for the sake of fairness, independence, confidence in, and transparency of, process, such reasons must always be given as a matter of course.
- Taking this issue further, the proposal that the Commission can decide when the Appeals Committee will and will not give reasons for a decision, and that this matter may also be subject to the decision of Ministers, means that the Appeals Committee’s decisions cannot, in the circumstances, constitute decisions of an independent and impartial appeal tribunal.
- In addition, notwithstanding that the Appeals Committee will not be independent of the Commission, the Appeals Committee also, apparently, have discretion in deciding when it will and will not hear an appeal, which is an unsatisfactory situation, particularly in light of the previous proposals that the Appeals Committee need not give reasons for decisions.

Section 15 - Handling by relevant professional organisations of conduct complaints: investigation by Commission

It is not clear what avenue of appeal a complainer then has if the professional body does not deal with the “handling complaint to the satisfaction of the complainer, if there is an issue about the conduct of the investigation undertaken by the professional body in looking into the matter or where the Commission does not decide to investigate a “handling complaint” or discontinues such investigation.

Presumably, the Scottish Legal Services Ombudsman currently has this duty, as it also has the power to refer matters to the Scottish Solicitors Discipline Tribunal.

However, since it is proposed that the office of the Ombudsman be abolished, it is assumed that the Commission must take over these duties. If this is not the case, the public will be receiving an inferior service which is not equivalent to the services previously offered by the Ombudsman in this regard.

Section 16- Investigation under section 15: final report and recommendations

What are the penalties for a professional organisation not complying with the Commission’s recommendation? If bodies choose not to comply, how will the Commission ensure that changes are made to inappropriate practices and good practice put in place, particularly since there is no compulsory provision for organisations, etc to implement guidance from the Commission under section 30 below?

Section 21- 21 Grants or loans by the Scottish Ministers

Presumably it will be the intention of the Executive to furnish the Commission with funding similar to the manner that it currently funds the Ombudsman, as the levies alone will not pay and the Commission cannot be funded by the fines it can apply. This is not addressed fully in the Bill.

Section 23- Duty of Commission to make rules as to practice and procedure
The Commission must ensure that it has all the relevant powers available to its predecessor, the Ombudsman, and that it continues to promulgate good practices and procedures that the Ombudsman had in place. It is important that the public and the profession continue to receive a high standard of service and that the Commission’s Code of Practice reflects this.

Section 25 - Commission’s duty to provide advice
We would not like to see “reasonably practical” being used as an excuse not to provide information - what does “reasonably practical” mean in terms of requests for information? The Commission must ensure that the public have access to information on the complaints process, the Commission’s work, policy, procedures and Code of Conduct and the appeals process.

Section 30 - How practitioners deal with complaints: best practice notes
The Bill is silent as to how the professional organisations will be under any duty to comply with this guidance and incorporate it into their own procedures, and there is the issue, therefore, of how this will be dealt with in the Bill as the Bill is silent on this matter.

Section 44 - Criminal legal aid in solemn proceedings
We would query why this is being done in the light of the comments below from consultees of the Advice for All Consultation, as recorded in the “Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward Analysis of Written Consultation Responses” Paper.

The areas in which consultees suggested that SLAB be given powers were:-
- All of those who provided a view agreed that SLAB should be given powers in solemn cases to recover costs from applicants who have made false disclosure of their means.
- The majority (61%) of those who responded favoured SLAB being given the powers in solemn cases to terminate publicly funded legal assistance where this is appropriate.

However, consultees were clear on a different viewpoint involving SLAB in the area of granting legal aid in solemn cases:-
- The majority view (58%) was opposed to the transfer of responsibility for granting criminal legal aid in solemn cases from the courts to SLAB. However, although a clear majority (77%) of legal bodies opposed the proposal, a slight majority (55%) of other respondents favoured this transfer of responsibility.
- A recurring theme was that the proposal would result in delays in solemn proceedings. Others defended the expertise of the courts in assessing financial circumstances and eligibility.

We would agree that involving SLAB in this area of decision-making would be time-consuming, result in delays, costly and involve further administration.

Section 45 - Register of advisers: advice and assistance
We have voiced our concerns previously, in other responses, on the reduction in service and standards that may arise from proposals allowing lay persons to represent or carry out services normally the responsibility of solicitors. Although the proposals above refer to Advice and Assistance (“A&A”) and not Civil Legal Aid work, changes in the delivery of which are our greatest concern, we would wish to raise the following issues:-

Appointment of Registered Legal Advisors
- Who does SLAB envisage as becoming a “Registered Legal Advisor?”
- What benchmark and level of standards in relation to suitability to give advice, experience, qualifications, service delivery, complaints procedure etc, will be employed?

Regulation of Advisors and compliance
- Will Advisors be required to comply with an equivalent standard of reporting monitoring and compliance that currently applies to solicitors carrying out A&A work e.g SLAB audits of their service, documentation, case-handling and financial handling of this matter? If SLAB carries out this monitoring, then there will be further
work for the Advisor that may negate the fee they receive for the work. On the other hand, if SLAB does not undertake this degree of overview, then neither they, nor service users, can be confident that they are receiving the same quality of service that a solicitor would previously have provided.

- Complying with the Code and all of the above administration requirements introduces a further regulatory structure that advice providers are not currently subject to.
- On the issue of regulatory structures, will advisors be obliged to comply with SLAB’s Advisors’ Code in addition to, or in place of, any code of conduct they already follow from their professional regulatory body, other funders and other regulatory bodies, and, in the case of any conflict, which Code of Practice will apply?
- A standardised, “one-size-fits-all” Code of Practice will not be acceptable and will be unworkable.

**Funding issues**

- There is a danger that where Local Authorities currently provide part or whole funding to an organisation who then chooses to become an Advisor, the Local Authority may then reduce or withdraw these monies if SLAB is to provide the Advisor with a fee from the Fund.
- There is a possibility that Local Authorities could compel advice providers to take up this funding, as an alternative to the Local Authority taking up their obligation in terms of grant funding.
- As a cost-cutting exercise, the Local Authority could decide to dispense with funding the organisation completely, seek their own funding from SLAB and operate the service in-house, which would impact on the independence and availability of advice services available to the public.
- The Bill is silent as to whether the funding will be provided on a case-by-case basis or by way of a grant. If done by way of a case-by-case basis, this could cause hardship to the advising organisation, particularly if the Local Authority takes action as suggested above.

**Impact of charging clients for services.**

Currently, the type of advice and information which would be covered by this proposal is being delivered free of charge by agencies, particularly the voluntary sector. This raises the following issues:-

- If an organisation currently delivering this service free of charge becomes a “Registered Legal Advisor” in relation to the provision of A&A, will they then be required to carry out a means assessment on the income and capital of those seeking Advice and Assistance services? This would mean that service users would be put off by the charge and would be denied access to services.
- There is the issue of additional administrative burdens on Advisors in terms of collecting contributions from service users, dealing with money and keeping the necessary record financial records,
- If the service users do not pay, then the organisation will be obliged to undertake debt collection work and may have to evoke the “claw back” provisions, again, a further administrative and cost burden.
- Delivering A&A, where there is a charge to the service user, will require the provider to undertake the type of reporting back to SLAB that solicitors carrying out A&A work currently undertake, in addition to SLAB audits of their service and financial handling of this matter.
- Advice providers may start to “cherry pick” those clients whose case is likely to be covered by the A&A categories specified by SLAB. This means that they will a) start charging for services previously provided at no cost to the service user and b) that they will turn away clients whose query does not fall under the income-generating categories, neither of which will be of benefit to service users and the provision of advice services generally.