Submission from Mary Seneviratne for the Legal Profession and Legal Aid (Scotland) Bill

Introduction

The stated purposes of the Bill are: to establish the Scottish Legal Complaints Commission; to make provision as regards complaints about members of the legal profession in Scotland and other matters concerning the regulation of that profession; to make provision in connection with the administration of the Scottish Legal Aid Fund, including a register of advisers in connection with advice and assistance; and for connected purposes. It arises from two separate strands of policy development: firstly, regulation of the legal profession, particularly in relation to complaints about its member; and secondly, the reform of legal aid. Both these policy issues have been the subject of inquiries by the Justice 1 Committee. I was the external advisor to the Justice 1 Committee for its inquiry into the Regulation of the Legal Profession, the report of which was published in November 2002 (SP Paper 700).

This response relates only to the first issue, the proposed reforms to improve the system for handling complaints against members of the legal profession.

Scottish Legal Complaints Commission

I welcome the aim of improving the system for handling complaints against members of the legal profession, but am not convinced that the model chosen in the Bill is the best way of achieving this.

The Bill proposes the establishment of a Scottish Legal Complaints Commission to take over the handling of complaints, headed by a board composed of a non-lawyer chair and non-lawyer majority. I am not convinced of the value of such a board; have reservations about its name; and do not think its powers strike the right balance between the regulator and the profession. There does not appear to be any advantage in having a board, rather than a single office-holder, and indeed, there is a great deal of value in having a person designated as the office-holder (even if deputies are also required), rather than an impersonal board. I do not see how a board will enhance public confidence, and there is a danger that it will be seen as another bureaucratic organisation. A named, single office-holder lends an air of approachability to the organisation. I am also concerned that the title of “ombudsman” has been lost, and would urge very strongly that this is retained. There is growing public recognition and respect for the title, and it is recognised as representing an independent complaint-handling function, which is free to consumers. It may not be at all clear to consumers that this is the role of the Commission. The title of “ombudsman” should be retained, even if there is to be a board.

Professional regulation

The proposals in the Bill focus on complaints, and the Bill does not deal with other aspects of regulation, for example, training, admission to the profession, professional standards. Traditionally, the legal profession, like other professions, has enjoyed the privilege of self-regulation, within a statutory framework. Within this framework, the system for dealing with complaints about the quality of legal services has been described as “joint regulation” or “co-regulation”. In essence, this model provides for independent supervision of the self-regulatory processes operated by the relevant professional bodies. Unlike the Clementi review, which involved a wide-ranging review of regulation of the legal profession in England and Wales, the Justice 1 Committee had focused its investigation on complaints. While accepting that complaints procedures represent only a small part of regulation and self-regulation, the Justice 1 Committee acknowledged that the way the profession handled complaints was seen to be the main source of public concern about regulation generally. The focus on complaints, by the Justice 1 Committee and in the Bill is appropriate. However, in my opinion, the Justice 1 recommendations achieved the right balance between the regulator, the public interest and the professions. It is a pity that the Bill has moved beyond these recommendations, resulting in a number of drawbacks with the proposed framework.
Justice 1 proposals

The Justice 1 Committee concluded that the best option was to keep the present system of co-regulation, but to increase the independent element. This was to be done by introducing a single “gateway” for complaints, which would then be allocated to the relevant professional body for investigation. Although the Bill provides for this single gateway (by creating the Commission), this does not follow the model recommended by the Justice 1 Committee. In my view, the single gateway model suggested by the Justice 1 Committee, which envisaged enhanced powers for the ombudsman (involving investigation of the original complaint; enforcement of the ombudsman’s recommendations; conduct of general audits; prescription of timescales; directions to professional bodies to investigate complaints) would have ensured that the public had confidence in the system, but still enabled sufficient input from the profession. It follows therefore that I believe that the Bill should not be abolishing the Scottish Legal Services Ombudsman, but should be increasing its powers and enabling it to become the “single gateway” for receiving all complaints where local resolution has not been possible. Once received, complaints would normally be referred to the professional bodies for investigation, subject to monitoring by the ombudsman, and with the ombudsman being able to conduct investigations where appropriate.

Specific concerns

I have a number of specific concerns with some aspects of the Bill.

Appeals

I am concerned that there is no provision for appeal, either by the practitioner or complainant. While appeals are not normally available from ombudsman decisions, this is not normally problematic, as many ombudsmen (particularly in the public sector) make recommendations, which cannot be enforced in the courts. This lack of appeal, coupled with court enforcement, and a maximum £20,000 compensation, could have human rights implications. Although there is provision for the Commission to establish an internal review mechanism by an appeals team, I am not convinced that this would provide sufficient safeguards for the parties.

Compensation (section 8)

The increase to £20,000, from the present £5,000, seems excessive. I wonder if such an amount is necessary, given the other remedies that are also available. I also wonder what effect this may have on the profession, given the problems with the appeals process, and the fact that determinations are enforceable.

Conduct complaints (sections 4, 5)

I am not convinced of the need to deal with conduct complaints differently from services complaints. There are often overlaps in these categories, and to separate them in this way may cause confusion.

Duty to investigate (section 7)

Given the views I have expressed above, I believe it would be better if there were discretion, rather than a duty, to investigate, and thus most complaints could be referred to the professional bodies for investigation.

Funding (sections 18, 19, 20)

If the Justice 1 model were adopted, most of the costs of complaint handling would be borne by the profession, as now. Some additional funding would be needed by the enhanced Scottish Legal Services Ombudsman, and this should be borne by the profession. It should be for the profession to decide on an appropriate scheme for a levy on individual firms/practitioners.

Conclusion

I agree that a “healthy justice system needs the legal profession to be efficiently and effectively organised and regulated in a transparent and accountable way” (Ministerial Foreward, Reforming complaints handling, Building consumer confidence), and I welcome the
introduction of a Bill which aims to achieve this. There is much that is good in the Bill (e.g. the power to oversee the profession’s handling of conduct complaints; the ability to reject frivolous and vexatious complaints; the establishment of a single gateway). However, I am not convinced that the mechanism proposed (the Scottish Legal Complaints Commission) will provide sufficient improvement on the previous system, and it may even be counter-productive, by removing from the legal profession the responsibility for complaints. I consider that the better course of action would be to follow the Justice 1 Committee proposals, and enhance the powers of the Scottish Legal Services Ombudsman. This should be a more cost-effective, and less bureaucratic way of improving the system, for the benefit of consumers.