

evidence to justice 2 committee on the legal profession and legal aid (Scotland) bill

March 2006

About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry, in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

Please check our web site at www.scotconsumer.org.uk for news about our publications.

Scottish Consumer Council
Royal Exchange House
100 Queen Street
Glasgow G1 3DN

Telephone 0141 226 5261
Facsimile 0141 221 0731
www.scotconsumer.org.uk

The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS

Can consumers actually get the goods or services they need or want?

CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS

If something goes wrong, can it be put right?

SAFETY

Are standards as high as they can reasonably be?

FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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Introduction

The Scottish Consumer Council welcomes the general principles of this bill. We have an interest in both of the main aspects of the bill - complaints about the legal profession and legal aid - from the perspective of consumers who use legal services. We have for some years argued that there is a need for an independent body to deal with complaints against lawyers, to ensure that the public has confidence in the legal system. We have also long argued that there is a need to introduce new, innovative and more effective ways of providing publicly funded legal assistance. We are disappointed that the bill does not progress this latter issue to the extent that we had expected, as discussed in more detail below in relation to Part 4 of the bill.

Part 1- The Scottish Legal Complaints Commission

We have long been concerned to ensure that complaints about lawyers in Scotland are handled in a way that operates in the interests of Scottish consumers. We therefore very much support the Scottish Executive's stated aim of the proposed reforms contained in the present bill: *'to put the users of legal services at the heart of regulatory arrangements.'*¹

Consumers who use lawyers do so at important and often stressful and difficult times in their lives. They place important transactions in the hands of their lawyers, and if things go wrong with that relationship it can have a devastating effect on client confidence. Where dissatisfaction does arise, consumers need to have no doubt about the impartiality of the dispute resolution mechanism.

This evidence focuses primarily on the arrangements for handling complaints against solicitors. Solicitors provide by far the greatest proportion of legal services to clients, and therefore most complaints that are made concern those services. However, the bill also concerns the future regulation of complaints against advocates, conveyancing and executry practitioners, and those granted rights of audience under the Law Reform (Miscellaneous Provisions) Act 1990. We believe that it is appropriate that similar arrangements should be made in respect of these groups of professionals; it would not be fair to either consumers or lawyers if non-solicitors were subject to different arrangements.

In 1999, we published research into the experiences of those who had complained to the Law Society of Scotland about a solicitor.² Half of those who responded believed that their complaint had not been handled fairly. The detailed responses revealed a clear perception that the Society was not impartial in its handling of complaints, appearing to take the side of the solicitor.

We believe that the greatest weakness in the present system for handling complaints against solicitors is the lack of consumer confidence in the ability of the Law Society of Scotland to adjudicate impartially on complaints. At present, the Society has a dual role: firstly, to regulate solicitors and represent the public interest in relation to the solicitor profession, and secondly, to represent the interests of its members. We believe that consumer confidence in the complaints-handling function is crucial and that our research, and the conclusions of the Justice 1 Committee's inquiry, showed that the present model does not command

¹ Policy Memorandum relating to the Legal Profession and Legal Aid (Scotland) Bill, at paragraph 26

² *Complaints about Solicitors: a study of consumers' experiences of the Law Society of Scotland's complaints procedure*, Scottish Consumer Council, 1999

that confidence. Once lost, it is very difficult for such confidence to be regained, no matter how many improvements are made to the system.

While we give credit to the Law Society of Scotland for the considerable improvements it has made in recent years, any complaints system run solely by a profession's representative body appears anachronistic and outdated today. The development of ombudsman schemes in financial services and the reform of regulation in other professions such as medicine and architecture point to the significant impact the consumer voice has had in recent years.

The move is away from in-house complaints handling towards independent schemes, because that appears to be the only way to ensure that consumers will have confidence in the adjudication of complaints. This issue of confidence is crucially important, particularly in the provision of legal services. In our view, the establishment of an independent body to deal with complaints about lawyers is the only way forward to ensure public confidence in the legal profession.

We therefore welcome the proposal to establish an independent Scottish Legal Complaints Commission to deal with complaints about lawyers, *where they have not been capable of resolution at an earlier stage*. This concept is central to the proposed new system: consumer complaints should be dealt with quickly and effectively at a local level, by the business or professional involved, so far as possible. Many complaints can be resolved by way of an apology or informal agreement at this stage. Only where local resolution fails, should the complaint then go to a higher complaints handling body.

It is in the interests of both client and solicitor that complaints are dealt with as early as possible. We welcome the policy intention behind the bill that complaints should be dealt with at an early stage, by the practitioner who provided the service complained about. We believe that such local resolution is the best way to resolve complaints before they escalate, and we have therefore welcomed the recent introduction by the Law Society of Scotland of a practice rule requiring all firms to have a complaints procedure and a client relations partner.

Section 3(2) of the bill provides that the Commission need not deal with a complaint where the complainer has not first raised the matter with the practitioner or his or her firm.³ This does, however, provide scope for the Commission to accept a complaint under these circumstances, where it considers this to be appropriate. There will be some instances where the complainer will feel unable to raise the matter direct with the practitioner, and we therefore welcome the fact that the Commission is given this discretion.

The bill also aims to ensure that practitioners and their firms do everything they can to resolve complaints by providing that the Commission may refer a service complaint back to the practitioner or firm if it considers that they have not made a sufficient attempt to negotiate a settlement.⁴ It also requires them to notify the Commission within a notified period to provide an account and an explanation of the steps they have taken to negotiate a settlement.⁵

Service and conduct complaints

We have long been concerned that the various categorisations applied to complaints by the Law Society of Scotland are confusing, and that complainers often do not know the difference between the different types of complaint. We have argued that they should not have to know the difference, and we welcome the definition of a complaint in the bill as 'any expression of dissatisfaction'.⁶

³ This is defined in Section 3(4) as a premature complaint

⁴ Section 6 (2) (b)

⁵ Section 6 (c)

⁶ Section 34

It is sometimes very difficult to draw the line between *inadequate professional services* (IPS) and *professional misconduct*. The distinction may sometimes boil down to a matter of degree: if a solicitor fails to reply to one letter or telephone call from his or her client, depending on the circumstances the service the client received might be inadequate. If, however, s/he fails to reply to any communication from the client, this might be considered to be conduct “which would be regarded by competent and reputable solicitors as serious and reprehensible”,⁷ and therefore would be professional misconduct.

We are concerned that the bill makes a clear distinction between service and conduct complaints, by providing that service complaints are to be dealt with by the Commission, while those regarding a practitioner’s conduct are to be referred to the relevant professional body. We can see that there is an argument in favour of referring conduct complaints to the professional bodies, as this would ensure that those bodies are aware of the problems which exist within the relevant profession, and could address these in the form of practice rules and professional guidance.

While we have previously been persuaded by this approach, we now consider that, on balance, conduct complaints should also be dealt with by the Commission. We are persuaded by arguments made by the current ombudsman and others that many complaints have elements of both service and conduct, and that these are very difficult to separate. The distinction between the various types of complaint is not always clear, even to solicitors, and members of the public cannot be expected to distinguish between them. We therefore believe that if conduct complaints are referred to the professional bodies, there will continue to be a lack of public confidence in the system, with the result that the bill will fail to meet its primary objective.

Were conduct complaints to be dealt with by the Commission, the Law Society of Scotland would still have an important role in promoting the reputation of the solicitors’ profession as a whole, rather than ruling on individual complaints. It would also have a clear role in trying to ensure that complaints are properly dealt with by firms, and offering training and guidance to its members. Without the burden of a complaints handling role, it would have the ability to concentrate more of its resources on its promotional and representational role. It would also continue to have a vital role in regulating the profession in relation to admissions, education and training, while promoting good practice and generally enforcing its code of conduct and practice guidelines.

Complaints about fees

We also think that the Commission should have power to deal with complaints about the fees charged by practitioners. At present, the Law Society of Scotland is unable to deal with such complaints, and the only recourse for those who are unhappy with the fee they have been charged by a solicitor is to have the account taxed by the auditor of court. However, there is a risk that the client will have to pay for this. Unless the auditor finds that the account was excessive, it is likely that the client will have to pay the auditor’s fee, in addition to what the auditor determines is a fair and reasonable fee for the solicitor’s services. This possibility may well deter clients from using the taxation procedure. We also have serious concerns that the current taxation procedure lacks transparency and consistency. We therefore consider that the system would be fairer and more transparent if the Commission were to deal with fees complaints in the future.

Mediation

We welcome the proposal that the Commission will have the power to resolve disputes by mediation, where both parties agree.⁸ This should help to reduce the number of cases going to formal investigation,

⁷ *Sharp v Council of the Law Society of Scotland*, 1904 SC 129 or 1984 SLT 313.

⁸ Section 6 (4) and (5)

thereby reducing the cost and time involved for the parties. We are very much in favour of using the most appropriate method of resolving disputes, and consider that less formal means of resolution should be used before recourse to more formal methods where possible. However, our 1999 research found that more than half of those who had been offered conciliation by the Law Society of Scotland did not find it helpful. We expressed concern that some complainers may feel pressurised into accepting conciliation, because they did not appreciate that it was not compulsory.

It is therefore important to ensure that both parties understand what is involved in mediation, and in particular, the fact that it is a voluntary process. The Commission would also need to be mindful of the potential imbalance of power between the complainer and the practitioner. Most complainers will not have the benefit of independent advice, and we would not wish to see a situation where some complainers may reluctantly agree to a settlement with which they are not happy, because they feel intimidated.

Compensation

We welcome the powers of the Commission under section 8, where it upholds a service complaint. The proposed increase in the limit up to which compensation can be awarded, from £5000 to £20,000, is particularly significant for those who have cause to complain about their legal practitioner. Increasing the limit to this level should have a significant deterrent effect in ensuring that firms do not fail to provide an adequate service.

Negligence claims

It is also significant that the bill explicitly states that 'inadequate professional service' includes negligence,⁹ this will allow the Commission to deal with the majority of negligence claims against solicitors. Previously, the problem in situations where negligence is alleged has been that the Law Society of Scotland has refused to deal with the matter, requiring the complainer to pursue it through the Society's master policy or if necessary, the courts. This is a costly and slow process, and it is likely that many complainers do not pursue the matter for that reason. We also have anecdotal evidence that where complainers do pursue a negligence claim, some have had great difficulty in finding a solicitor who is willing to sue a fellow legal professional. The ombudsman is also concerned about this issue, and has recommended that Scottish Ministers should look into the matter.¹⁰

We therefore welcome this provision, which will mean that a considerable proportion of complainers with negligence claims will no longer have to face the risk, expense and uncertainty of taking their claims to court. Moreover, the court process can be slow, and we would hope that this procedure will allow claims to be dealt with quickly and efficiently, allowing both the complainer and the practitioner to get on with their lives sooner than at present.

We have previously expressed the view that any limit on negligence claims is arbitrary, and we can see no reason in principle why the Commission should not be able to deal with negligence claims of any value. We welcome the provision in section 8(7) that Ministers will consult with appropriate consumer interests should they decide to amend the compensation limit.

Other powers

⁹ Section 34

¹⁰ *Scottish Legal Services Ombudsman Annual Report 2004-05*

We welcome the Commission's powers to monitor compliance with its directions,¹¹ to examine documents and demand explanations,¹² and to obtain information or documents from the professional organisations.¹³

We also welcome the duties placed upon the Commission to monitor practice and identify trends in both service and conduct complaints, and to publish reports and guidance on these matters.¹⁴ As we have said, we think that conduct complaints should be dealt with by the Commission, but the professional bodies should continue to have a central role in promoting good practice in the relevant professions. The Commission should therefore liaise with the professional bodies in the production of such guidance.

We also welcome the Commission's duty to provide advice to the public on the process involved in making a complaint.¹⁵ We hope that the Commission will provide a telephone helpline, and publish clear and accessible information for the public on the complaints process.

We are particularly pleased to see that section 14 gives the Commission power to enforce any direction it makes under section 8 (2) in the courts. One of the major criticisms of the Scottish Legal Services Ombudsman has been that, while she has power to make recommendations to the professional bodies, she does not have powers to enforce them. Research has found that many complainers feel the ombudsman does not have sufficient 'teeth', and should be given increased powers.¹⁶ The new Commission will have such 'teeth', allowing it to effectively enforce its directions.

We warmly welcome the provision in section 29 that the Commission may monitor the effectiveness of the Scottish Solicitor's Guarantee Fund and the Law Society of Scotland's master policy for indemnity insurance. The New South Wales ombudsman has the power to oversee the equivalent mechanisms in that jurisdiction, and we have previously argued that this would be appropriate for Scotland. We have been contacted in recent years by a number of complainers who have had difficulties in pursuing claims under the master policy. We consider that the current procedure appears to lack transparency, and gives some complainers the impression that the insurers are in league with solicitors and the Society. This new provision should help to increase public confidence in the operation of the policy.

Membership of the Commission

We welcome the fact that the Commission will be chaired by a non-lawyer member, with a non-lawyer majority.¹⁷ This should ensure that the Commission is seen as truly independent of the legal profession. We like the use of the term 'non-lawyer' rather than 'lay'; we have evidence from other areas of our work that the term 'lay' is not always well understood. It may be seen to imply a lack of knowledge and experience, when in fact non-lawyer members are likely to have significant knowledge and expertise in other areas of life. We are pleased that the bill makes specific reference to appointing those with experience and knowledge of consumer affairs and complaints handling. We would also welcome the knowledge and experience of the lawyers appointed to the Commission; like the non-lawyer members, they would be there to represent the public interest, rather than the interests of their own profession.

¹¹ Section 12

¹² Section 13

¹³ Section 28

¹⁴ Sections 26,27 and 30

¹⁵ Section 25

¹⁶ *Complaints about Solicitors: a study of consumers' experiences of the Law Society of Scotland's complaints procedure*, Scottish Consumer Council, 1999; *Survey of Complainers to the Scottish Legal Services Ombudsman*; Scottish Executive Central Research Unit, 2000

¹⁷ Schedule 1

Funding

In line with the policy intentions of the bill, we believe that the legal profession, individually and collectively, should be encouraged to try to resolve complaints without complainers having to resort to the formal complaints system. A 'polluter pays' approach will encourage this, and we therefore support the bill's approach: a general levy on all members of the profession, and a complaints levy on firms against whom a complaint is made, provided that the complaint is not frivolous, vexatious or otherwise ineligible.

Part 3- Legal Profession: other matters

We are pleased that Section 39 provides that the Scottish Solicitors' Discipline Tribunal should have equal numbers of solicitor and non-lawyer members. We think, however, that, as with the Commission, the tribunal should be chaired by a non-lawyer. While the legislation allows for a non-lawyer to chair the tribunal,¹⁸ the current chairman is a solicitor, and we believe that in practice this has always been the case.

We welcome section 42 of the bill, which is intended to pave the way for the commencement of Sections 25-29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which relate to the granting of rights of audience in the Scottish courts to non-lawyers. We have long argued that greater competition in the provision of legal services would be in the interests of consumers, and should be encouraged, subject to adequate safeguards.

Consumers should have a wider choice as to who represents them in court, should they feel unable to represent themselves. We believe that there are some non-legal professionals who could very competently represent clients in court, such as insolvency practitioners in bankruptcy cases. These provisions are clearly in the interests of consumers, but they cannot be utilised until they are brought into force. At that stage, any organisation wishing to make such an application must prove that it fulfils the criteria laid down by the legislation.

We are aware that there may be an issue in relation to section 42 regarding non-lawyer providers of executry services. As we understand it, while at present others, such as accountants, can provide most executry services, they cannot make application for confirmation of an estate, but must refer this to a solicitor. We consider that this matter should also be brought within the scope of section 41, in the interests of greater competition and consumer choice.

We welcome the clarification of the status of solicitors admitted as notaries public, but who are no longer practising,¹⁹ and are not therefore covered by the Law Society of Scotland's master policy for indemnity insurance. The current situation may lead to confusion, and may pose an element of risk to consumers.

Part 4 - Legal Aid

An important feature of a just and inclusive society is the ability of all of its members to enforce their rights, meet their responsibilities and resolve their disputes. The costs of doing so should be affordable, while the processes available should be both appropriate and free of undue delay. We welcomed the recognition by the Scottish Executive in last year's *Advice for All* consultation²⁰ that more effective targeting of publicly funded legal assistance can contribute to greater social inclusion in Scotland. Publicly

¹⁸ Solicitors (Scotland) Act 1980, Schedule 4, paragraph 4

¹⁹ Section 43

²⁰ *Advice for All: Publicly Funded Legal Assistance in Scotland - the Way Forward*, Scottish Executive, 2005

funded legal advice, information and representation are essential public services, which are required to ensure that those who need to resolve their disputes are not excluded from the civil justice system due to cost or to lack of knowledge, help and/or advice.

We have long argued that, in order to ensure that it meets the real needs of consumers, the present system of public funding for legal and advice services requires to be radically restructured. At present, legal aid can only be provided by solicitors; consequently the present legal aid scheme concentrates on traditional areas of private legal practice, such as family law and reparation. This has resulted in unmet legal need, particularly in the area of 'social welfare law', which includes welfare benefits, debt, housing, consumer and employment issues. Many consumers therefore rely heavily on non-solicitor advice services and law centres for assistance with such matters.

Non-legally qualified advisers currently make a significant contribution to the provision of legal advice, assistance and in some cases, representation, in these areas of law. At present, however, such services cannot be funded by legal aid. We believe that publicly funded legal assistance should be based on the needs of those who use the civil justice system. People should be directed towards the most appropriate adviser for their problem, who may not always be a lawyer, and public funds should be made available to ensure that these services are provided. We therefore welcome the steps that the Scottish Executive is taking towards extending publicly funded legal assistance.

The *Advice for All* consultation clearly recognised that legal and advice services are currently provided by a wide range of agencies, and the vast majority of those who responded to the consultation were in favour of the Scottish Legal Aid Board being able to fund provision by non-legally qualified advisers as well as solicitors and advocates.²¹ We are therefore very disappointed that the provisions in section 45 are so limited. While it was clear from *Advice for All* that some of the changes proposed, such as the establishment of a national co-ordinating body for publicly funded legal assistance, were for the longer term, it was equally clear that the intention was to give the Board power to fund non-solicitors, including grant funding, in the short to medium term.²²

However, section 45 simply extends the current system of legal aid advice and assistance to non-solicitor advisers, allowing such advisers to apply to register with the Board to provide advice and assistance. Once registered, they may then provide advice and assistance under the existing legal aid scheme, as solicitors currently do. This means that, rather than a grant being awarded to an advice agency to provide advice on a contractual basis, an individual application form will need to be completed in every case.

This means that, as currently drafted, section 45 will have only a minimal impact on the provision of publicly funded legal assistance. While it may be utilised by law centres and private practice solicitors who employ paralegals or non-solicitor advisers, we do not believe that most advice agencies will take advantage of the provisions. Firstly, they would introduce considerable bureaucracy, as a form would need to be filled in for every client. Most advice agencies are not geared up to operate on a case-by-case basis, as they are largely grant funded at present.

Secondly, the provisions would require agencies to means test clients. Many advice agencies, most notably citizens' advice bureaux, offer their services free at the point of delivery. Some agencies are opposed to means testing as a matter of principle. This was recognised in the 2001 report of the *Working*

²¹ *Advice for All: Publicly Funded Legal Assistance in Scotland- the Way Forward*; Analysis of Written Consultation Responses, Scottish Executive, 2006

²² *Advice for All* -see note 20- at page 3

Group on the Review of Legal Information and Advice Provision in Scotland, which concluded that the conditions for funding would have to take account of this opposition to means testing and charging, and noted the need for flexibility to allow agencies to access other funding to cover the costs of providing services to clients who were not financially eligible.²³

We are therefore of the view that, unless the bill can be amended to introduce provision whereby the Board can award grant funding to advice agencies, it will have little impact, and will fail in its objective of ensuring that people receive advice from the adviser with the most appropriate skills, knowledge and experience. There will be an issue as to the proportion of the Board's budget which should be earmarked for such grants.

While we do not think that the funding mechanism in the bill takes the correct approach, there is clearly a need to introduce some form of quality assurance for all those delivering publicly funded legal and advice services. Those who use these services are entitled to expect that those providing them, whoever they may be, are competent, have adequate training and expertise, and that the services are of a good standard. We consider that a register, as proposed in section 45 is the way forward, but we think that it would be disproportionate in terms of cost and time to require each individual adviser to be registered.

Given the substantial turnover of volunteer advisers within many agencies, we think that, while individual advisers should be required to follow the code, it would make more sense to designate a specific 'compliance' person within each agency (in the case of CABs, one such person in each CAB), who is registered with, and therefore responsible and answerable to, the Board. This would follow the current approach of the Board's code of practice for solicitors undertaking criminal legal aid work. We think that there should be an 'exception' register of those advisers who are found not to be fit and proper people to give advice, which would be held by the Board.

There is an issue here about parity between solicitors and other practitioners, as defined in the bill, and other advisers, in relation to how complaints about them are handled. There is a need for a proportionate and independent mechanism for dealing with complaints about inadequate professional service and professional misconduct relating to such advisers.

Section 45 provides that Ministers may specify by regulations categories of advice and assistance which non-solicitors might provide. We would suggest that these should include areas of social welfare law such as benefits, employment, housing, consumer issues and debt. These are areas of law which private practice solicitors generally do not deal with, and consumers may therefore find it difficult to obtain advice on these matters.

Finally, we note that section 45 specifically excludes those who have acquired rights of audience under the 1990 Act from the register, and we would query why this should be the case. Given that they are not solicitors or advocates, such practitioners cannot grant legal aid advice and assistance under any other provisions, so far as we are aware, and we cannot see why they should be treated less favourably than others in this respect.

²³ *Review of Legal Information and Advice Provision in Scotland*, Scottish Executive, 2001, Part 8