The Limits of Self-Regulation in the Legal Profession

A consumer view of the Law Society of Scotland’s handling of complaints about solicitors
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?

We can often make our publications available in braille or large print, on audio tape or computer disk. Please contact us for details.
Background

In 1999 the Scottish Consumer Council published the results of a survey of clients who had complained to the Law Society of Scotland about the service they had received from their solicitor. The results showed that there was widespread concern that the body that represents the interests of solicitors, the Law Society of Scotland, also has statutory responsibility for investigating complaints against its members. As a result the Scottish Consumer Council recommended that the Scottish Parliament should review the Law Society’s complaints procedure, with a view to establishing an independent body to deal with complaints against solicitors in Scotland.

Solicitors provide a sophisticated and complex service to their clients. Depending on the particular case, solicitors are required to give advice on sometimes difficult areas of law; to represent clients in court in civil or criminal actions; to handle the legal aspects of transferring heritable property from one person to another; and to advise and negotiate on contractual matters. Every year, solicitors in Scotland are involved in negotiating and processing thousands of different transactions on behalf of their clients.

The vast majority of these are handled competently and cause no difficulty to clients. But some clients are dissatisfied with the service they have received.

It is therefore important that any system which handles complaints against solicitors has the capacity to make a judgement about whether or not the solicitor acted competently. This means whether he or she knew and applied the legal rules to the client’s particular problem or transaction and handled the client’s problem up to a standard that would be expected from a competent solicitor. What is not clear is that such a system, in order to ensure this, has to be set up and run by the professional body that represents the interests of solicitors.

This report presents a summary of the results of our research, together with a discussion of some of the issues surrounding self-regulation of the legal profession, with particular emphasis on complaints-handling.

### Principles of an effective complaints system

**Clearly defined**
There should be a relevant and consistently applied definition of what a complaint is.

**Accessible**
The procedure should be accessible, and well publicised. People should be told at the beginning what to do if not happy with the service provided.

**Barriers to complaining should be removed to ensure access for all**

**Procedure**
There must be a formal written procedure for handling complaints. This should be clearly written, simple to understand and use.

**Speed**
Complaints should be resolved quickly. There should be published targets for acknowledging and responding to complaints.

**Fairness**
All complaints must be dealt with impartially. The complaints procedure must be fair, open and understood by all involved.

**Effectiveness**
The procedure must be effective, dealing with all points raised, and providing suitable remedies.

**Complaints recording**
There should be a system for recording complaints, whether dealt with formally or informally, in writing or by phone.

**Monitoring and auditing**
This should be done regularly to ensure improvements are made.

**Review**
There should be a system for review which is seen by the public to be independent.*

---

1 Complaints about solicitors, Scottish Consumer Council, January 1999

* Taken from Service First - How to deal with complaints, Cabinet Office, 1998.
The research results

A total of 415 people who had used the Law Society’s complaints procedure returned a completed questionnaire. This was a response rate of 36% of a total of 1,229 questionnaires sent out. This was a reasonable response rate, and represents roughly one in three of people who complain to the Law Society of Scotland each year. Respondents answered questions about the nature of their complaint, aspects of the Law Society’s system for handling complaints, and their satisfaction with it.

Why people complain
The reasons why respondents complained about their solicitor were:

<table>
<thead>
<tr>
<th>Reason</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of communication</td>
<td>35%</td>
</tr>
<tr>
<td>Incompetence</td>
<td>33%</td>
</tr>
<tr>
<td>Delay</td>
<td>28%</td>
</tr>
<tr>
<td>Failure to follow instructions</td>
<td>24%</td>
</tr>
<tr>
<td>Poor advice</td>
<td>22%</td>
</tr>
<tr>
<td>Solicitor’s behaviour</td>
<td>15%</td>
</tr>
<tr>
<td>Over charging</td>
<td>11%</td>
</tr>
<tr>
<td>Dishonesty</td>
<td>7%</td>
</tr>
<tr>
<td>Other</td>
<td>7%</td>
</tr>
</tbody>
</table>

* Some respondents gave more than one answer.

Going back to the solicitor

The Law Society recommends to complainers that they should first raise their complaint with the solicitor if they have not already done so. While this is good advice, because many complaints can be resolved in this way, it can be off-putting.

Over 40% of complainers in our survey were advised to go back to their solicitor first.

Many respondents commented that they did not find this advice helpful. The following remarks were typical:

“I felt they were reluctant to get involved. This only led to further delays, but I assumed this was the procedure that must be followed.”

“It was a waste of time. The company would go to any lengths to avoid an admission of fault. They ducked and dived for months through a protracted correspondence described as ‘conciliation’ which actually just meant ‘excuses and self-justification’.”

In some cases, people who had already complained to their solicitor were told to go back to them. This was seen to be a waste of time:

“Having already spent a considerable amount of time discussing my complaint with the solicitors, I felt it was a waste of time and only reluctantly agreed to it after making the Law Society aware of my feelings.”

Conciliation

The Law Society tries to “conciliate” complaints between complainer and solicitor, which avoids the need for a formal investigation of the complaint if both parties reach an agreement. If the complainer has not already discussed the matter with the firm, their complaint letter is sent back to the firm suggesting that the firm contact the complainer directly to try to settle things informally. If this does not suit either the complainer or the firm the Law Society then tries to resolve things itself by conciliation.

Over half the respondents did not find the offer of conciliation helpful. Some of the responses also indicated that people were not sure if they had a choice in the matter.

---

2 According to the Law Society of Scotland’s Annual Report for 2000, the Society received 1,094 complaints last year.
How long does the process take?
More than half of respondents said it took up to one year for their complaint to be resolved, with over one third saying it took less than six months. However, one fifth said it took between one and two years, while almost a fifth said the process took over two years. Respondents were divided as to whether the time taken was reasonable, with those whose cases took over a year to be resolved being most dissatisfied.

Since our survey was carried out, the Law Society has devoted more resources to its Client Relations Office, which should reduce the length of time taken to handle complaints.

How satisfied were complainers with the outcome?
Most complainers (56%) were unhappy with the outcome of their complaint, with over 45% saying they were very unhappy. Only one in four said they were happy or very happy with the outcome.

As would be expected, those who were most unhappy were the ones whose complaint was not upheld. Of those whose complaint was not upheld, 92% were either unhappy or very unhappy with the outcome.

But some people whose complaints were upheld were also unhappy. Most significantly, where the Law Society had disciplined the solicitor or where compensation had been paid, half of the respondents were either unhappy or very unhappy with the outcome. It appears that they considered the sanction to be inadequate.

Was your complaint to the Law Society handled fairly?
Half of all complainers in our survey said that they considered that their complaint had not been handled fairly. When we asked them why, the responses revealed a clear view that the Law Society was not impartial in its handling of complaints, appearing to take the side of the solicitor.

What did people want?
The most common outcomes complainers hoped for were:

- 1 The mistakes to be put right (39%)
- 2 Financial compensation (39%)
- 3 An apology from the solicitor or the firm (38%)
- 4 Disciplinary action against the solicitor (38%)
- 5 Reduction or writing-off of fees (37%)
- 6 An explanation about what went wrong (32%)

* Some respondents gave more than one answer.

What actually happened?
Complainers mostly did not get what they hoped for. The most common actual outcomes were as follows:

- 1 My complaint was not upheld (23%)
- 2 Other (24%)*
- 3 I received compensation from the solicitor (16%)
- 4 My fees were reduced (14%)
- 5 I received an apology from the solicitor or the firm (12%)

* This was the most common outcome. Many people said that while the complaint had been upheld, an inadequate sanction was applied. Some said that the matter had not been resolved, or that nothing had happened.
The following comments were typical:

“I thought that the Law Society was entirely on the side of the lawyer. They asked me to send documentation, but when I did send documents they disregarded it. I honestly think, unless it is a matter of national or political importance or a huge scandalous matter, the Law Society of Scotland only wastes time with their complaints department.”

“Repeated attempts were made to reduce the status of the complaint. Letters were clear enough in so far as they went but, on several occasions important points raised by me went unanswered. The impression was gained that an attempt was being made to discourage me from pursuing my complaint.”

“The Law Society were seen to be an organisation solely intent on protection of their members. Numerous questions, queries and issues raised by us during the complaint were merely and rather blatantly ignored by the complaints committee.”

“Not for the first time the Law Society were seen to be merely a mechanism for protecting incompetent, negligent members. Many issues raised were ignored where it would obviously cause embarrassment to the Society and their members.”

Some complainers commented that although they thought the process was fair, the Law Society had not gone far enough in its disposal:

“Although I feel my complaint was handled fairly, I do not think that the Law Society took any steps against my solicitor to ensure that someone else did not get the same advice, eg additional training.”

“The procedure seemed fair, as far as it went. The outcome did not seem fair but it ended up as a choice between believing my version of events and that of a slippery-tongued solicitor.”

It was not only those who had not had their complaint upheld who thought it had been handled unfairly. In fact, almost half of those whose solicitor had undergone disciplinary action said that they thought their complaint had been unfairly handled. Almost one third of those whose complaint had been upheld said they thought that the process was unfair.
Were people satisfied overall with how their complaint was handled?
While just over four out of ten people were satisfied, a similar proportion were dissatisfied or very dissatisfied. Almost three out of ten said they were very dissatisfied.

Were people likely to approach the Law Society again?
Given the lack of alternative ways of complaining about solicitors, it is perhaps not surprising that less than half of the respondents said they would be likely to approach the Law Society again should they have another problem with a solicitor in the future. Almost one in five said that it was very unlikely, which suggests that their experience of the Law Society’s procedure has further reduced their confidence in the legal profession.

Taking the complaint further
Over one quarter of respondents were dissatisfied enough with the whole experience to take it further. The vast majority of these (84%) took their complaint to the Scottish Legal Services Ombudsman.

How satisfactory was the whole experience?
While around one third of the comments were positive about the Law Society procedure, the majority were critical of the Law Society and its complaints system.

Some comments indicated a general lack of care in dealing with complaints:

“The Law Society go through the motions, they treat you like a nuisance if you ask them for more information or if you want to question anything, and they take an age to do it.”

“We found the Law Society very unhelpful and at times to the point of arrogance.”

“The Law Society, in my view, are the most unhelpful people in society. If this customer care attitude was the attitude of business in general today, I do wonder what would happen.”
“... the general public will always be aware that there may be bias on the part of the Law Society, and that justice may not always be seen to be done by an organisation that investigates one of its own profession. One day, it may be more suitable to have an organisation like "ACAS" who are totally independent.”

There were, however, many people who said that they were very happy with the handling of their case:

“I cannot praise them enough.”

“I must say I was pleasantly surprised at the even-handedness and the professionalism, and also must say the people I was dealing with at the Law Society were very helpful.”

“I certainly don’t have any complaints of the Law Society. I think they did a considerable amount of work on my behalf. The Law Society kept me well informed at all times by phone and letter. The work they did for me was very much appreciated and I told them so.”

Some, however, indicated that although they were generally satisfied with the handling of their complaint, they felt uneasy about the Law Society’s self-regulatory role:

“The Law Society dealt with my complaint in a pleasant manner, keeping me informed at all times. I was always very conscious however of the fact that lawyers were involved in investigating the actions of a fellow lawyer, and had a distinct advantage over me.”
The role of self-regulation in the handling of complaints against professionals

It has been the Scottish Consumer Council’s position for many years that complaints against solicitors in this country should be handled by an independent body, because this is necessary to ensure that there is public confidence in the impartiality of the complaints process.

The Law Society co-operated fully with our research from the beginning, and was represented on the research advisory group. After the report was published the Society suggested that we had an “agenda”, and that we had simply reiterated our earlier policy on this issue without taking into account the changes the Law Society has made to its procedures over the years.

The clearest conclusion of the research was that 50% of complainers did not consider that the Law Society’s investigation of complaints was fair. Even where complaints were upheld, there was considerable disappointment with the outcome.

Completely unprompted by the questionnaire, respondents indicated again and again that they would have been happy had their complaint been dealt with by an independent body. Faced with such powerful evidence, there could be no possible justification for the Scottish Consumer Council changing its earlier policy. Improvements to the procedure over the years have clearly not increased the confidence of complainers in the self-regulatory system.

The Law Society’s procedure continues to be run by solicitors, for solicitors. The existence of lay members on the complaints committees cannot by itself ensure independence. A large number of complaints do not even get as far as being considered by a committee because they are disposed of administratively by Law Society staff before then.
The role of self-regulation in the professions has been the focus of public attention in recent years. This is true not only of the legal profession. A number of high profile cases have also called into doubt the role of the General Medical Council in regulating its members. According to Ann Abraham, the Legal Services Ombudsman for England and Wales, the media compared the medical profession’s regulatory framework with those of other professions, including lawyers, and a common perception has emerged that ‘the professions react unsympathetically to public complaint and are slow to embrace reform’. 3

In England and Wales, the Office for the Supervision of Solicitors, which is an arm of the Law Society, has been heavily criticised by the Ombudsman and the Lord Chancellor’s Department for lengthy delays and failure to reach the targets of performance set by the government.

There are many fewer practising solicitors in Scotland than in England and Wales (approximately 8,500 in Scotland compared to approximately 75,000 down south), and the volume of complaints is considerably lower here. Severe delays in the way that the Office for the Supervision of Solicitors (OSS) has dealt with complaints in recent years are not reflected in the Scottish system. However, in many ways it could be argued that the OSS is more independent than the Law Society of Scotland’s complaints procedure.

The OSS complaints scheme is well publicised and it has clear principles, standards and targets. The Law Society of Scotland’s procedure is not clear — it is very complex, and no clearly written formal complaints procedure exists. Moreover, the Society has not published any performance targets for each stage of the procedure. While the OSS conducts customer satisfaction surveys and publishes the results, our research was the first time complainers in Scotland had ever been surveyed.

In Scotland, the Legal Services Ombudsman has criticised the Law Society for delays in handling complaints, and additional resources have been put into the system to increase efficiency and reduce delay. However, no structural changes have been made to the procedure, and significant recent improvements to the system, while welcome, do not address the real problem.

The real problem is the lack of public confidence in the solicitors’ complaints procedure. The danger is that if the public do not have faith in a regulator, they will be discouraged from taking complaints and will see any investigation carried out by that regulator as biased. As well as being bad for the consumer, this is bad for solicitors.

The National Consumer Council has said that the solicitors’ complaints scheme in England and Wales has never commanded public confidence. It used to be even closer to the Scottish system than it is now, and its legalistic procedures appeared to favour the solicitor. The National Consumer Council considers that trade or professional organisations are always in a difficult position as regards the running of a self-regulatory scheme:

“How committed, they will be caught between alienating their own membership yet still generating public scepticism about their impartiality.”

This is exactly the situation the Law Society of Scotland finds itself in. At the same time as the consumer movement has been calling for an independent complaints system, some members of the profession have themselves been arguing that the Law Society should divest itself of its complaints-handling function because of the conflicts of interest involved. The Law Society appears to consider the fact that it is being criticised from two different perspectives to be evidence that the status quo is working. However, it is more likely that the opposite is the case.

---

4 Models of Self-Regulation: an overview of models in business and the professions; National Consumer Council, November 2000
Other models

There are various successful examples of independent complaints systems in other countries and other sectors. In New South Wales, Australia, the Office of the Legal Services Commissioner was established in 1994 to receive and investigate complaints against lawyers, and it can refer complaints to the Law Society. Such a change was introduced precisely to respond to concerns about the independence and accountability of the previous system, which was very like the Scottish solicitors’ complaints procedure.

Our research showed that there was considerable support for an enhanced role for the Scottish Legal Services Ombudsman, so that rather than simply investigating how the Law Society handles complaints, the Ombudsman should be dealing with complaints first-hand. This was also an approach which found favour with respondents in research conducted on behalf of the Scottish Executive last year.5

Other models worth considering include those now under the umbrella of the Financial Ombudsman Service, which is currently being established under the Financial Services and Markets Act 2000. It is not yet known when the Service will take over these roles, but the Banking Ombudsman scheme, the Personal Investment Authority Ombudsman Bureau and the Insurance Ombudsman scheme all have a long history of independence and expertise in resolving complaints.

All three of these schemes require the complainer to raise the matter with the firm before having his or her complaint adjudicated by the Ombudsman. The service is paid for by the industry, is free to consumers, and independent of the industry and of government.

---

5 Survey of Complainers to the Scottish Legal Services Ombudsman, Scottish Executive Central Research Unit, 2000
We can see attractions for the consumer in these models. There is no doubt about their independence. While given that many solicitors who are independent financial advisers have to submit to this approach, some of them might welcome such a scheme. The fact that complainers have to complain first to the firm, would give an incentive to solicitors to be more responsive to this approach than is presently the case.

Another alternative is for the legal profession to establish a non-statutory “arms-length” scheme which would be funded by the legal profession, as now, but established as a separate entity from the Law Society of Scotland.

There would, however, be pitfalls to be avoided in the establishment of such a scheme. This is very similar to the approach adopted by the Office for the Supervision of Solicitors, which has not been seen to be independent of the Law Society in England and Wales, or to operate very efficiently.

The Scottish Consumer Council would be concerned if such a model were adopted in Scotland, because we do not believe that it would be capable of giving complainers confidence that the system was unbiased. No matter how carefully the Law Society approached the establishment of such an entity, it would still be open to the accusation that it was biased in favour of its members.
Looking forward

So how should complaints against Scottish solicitors be handled? While not wishing to propose a definitive answer, we do believe that the present system of self-regulation is not sustainable, not least because it does not command public confidence. Any new system must be genuinely independent of the Law Society of Scotland, the professional association that represents solicitors’ interests.

There are a number of principles which are key to ensuring that independence:

External consultation and involvement. The procedure should take account of the views of those who may have to use it, as well as those representing the public and consumer interest.

Consumer, public and other independent interests must be fully represented on the body which establishes and oversees the rules of the complaints system. Any redress mechanism must be free of pressures from the professional body to deliver decisions which appear to favour its members. To ensure that there is no perception of institutionalised bias, the legal profession should not have control over rule-making in the complaints procedure. It is not necessary that solicitors draw up the rules, as long as they have some representation on the body that does.

There must be adequate, meaningful and commercially significant sanctions. The ultimate sanction, removing a practising certificate, is one which is clearly regarded as an extremely serious step and therefore one not likely to be taken. But there may be other sanctions which would have a greater impact, such as the payment of greater compensation for inadequate professional services. At present, in England and Wales the OSS has the power to make awards of up to £5,000, whereas the Law Society of Scotland can only award up to £1,000.

There should be an annual report, to deliver a degree of public accountability. At present a section of the Law Society’s Annual Report is devoted to the work of the Client Relations Committee, which deals with complaints. Some may question the appropriateness of such a report being contained within a document which is written as an account of how well the Society has been representing the interests of its members.
There must be adequate resources. The question of funding is crucial. As with all complaints procedures and ombudsman schemes, it should be free at the point of delivery to consumers. We consider that solicitors should pay, as they do now, for the complaints system. At present, solicitors pay for the handling of complaints through the annual subscriptions of members. The payment of salaries alone for the Law Society’s complaints department amounts to £386,000. The Financial Ombudsman Service is proposing that the financial services industry funds its work by a combination of a general levy on all firms and a ‘user pays’ element (i.e. a case fee) paid by firms for individual complaints. Initially, a 50:50 split between these two elements is proposed, with the ‘user pays’ element increasing in the light of experience of the scheme. We believe that such an approach should be considered for the solicitors’ complaints scheme.

**Conclusion**

We believe that a new independent system for dealing with complaints against solicitors should be introduced. The principles set out in the previous section are in our view the key ones to be taken into account when planning for the future. We hope that this report is found useful by those faced with ensuring that our mechanisms for handling consumer complaints about solicitors are fit for the twenty first century.

---

7 Funding the Financial Ombudsman Service: A joint consultation paper; Financial Services Authority and Financial Ombudsman Service, November 2000