PE1724/G
Petitioner submission of 19 November 2019

Consolidated response to the replies from the Scottish Government, and others.

The petition also refers to party litigants, and not just legal professionals, so the response from the Scottish Government is incorrect. It is essentially about fair competition in the provision of legal services and access to justice. If the committee comes to the conclusion that there may be unfairness against commercial attorneys, then the position of party litigants could also be worthy of consideration. I would observe that the Scottish Government has declined to comment on whether there are unfair restrictions within the courts, even though this is ultimately its responsibility.

It was a concern about fairness in the process, the failure to communicate, and to give any timescales, that resulted in the petition. It is worth noting that on the very afternoon of the day that the petition became public, (a Friday), a detailed e-mail was sent by the Lord President's Office explaining what the position was. On the following Monday a further explanation was given explaining that the Lord President had approved the revised scheme, and it was now up to Scottish Ministers. At that point the Association of Commercial Attorneys (the Association) still did not know what the Lord President's position was, and there was a concern that he would be against the revised scheme. On the Tuesday of that week Scottish Ministers approved the revised scheme.

Up until the petition was made public, no information was given as to what the timescales were regarding the decision on the revised scheme. The approved revised scheme is the essentially the same one that was submitted in October 2016. So, it took from then, until June 2019 to approve the revised scheme.

It is unclear what relevance can be obtained by stating that commercial attorneys are not solicitors, since neither are advocates. The whole point of the 1990 legislation was to create more choice in the provision of regulated legal services, not to protect solicitors and advocates from competition. A comparison with the much greater choice available in England might be worthwhile.

Previous government officials delayed the commencement of Sections 25 to 29 of the 1990 Law Reform Act for 17 years, on the basis of what does appear to be nothing other than prejudice against competition with solicitors, since no evidence was ever put forward to support the reasons for the delay. In fact it took the support of the Petitions Committee in 2002, the cross party campaigning of John Swinney, Margo Macdonald and David Whitton over a number of years, along with appeals to the Court of Session to eventually have the will of parliament upheld. If there is a long standing culture of resistance to change within the Scottish Government and the Scottish Courts which impacts on fair competition and access to justice, then it is relevant.

The selected extract from the letter in 2012 referred to, does not provide a full background to the matter. The 50 members in 3 years was set by the Lord President's Office at the time of approving the initial scheme. By comparison, in 2012, there were 60 solicitor advocates against a background of support from the law society, with all its considerable resources and who have had the dominant position in the marketplace for legal services for almost a century . The Association

years, what the law society had taken some 22 years, after the commencing of the 1990 Act, to achieve.

What the Association also raised at the same time with the Scottish Government and the Lord President's office, was a particular problem in with regard to procedural hearings in court, which was a factor in undermining the ability to grow the membership. Contrary to what had been anticipated in the initial scheme, it was proving very difficult and disruptive to find solicitors to act as local agents for commercial attorneys in procedural hearings in the same way that they appeared for other solicitors. Rights of audience for procedural hearings were first requested in 2012 but this was rejected.

There was no communication from the Scottish Government or the Scottish Courts in December 2015 with the Association regarding the points that have been raised in the submission from the Scottish Government, nor were there any discussions. It is important to note that the Scottish Government also appears to have glossed over the fact that it had been decided, without any consultation whatsoever, to restrict the revised scheme. Again, the Scottish Government have decided not to comment on any aspect of what was a very difficult process, why it took so long, and why there appears to be such fierce institutional resistance against more choice in legal services.

These are the facts.

1 There was no agreement with the Association to restrict the revised scheme in either 2015 or 2016.

2 The revised scheme was submitted in October 2016, and it reflected two main additional aspects from the original scheme. The procedural hearing rights first requested in 2012, and the right to conduct litigation in the Court of Session, since it had become obvious as a result of being able to practice, that it was potentially more straightforward than litigation in the sheriff court. No comment was made in October 2016 that there had been an alleged previous agreement to restrict the revised scheme.

3 Seven months later on 10 May 2017 the Scottish government effectively rejected the revised scheme claiming that it had been "agreed" to restrict the revised scheme to minor revisions only. First of all this is not true, and secondly, what would be the actual benefit, with regard to the purpose of the primary legislation, in restricting the scheme ? I have attached the relevant e-mail. No evidence has ever been put forward to support the comments within the e-mail.

4 The Lord President then proposed in October 2017 that he was now willing to consider procedural hearing rights of audience only, but not Court of Session litigation rights. This would require an "informal" consultation. After having reluctantly agreed to the pressure from the Scottish Government and the Lord President to compromise, and despite repeatedly asking, the Association was given no timescale as to how long the informal consultation process would take. The consultation did not actually commence until December 2018.

5 At some point between October 2017 and April 2018, a decision was taken by the Lord President to now consider Court of Session litigation rights in the revised scheme. To this day the Association is unaware of the reasons for the change of position, and how it came about.

6 The consultation was completed in January 2019 and the revised scheme, first submitted in October, was approved, subject to very minor changes, in June 2019.

7 The Scottish Government has confirmed that it has made no consideration of the impact on competition, of the dominant position of solicitors in the legal services marketplace.

Revised Scheme/ Handling of revisions.

It is unclear why the Scottish Government are making a big issue out of the fact that another member of the Association was involved in the process. Is it an attempt to isolate me ? The "other member " was always going to be the person who was involved, since that is his function within the Association. For the record I liaised with the " other member" on every aspect of the process, as we worked closely together. My role as the Chairman was to deal with the delay and to question any aspect of potential bias, prejudice, or unfairness.

If there is no reasonable basis or evidence to support the delay and restrictions imposed on commercial attorneys, then the committee can form its own conclusion.

The reference to the failure of the Scottish Government to publicly recognise the very existence of the Association, was met at the time with the response that the government would only give information to the public if the Association provided the content. Solicitors or advocates do not need to provide their own content in order to be recognised by the government, as can be easily seen on the various sources of government advice.

I have already commented previously on the issue of commercial attorneys being given the same rights as all other officers of the court, however it is perhaps worthwhile noting that the Lord President has recently confirmed that all regulated professionals are officers of the court and must conduct themselves accordingly. There can be no doubt whatsoever, that commercial attorneys are regulated legal professionals and are therefore officers of the court. The revised scheme that was approved by the Lord President also confirms this. All officers of the court wear gowns when appearing, unless requested not to. However, the test put forward by the Lord President to the petitions committee , is that in order to demonstrate that the courts would not be disrupted by commercial attorneys wearing gowns at procedural hearings the Association effectively has to prove a negative. This is an impossible, and some might say, a *Kafkaesque* evidential burden to overcome. It is a bit like being guilty until proven innocent, but the evidence needed to prove innocence is always withheld, since the test cannot ever be met until commercial attorneys are allowed to wear gowns, and demonstrate otherwise.

There were a number of e-mails requesting timescales for the delay, that is correct. However there was no planned approach, and the Scottish Government has confirmed

that it does not have any management systems that would be used for this alleged “planned approach”. Perhaps evidence could be provided to support the existence of this “ planned approach” The Director for Justice actually advised at the time that the informal consultation was a matter for the Lord President. He did, however, state in writing that the decision to restrict the revised scheme was taken by the Lord President’s Private Office. The Lord President’s Private Office has denied this. I would suggest that it is really important to establish who is correct, since the decision to restrict the scheme has resulted in a considerable, costly, and potentially completely unnecessary delay.

The Review was, I believe, set up at the request of the Law Society, and possibly discussed during the quarterly private meetings with Scottish ministers that they have always been granted. The Association felt that all the legal professions, irrespective of size, should be involved in order that there was transparency, fairness, no distortion of competition. Is the Scottish government stating on the record that small organisations are not important, and therefore should have less rights than the larger ones ? The Review did not recommend that the title of lawyer should be restricted to solicitors. There is no such thing as an unregulated solicitor since “ solicitor “ is already a protected title. In any event the Competition and Markets Authority disagrees with the Review on this aspect.

Exactly what relevance the issue of a complaint has with this petition is unclear. For completeness the information given is wrong, and it has yet to be decided how independent the process was.

The final paragraph is factually incorrect. The Scottish Government has **not** made all efforts to support the work of the Association. I can provide a list of unanswered correspondence regarding the timescales for the consultation. The private decision to restrict the revised scheme without giving the Association any opportunity to have an input beforehand is hardly supportive. The e-mail of the 10 May 2017 is far from being supportive.

When decisions are taken to restrict, or reject practicing requests by the Association, no consultation appears necessary, sometimes there is even no explanation given. It took over a year to carry out an informal consultation. An impossible test has been given in order for commercial attorneys to have the same recognition rights as all other officers of the court when appearing. The Scottish courts have refused to publicly recognise the existence of the Association by changing the court forms to reflect the fact that solicitors no longer have a monopoly, and to give the appropriate guidance to defendants. They were asked to do so nine years ago and refused. The Competition and Markets Authority have commented on this in their submission to the committee.

What would, I believe, help the committee to take matters forward is for the following questions to be answered.

1 Who decided that the revised scheme should be restricted, what advice was given, and on what basis, since both the Director for Justice and the Lord Presidents Office cannot be right, as they seem to be directly contradicting each other. It does seem

very strange that having been able to practice in court, no consideration of what had been learned as a result of this experience, was to be excluded.

2 Sheriffs Principal are some of our most senior judges. They do not normally make throw away comments. They arrived at a "carefully considered" decision, which was that commercial attorneys were more likely to mislead the court by wearing a gown in procedural hearings. This is a very serious concern for the Association, since it may also involve other aspects, of which the Association is unaware. How did they arrive at this conclusion, and what evidence did they consider at the time.

3 Why will the Sheriffs Principal not meet with the Association, despite being asked to do so, in order to have a constructive dialogue and to allow the Association to understand better the concerns that have been raised by the courts against commercial attorneys.

4 Why is the Law Society given private meetings four times a year with justice ministers and the same facility is not offered to all of the legal professions on a consistent basis.

5 Why will the Scottish Courts not publicly recognise the existence of commercial attorneys by giving guidance to judges, court practitioners, and the public, as to the rights that have been granted in the revised scheme?

6 Why has competition law not been applied by the Scottish Government to the ability of commercial attorneys to compete on a fair basis in the legal services marketplace.

7 Why do party litigants get restricted legal expenses even if they are successful in their court action.

Alternatively, the committee may wish to refer this matter to the Justice Committee for its consideration.