

**11 DANUBE STREET  
EDINBURGH EH4 1NN**

Civil Justice Advisory Group Consultation,  
COSUMER FOCUS SCOTLAND,  
Royal Exchange House,  
100 Queen Street,  
Glasgow. G1 3DN

24<sup>th</sup> September 2010

Dear Gemma Compton,

Having attended your recent, interesting and enjoyable, well conducted and organised, Civil Justice Seminar “Ensuring effective access to appropriate and affordable dispute resolution” at the Roxburghe Hotel, Edinburgh, on Monday 13<sup>th</sup> September, I would like to contribute the following observations for your Group’s further consideration.

Firstly, let me say I endorse most of your findings and aims – but having felt that I had been given ample opportunity to make my views known thereat, I am happy to leave further comment on these discussion group subjects to the many others who also attended your seminar, and seemed well able to put all relevant points forward.

However, as you are aware, I do have a particular point I would wish your Civil Justice Advisory Group to take into consideration along with all the other ideas and informed comment presently being compiled as a result of the Seminar – the issue which, to my mind - being a very important *consumer related ‘issue’* – requires to be raised for the Group’s serious and erudite deliberation. I consider that there is an unacceptable structural ‘flaw’ in our Civil Justice System, which the Office of Fair Trading has reported is a matter of “Access to Justice”. The structural flaw results in the inability of Consumers in Scotland to *get access* to any professional legal advice or representation should they have a dispute with a practicing member of the legal profession, or an incorporated legal practice, in Scotland.

At your excellent seminar, during a conversation with a delegate who was an in-Court Adviser from Citizen’s Advice, I was informed of that individual’s profound concern over the fact that she frequently had citizens come to her seeking help over what to do about various problems with solicitors - she mentioned 6 clients per week (in her area alone! If you extrapolate a nationwide figure from that single in-Court Adviser, the numbers of ‘would be consumers’ being ‘failed’ access to justice, *at the present time* across all of Scotland would be staggering! A questionnaire circulated around ALL 70+ Citizen’s Advice Bureaux may prove most enlightening) - to which requests for help she had to respond that she had no way of helping [ie., *cannot help!*]. In fairness, I should pass on the observation that she told me that many of their concerns related to legal fees/accounts.

I pointed out to her the reason why she finds consumers (clients) who cannot obtain alternative legal help in matters relating to their solicitors, was that the consumer/citizens’ solicitors were all required to be members of the same monopoly “Master Policy” Professional Indemnity Insurance Scheme run by that august body, The Law Society of Scotland, which monopoly ensures that any solicitor taking significant action for a consumer against a fellow solicitor, immediately has a conflict

**11 DANUBE STREET  
EDINBURGH EH4 1NN**

of interest as they share the same master insurance policy. That monopoly of “supply” of insurance to an entire profession *makes absolutely certain* that such would-be clients cannot obtain properly “independent” advice, and are DENIED ACCESS TO JUSTICE, as should be their right, under ECHR Human Rights Law. For ease of comprehension of why the absence of a diversity of “approved” suppliers of insurance is adverse to, and why the universality of the “Master Policy” is so incompatible with, “Ensuring effective access to appropriate and affordable dispute resolution”, I invite the eminent minds of the Civil Justice Advisory Group to consider what the outcome might be were there to be a diversity and plurality of approved insurance suppliers.

I submit that if there were a diversity of suppliers of “approved” insurers, there could be a cost incentive of a “*no claims bonus*” introduced. The “*no claims bonus*” in respect of motoring insurance is designed to stimulate careful, diligent driving, by rewarding it, whilst being a disincentive to careless/bad driving by incorporating a cost penalty for it. It is a mechanism that is widely recognised as producing a desired affect on human behaviour. There would be competitive advantage to be obtained by being the least claimed against (i.e. the best drivers), whilst the most complained against (i.e. the worst drivers) would suffer a cost disadvantage (penalty). I suggest that a “universal” insurance policy, in the circumstances peculiar to solicitors (as the gate-keepers of access to justice / legal remedy), loses this potential leverage towards good conduct in that the worst ‘drivers’ simply run up the cost of insurance for all of the members of the scheme. Further, under my motoring analogy - the recklessness of a driver not incurring a penalty for the recklessness carries on as before as there is no financial penalty (joy riding tends to be carried out by the uninsured, whose costs are borne by increased costs for all), which in turn would tend towards a lowering of standards across the board, there being no reward to be had for good driving.

There is a particular risk in the event of significant claims under the universal single “Master Policy” scheme – in that it acts as a disincentive to the members of the scheme to “do their best” in bringing claims against their scheme on behalf of third parties (i.e. the consumer). What are the good drivers to do – just keep on paying the increased premiums – or in the peculiar situation of solicitors, simply cease to bring the claims to the best of their ability?

In any event, the “risk” exists that such a choice could be made, and I suggest that the “structure” be adjusted to eliminate that risk, by introducing a diversity of suppliers of “approved” professional indemnity insurance policies, thereby pursuing “Ensuring effective access ..” to justice.

The communications enclosed herewith give a brief outline summary and illustration of this very serious problem, which has been maintained as part of our legal process since October 1977, and in these 33 years which have passed since the inauguration of “The Master Policy”, injustice will certainly have been done, and legal-wrongdoing passed over, ignored, without redress; which in turn has tended toward a gradual *increase* in legal malpractice etc., Practitioners being discouraged from taking-on just causes against their fellow practitioners, by nods and winks of persons within their governing body, the Law Society of Scotland. As the profession has lost the will to police itself with the application of the old standards of ethics and expectations of good practice and conduct, it being manifestly wrong-minded-thinking of the Public

**11 DANUBE STREET  
EDINBURGH EH4 1NN**

to expect turkey's to come forward to vote for Christmas ! Cover-up and denial have become the order of the day, if a wronged consumer of legal services, attempts to find justice by recourse to the Courts as a Party Litigant (the only recourse left open to them because of the Master Policy Indemnity Insurance Scheme), the 'hoops' of the Rules of the Court process will very likely result in failure, no matter the underlying "merit" of their cause, given the knowledge necessary for drafting "relevant" written pleadings (which can be gained only through training, practice and experience).

Please pass THIS entire response (inclusive of enclosures) on to your Group leaders. It is not well laid out, but owing to necessary legal-business/work intervening over the past week, I have not been able to give this the proper attention to detail it deserves. I would be happy, along with my son, James, to meet with your Group to answer any queries about details and 'history' in support of my assertions in respect of this matter, or any issues which they might have upon receiving this response. It is a most critical item denying proper access to Justice, for significant numbers of our citizens – and allows legal practice wrongdoing to go on, unfettered and unpunished – not a good situation for any democracy reliant upon equitable application of the rule of law.

Yours faithfully,



Joan Pentland-Clark

~~Mrs Joan Pentland-Clark, Judicial Factor~~  
~~The James Clark Executory Estate~~

**Franck David**  
**Assistant Clerk to the Public Petitions Committee**  
**Scottish Parliament**  
**Edinburgh EH99 1SP.**

15<sup>th</sup> April, 2010.

Dear Mr David,

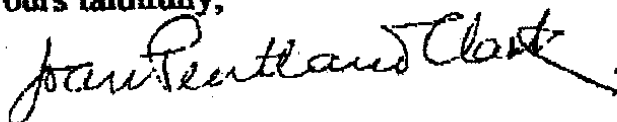
**RE - Petition 1247**

Following Mr Stewart Mackenzie's letter addressed to you dated 31<sup>st</sup> March 2010, and the Submission you have lately received from Mr Ryan Norton of Consumer Focus Scotland, also, a letter dated 12<sup>th</sup> April 2010 from my son James Clark, I would like to add points which highlight the elementary, iniquitous and inequitable flaws inherent in our legal Justice system, practiced by over 10,000 solicitors in Scotland, which give rise to what amounts to a 'failure to gain access to Justice' for so many of our fellow citizens, leading to many being forced into becoming Party Litigants, in their attempts to achieve Justice, for/and by, themselves.

At the outset, let me explain why I maintain that thinking Legal Aid could be the/ or even an answer, is an entirely fallacious proposition, for the following reason : each and every member of the Legal profession's fraternity, whether a Legal Aid practitioner or not, is required by their governing body The Law Society of Scotland to sign-up annually to being insured under their monopoly one-covers-all 'Master Policy' Indemnity Insurance Scheme. Thus every solicitor, without exception, is 'bound in' to their mutual advantage/disadvantages of that insurance scheme, thus ensuring that no solicitor can act in his clients best interests without becoming in 'conflict' with his own and his fellow professional's interests, if the client/consumer's legal issues require that another - ie., most probably their former solicitor - be sued, which would then bring the 'Master Policy' Indemnity Insurance Scheme into play, creating a conflict of interest. This anomaly requires rectification.

To further explain this highly significant reason/problem please find attached herewith my email to Ryan Norton of Consumer Focus Scotland, dated 13<sup>th</sup> April. I would be grateful if you could ensure that each member of your committee receives a copy of this note - with attachment - in time for their next meeting.

Yours faithfully,



Joan Pentland-Clark.

Main Identity"ATTACHMENT"

From: [REDACTED]  
 To: [REDACTED]  
 Cc: <meik@consumerfocus-scotland.org.uk>  
 Sent: 13 April 2010 04:26  
 Subject: PE 1247 RE - Your McKenzie Friend Submission (April 2010) to the Public Petitions Cttee. of the Scottish Parliament.

Dear Ryan Norton, & Consumer Focus Scotland,

It is with the knowledge gained through personal experience, as a former Consumer of private Legal Services, having then become personally involved with the Court System in Scotland, after becoming a Party Lligant Pursuer - since 2002, ie., over the last seven years ( despite the fact that I am now nearly 75 years old ! ) - that I write to further clarify what my son James Clark wrote in his email to you, which was sent yesterday, 12 April 2010 @ 19:35hrs, in commendation of your most recent submission to the Public Petitions Cttee of the Scottish Parliament, re : the need for "McKenzie Friend" legislation, in PE 1247.

In his second paragraph, he wrote : " the newly instructed solicitor will unfortunately have an inherent and unavoidable conflict of interest with his client's best interests in respect of . . . . under the 'Master Policy' in the event that he is fully successful on behalf of his clients. . . . "

These words fail to make entirely clear to you, that it is therefore the practice of solicitors, IF ONE does accept a client's instructions against a 'brother' solicitor - by reason that he/she is legally obliged so to do, will 'withdraw' from acting on their client/ consumer's behalf before the cause ever gets to a Proof - even earlier, more usually . . . however it is also the case, that the solicitor never divulges to the consumer/client that THAT is the reason for their failure to continue acting on their behalf. This iniquitous situation has prevailed in the Scottish Courts since the Law Society of Scotland's 'Master Policy' Indemnity Insurance Scheme was introduced in 1977, to which all 10,000 or so solicitors in Scotland are obliged to sign up, annually - IF they wish to have their licence to practice, renewed. This is an absolute pre-requisite, maintained by the LSoS, despite their full cognizance of it's inherent - and wholly indefensible - potential for 'conflict of interest' issues ! Hence the large numbers of consumers who are presently forced into attempting to achieve Justice through becoming Party Lligants . . . and the absolute necessity for 'McKenzie Friends' to be properly introduced without the unnecessarily stringent restrictions presently being proposed by a complicit Lord President.

It is always claimed by solicitors that they are not given the opportunity of reading, or being shown the "Master Policy" in it's entirety - if at all; It is incontestable that a solicitor would never advise a client/consumer to sign any document/contract, without FIRST having had sight of it - and read the small print ! The question must now be asked, how it is that the LSoS can require it's 10,000 members to annually do just that . . . and get them all to comply ? Why the need for the veil of secrecy, which is always so jealously guarded by the LSoS, surrounding this Insurance Policy ? You will find that thereby hangs the tale of the present mess which is at the very heart - and is the route cause of - the state of our "Access to Justice" under EU Law here in Scotland, making it quite the worst in Britain - if not in the whole of Europe.

Do hope you will find this communication provides subject matter which is of immediate concern and interest to you, enough to ensure further investigation and enquiry. I can furnish your body with material, in the form of lengthy articles written by a solicitor and published in the Glasgow Herald, in the early 1960's, which will validate in it's entirety all that I write, herein.

Yours sincerely,  
 Joan Pentland-Clark. (Mrs)

Mr. J. Clark

Public Petitions Committee Members  
Scottish Parliament  
Edinburgh

12 April 2010

Dear Committee Members

**Supplementary Evidence on Petition PE1247: McKenzie Friends.**

I write to commend to your attention the recent statement by Consumer Focus Scotland (April 2010), in support of Parliament's introduction of primary legislation creating a tangible presumption in favour of "McKenzie Friend" assistance in Scotland, in respect of which the Scottish Court Services / the Scottish Court Rules Council, can issue practice guidance to aid comprehension of the litigant and to assist in providing clarity for the exercise of judicial discretion in respect of "McKenzie Friend" assistance.

In particular I call your attention to the following passages:

" It is Consumer Focus Scotland's view that the best way to ensure that there is a strong presumption in favour of a McKenzie Friend is to enshrine this right in primary legislation. The current confusion surrounding this area suggests such legislation is a necessary step. Taking this approach would make the use of a McKenzie Friend a tangible right, which would be in the interests of consumers who may wish to ask for permission to have one and would also clarify the rules for the judiciary and court service staff. Such legislation should not be prescriptive but should set out the general principles surrounding the use of a McKenzie Friend. Court rules could then be used to supplement such legislation by providing guidance to the judiciary as to an appropriate approach for dealing with requests for McKenzie Friends as well as outlining the parameters of what a McKenzie Friend can and can't do. As discussed above, any court rules relating to McKenzie Friends should not be so prescriptive as to take away the discretion of a sheriff or judge to respond flexibly to the circumstances of each particular case. "

" It is our understanding that the Scottish Government intends to bring amendments at Stage 2 of the Legal Services (Scotland) Bill to allow those without a right of audience, such as McKenzie Friends, to be granted rights of audience in certain circumstances. We would like to see this amendment outline the principle of the right to use a McKenzie Friend in the traditional sense in Scotland. "

I urge that the Committee recommend that Parliament adopt the approach recommended by Consumer Focus Scotland, namely to enshrine the principle within primary legislation that there be a presumption in favour of allowing "McKenzie Friend" assistance to any party in a litigation; and that the conduct of any person so acting shall be under the ordinary supervision and control of the presiding judge, within the presiding judge's discretion, in respect of which discretion the judge may find guidance within the Practice Notes or Guidance Notes to be issued by the Scottish Court Rules Council / Lord President of the Court of Session.

Mr. J. Clark

I would urge that this approach be adopted whole-heartedly by the Committee, as being in the interests of natural justice. I do so with greater emphasis than that which may have been apparent from the modest understated tone used by Consumer Focus Scotland, for the following reason: that there is an absence of a diversity of authorised indemnity insurance provision to the legal profession in Scotland. Accordingly there will be occasions where a solicitor's client cannot obtain representation in circumstances where the client's action is a significant claim against the Solicitors' collective "Master Policy" indemnity insurance scheme. This arises out of the fact that any solicitor who took on the client's case against a fellow solicitor would immediately be in conflict with his own personal interest: namely his interest in maintaining low insurance premiums under the 'Master Policy'.

I wish to emphasise the following. Whilst the 'Master Policy' brokered through Marsh UK remains the single authorised 'professional indemnity insurance' provider in terms of the solicitors' rules and regulations [i.e. made by the Council of Law Society of Scotland and in force of concurrence of The Lord President *{per the Solicitor's (Scotland) Act 1980, Section 44}*]; and, whilst every solicitor applying for renewal of their annual "license to practice" each October is compelled to have made arrangements for his insurance under said singular 'Master Policy' provision; then there shall remain an inherent structural flaw in Scotland's legal services market, which undoubtedly will from time to time cause a denial of qualified professional representation to a legal services consumer, which denial will result in that person either acting as a party litigant or being denied recourse to judicial determination of any dispute he/she may have with a former solicitor.

The essential resolution of said systemic structural flaw requires that arrangements be made for rules that provide for a diverse range of distinct suppliers of authorised insurance provision, together with transparency for consumers (i.e. clients) so that the consumers can discover whether their new solicitor may have the same or a different insurance policy / or insurance provider to that of the "target" of his claim (i.e. a former solicitor), and to thus hopefully terminate the cabal and denial of access to justice which results from the present "monopoly" 'Master Policy' arrangement.

In support of the above contention, I refer the Committee to previous written submissions of the Office of Fair Trading, who have recommended that there should be a diversity and choice of indemnity suppliers rather than the present singular 'Master Policy' provision (*e.g. OFT written submission to Justice Committee re Legal Services (Scotland) Bill, paragraph 11. Professional Indemnity*).

Yours faithfully,

James Clark