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Convener  
Delegated Powers and Law Reform Committee  
The Scottish Parliament  
By email only: [DPLR.committee@scottish.parliament.uk](mailto:DPLR.committee@scottish.parliament.uk)

Date: 21 August 2018  
Our Ref: Policy/Prescription

Dear Mr Simpson,

### **Prescription (Scotland) Bill: Stage 1**

Thank you for your letter of 28 June 2018 seeking our views on the introduction of “a system of strict liability for solicitors in conveyancing cases”. We hope the observations set out in this letter will be of assistance to the Committee in considering this issue.

Our interpretation of strict liability is that which arises due solely to the actions of the relevant party and is not dependent on intention, for example an intention to harm, or proof of negligence.

Our view is that this matter falls outside the scope of the Bill – a system of strict liability is really part of the law of negligence and of consumer protection, rather than prescription. We note the comment that it is for the Law Society to introduce a system of strict liability for solicitors in conveyancing cases. A system of strict liability would require separate legislation.

The Law Society is created by statute. Section 1 of the Solicitors (Scotland) Act 1980 sets out that the objects of the Society are to include the promotion of the interests of the solicitors' profession in Scotland and the interests of the public in relation to that profession. The regulatory objectives of the Society are set out in the Legal Services (Scotland) Act 2010 and include among others, protecting and promoting the interests of consumers and the public interest generally; promoting access to justice; and promoting and maintaining adherence to the professional principles. Because the Society is a statutory body, there are restrictions on what we can and cannot do. The Society does not have the statutory authority to introduce legislation, and therefore we do not have the powers to introduce a system of strict liability.

We have been informed by Registers of Scotland that in the financial year 2017/2018, 374,189 Land Register applications were received. Title issues do not arise in the significant majority of transactions. It is not clear if there is a strong evidential basis for the need of a system of strict liability in relation to title issues for properties. We recognise that problems may arise more frequently in respect of other property matters, such as structural issues.

The law provides remedies when a person has suffered loss due to the fault of another; the loss should be borne by the person(s) who caused the loss, rather than by the person who has



suffered. Those carrying out conveyancing transactions have a duty of care to their client not to cause loss due to negligence in the conduct of the conveyance.

There are already significant protections in place for consumers. Those solicitors working in private practice are required to have professional indemnity insurance in place. The Law Society makes arrangements for the Master Policy which is the compulsory insurance arrangement that covers any valid claim against a solicitor for an act of negligence which has occurred in the course of his or her work. The insurance policy covers claims even if the solicitor is no longer in practice. A claim intimated on the basis of alleged negligence on the part of a solicitor is subject to the limitations of the policy. The professional indemnity insurance arrangements are subject to statutory oversight by the Scottish Legal Complaints Commission.

Where a consumer has been wronged, a system of strict liability could facilitate the process of a consumer seeking redress. Such a system would require the claimant to meet lower procedural and evidential standards than a claim where strict liability does not apply, thereby reducing the burden on the consumer.

A system of strict liability, on the basis of our understanding above, would require a claimant to demonstrate as a matter of fact that an error or fault had occurred and that a solicitor had made such an error, albeit would not require a legal determination of fault, for example in negligence. Such a system would therefore require some form of documentation to be produced by a claimant.

We anticipate that a system of strict liability would require significant cost as a result of increased insurance premiums or the costs required for operation of a fund to settle claims. It is not clear that such costs would be proportionate. Solicitors currently contribute to the costs of professional indemnity insurance (for those working in private practice). There is a strong potential that additional costs to solicitors will in turn result in increased costs to consumers.

If a system of no fault compensation is envisaged, such as would operate by way of an arrangement requiring proof of an error or fault in the conveyancing process only, we note that this is likely to require significant levels of funding. It is important to recognise that a variety of parties play a part in the conveyancing process, including solicitors, Registers of Scotland, surveyors, and others, and so a system of no fault compensation would require to extend fully throughout the conveyancing process. We note the potential for misuse of a system of this nature.

We hope this information is helpful. We would be happy to engage with the Committee and/or Scottish Government in further discussion about the policy issues surrounding this topic.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,

Andrew Alexander  
Head of Policy