



Law Society
of Scotland

Consultation Response

Tenant Farming Commissioner: Review of Operation of Agents

April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Rural Affairs sub-committee welcomes the opportunity to consider and respond to the Tenant Farming Commissioner's Review of Operation of Agents consultation.¹ The sub-committee has the following comments to put forward for consideration.

Consultation response

1. Do/will the TFC's Codes of Practice enable the issues raised concerning the conduct of agents to be addressed? For example when discussing repairs and maintenance obligations, planning the future of Limited Partnerships and (once agreed) rent reviews?

We have no comment on this question.

2. What, if anything, could your organisation do to address these issues of dissatisfaction – bearing in mind that both the instructions to an agent and the conduct of agents should be fair and reasonable?

We are pleased to note from the results of the TFC's research that dissatisfaction with solicitors acting as agents appears to be low.² We also note that those who cited dissatisfaction with solicitors generally stated that dissatisfaction was with the other's party's agent rather than with their own agents.³

¹ <https://landcommission.gov.scot/wp-content/uploads/2018/03/Review-of-Operation-of-Agents-Stakeholder-Consultation-March-2018.pdf>

Solicitors are subject to a robust complaints system, which is considered in our answer to question 3, and to a strong regulatory regime. This particular question presents some difficulty; an instruction to a solicitor has no requirement to be fair or reasonable, provided that the instruction is lawful either under statute or Common Law. Solicitors are required to act in the best interests of their client.⁴ Although the principal duties are owed to the client, our practice rules also impose upon solicitors, duties to the Court, other solicitors, and third parties. While solicitors giving advice in this area of law may draw their clients' attention to the TFC's Codes of Practice, and it would be beneficial to do so, clients' instructions will not necessarily be consistent with the Codes.

A solicitor is under no duty to accept instructions from a client and subject to professional rules and guidance, may withdraw from acting for a client.⁵ A solicitor, however, is entitled to accept a client's instructions and is not under any obligation to refuse to accept an instruction which implements the law because it would be unfair or unreasonable to act in that manner. A solicitor's duty is to act in the best interests of their client. Solicitors must not knowingly mislead other solicitors or, where they have given their word, go back on it.⁶ If one party misses a time limit which puts the other party in an advantageous position, it is of little relevance to a solicitor whether the TFC (or any other person) thinks it is unfair or unreasonable to use that advantage, as long as the solicitor is acting within the boundaries of the professional rules to which they are subject.

It is, of course, important that solicitors act in a courteous and polite manner, and respond timeously to an opponent or opponent's agent.⁷ It must, however, be borne in mind that solicitors may be acting on a client's instructions when acting in a manner which a lay person thinks is unfair and unreasonable. Situations may arise where a solicitor's professional duties do not allow them to act in the way a member of the public may think is reasonable. For example, a solicitor is not permitted to communicate directly with a person he/she knows to be the client of another solicitor.⁸ This may lead to a solicitor refusing to take telephone calls or respond to correspondence from the other party and require that communication be made through that party's solicitor.

With regards to the improvements suggested in section 10 of the consultation document, we note that some of these suggestions may well be incompatible with the duties owed by solicitors to their clients. In

² Of those subject to the follow-up research, 5% noted dissatisfaction with a solicitor as an agent and 5% with a combination of land agent and solicitor. Report available at: <https://landcommission.gov.scot/wp-content/uploads/2018/03/Follow-up-research-to-Determining-the-views-and-experiences-of-tenant-farmers-and-landlords-report-FINAL.pdf>

³ Of those subject to the follow-up research, 5% noted dissatisfaction with their own agent.

⁴ Law Society of Scotland Practice Rules 2011, Rule B1.4.

⁵ Law Society of Scotland Practice Rules 2011, Rule B1.5 and B1.12.

⁶ Law Society of Scotland Practice Rules 2011, Rule B1.14.

⁷ Law Society of Scotland Practice Rules 2011, Rule B1.9 and General Guidance, Division A: Standards of Service. Note that compliance with practice rules is mandatory for solicitors unless a waiver has been granted. Compliance with most guidance is non-mandatory but solicitors may be required to justify any departure from guidance in the event of a complaint being made.

⁸ Law Society of Scotland Practice Rules 2011, Rule B1.14.

particular, the suggestions to “disclose information” and to “play fairly” could be incompatible with solicitor’s duties of confidentiality⁹ and to act in their client’s interests.¹⁰

3. How could professional bodies and membership organisation’s complaint services be improved?

The Scottish Legal Complaints Commission (SLCC) is the gateway for all complaints against solicitors in Scotland. The SLCC was established under the provisions of the Legal Profession and Legal Aid (Scotland) Act 2007. The 2007 Act also sets out the complaints process, including investigation and determination. If an individual is not satisfied with a solicitor or a solicitor's firm, they are required to raise their concerns with the firm in the first instance. All solicitors' firms are required to have a client relations manager who will try to resolve any difficulties.¹¹

If the problem is not resolved with the client relations manager, then a formal complaint may be submitted by the complainer to the SLCC. We also have the power to make a complaint about a solicitor to the SLCC. The SLCC determines if a complaint relates to the service provided or the conduct of a solicitor. Complaints relating to service are investigated by the SLCC and we investigate complaints relating to conduct. Complaints can be made by third parties such as any party to a transaction or dispute and are not limited to the client of the solicitor being complained about.

We know that the current system for complaints is slow, bureaucratic and expensive. There is currently an ongoing independent review of legal services¹² which is expected to report in August or September 2018. Within a paper we have submitted to the Legal Services Review¹³ we made a number of recommendations which we feel would greatly improve the complaints process. We suggested that:

- The SLCC continues to handle service complaints and the Law Society continues to handle conduct complaints;
- The single gateway function for complaints by the SLCC be abolished and complaints can be received by either the SLCC or the Law Society;
- Where the complaint relates to a conduct matter, the complaint be taken forward in the name of the Law Society of Scotland. Where we identify possible misconduct, we would be able to move to a formal investigation without first seeking approval from the SLCC;
- Compensation will not be awarded for ‘pure’ conduct complaints;
- Hybrid complaints are reinstated;
- The creation of an independent ombuds to oversee the SLCC and the Society.

⁹ Law Society of Scotland Practice Rules 2011, Rule B1.6.

¹⁰ Law Society of Scotland Practice Rules 2011, Rule B1.4.

¹¹ Law Society of Scotland Practice Rules 2011, Rule B5.2.1.

¹² <http://www.gov.scot/About/Review/Regulation-Legal-Services>

¹³ <https://www.lawsocot.org.uk/media/359509/case-for-change-revisited-law-society-of-scotland.pdf>

There are also certain protections in place for clients of solicitors. The first of these is that all Scottish solicitors are covered by the Client Protection Fund (defined as the Guarantee Fund in the Solicitors (Scotland) Act 1980). The fund protects clients who have lost money because of the dishonesty of a solicitor, an employee of a solicitor, a registered foreign lawyer or a conveyancing/executory practitioner or employee. The fund is financed by annual contributions from the profession. It is a discretionary fund and there are rules and criteria for an application and for making an award. It is also a fund of last resort and, in most cases, will only compensate those who have tried all other options to recover their losses.

In addition, all solicitors working in private practice are required to have professional indemnity insurance in place. Most are covered by our Master Policy. This is the compulsory professional indemnity insurance arrangement¹⁴ that covers any valid claim against a solicitor for an act of negligence which has occurred in the course of his or her work, even if the solicitor is no longer in practice. We make arrangements each year for the Master Policy, however, individual claims are handled by the Master Policy insurers. Each practice is obliged to contribute to the premium in order to be covered and the individual premium paid by each practice is determined by the lead insurer's rates and rating factor rules.

We do not seek to comment on the complaint services of other professional bodies and membership organisations.

4. Would better awareness of the other party's long term plans improve relationships between landlords and tenants, and/or make it easier for agents to conduct business in a fair and reasonable manner? If so, how could your organisation support clear communications around long term planning?

We have no comment on this question.

5. In your opinion, what else could be done to ensure continuous improvement of professionals to the benefit of the agricultural holdings sector?

Scottish solicitors are currently subject to requirements for continuing professional development (CPD). Solicitors and Registered European Lawyers are required to undertake a minimum of 20 hours CPD in each practice year. They are required to plan, record and reflect upon their CPD activity. It is important that CPD activity is relevant to solicitor's work and solicitors are required to demonstrate this. We would therefore expect those solicitors working in the area of agricultural tenancies to be undertaking CPD on such matters. We conduct an audit of a minimum of 5% of the profession each year to ensure that these rules are being complied with.

¹⁴ See section 44 of the Solicitors (Scotland) Act 1980 and Law Society of Scotland Practice Rules 2011, Rule B7.

Solicitors can access CPD from a wide-range of providers which means that relevant training can be accessed as required and appropriate. We generally offer an annual Agricultural Law Conference as well as webinars on specific topics related to this field of work.

We do not seek to comment on the continuous improvement of other professionals.

6. Are these research findings generally as you would have expected? Please explain.

We have no comment on this question.

7. Do you have any other observations or comments to make regarding the TFC's review of agents?

We have no further substantive comments to make. We would welcome the opportunity to be consulted on matters concerning operation of agents in future.

For further information, please contact:

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