Submission from Alistair Bonnington for the Legal Profession and Legal Aid (Scotland) Bill

I submit the following in my personal capacity:-

Relevant experience:

I was admitted as a solicitor in Scotland in 1976. In addition to an LLB degree in Public Law (graduated 1974) from the University of Glasgow, I hold a degree in Management Studies from the University of Bradford. This was awarded in 1998. I have served on the Scottish Criminal Cases Review Commission as a Commissioner. I currently serve on the Law Society Education & Training Committee.

In my daily solicitor’s practice as BBC Scotland’s Head of Legal, I deal with the public, Scottish and English solicitors and Counsel. I am admitted as a solicitor-advocate and appear in the High Court of Justiciary to represent the interests of BBC Scotland.

I am involved in policy matters within BBC Scotland.

I have taught part-time in the Law Schools of the Universities of Glasgow and Strathclyde for a period in excess of 20 years (continuously). I have taught advocacy; criminal procedure; professional ethics; and media law.

The extent of this response

I will deal solely with the provisions relating to the setting up of the new Scottish Legal Complaints Commission as it relates to solicitors. I will not respond on Legal Aid matters as I have not dealt with Legal Aid cases for some considerable time and I am concerned that my knowledge of the operation of that system will now be out-of-date. Nor will I deal with the position of the Faculty of Advocates. I have not practised as an advocate, so have insufficient knowledge to comment on the Bill insofar as it relates to advocates.

General principles

I support, and always have supported, the idea of an independent body to consider complaints against solicitors. That is to say, independent of the Law Society of Scotland. That is because, as a constitutional lawyer, I see a conflict between the role of the Society as representative of the solicitors’ profession and simultaneously as the regulator of the profession in the public interest.

The Law Society of Scotland is, in effect, the prosecutor of the solicitor against whom a complaint has been made. In extreme cases, this will result in quasi criminal proceedings against the solicitor before the Scottish Solicitors Discipline Tribunal, where the Law Society is the prosecutor.

This dual role of the Law Society and judge and prosecutor has always been an uncomfortable one. Although the public will not agree with this, the reality is that most solicitors find the Law Society’s treatment of their cases to be harsh and brutal. The Law Society is perceived by the practising profession as demanding exceptionally high, sometimes impossibly high, standards from practising solicitors.

Sometimes the public perception of the present complaints system (operated by the Law Society of Scotland), doubtless fuelled by sensational and inaccurate tabloid newspaper stories, has led to some lack of public confidence in the system. But, it is relevant to note that there is a substantial body of up-to-date independent research demonstrating that almost every member of the Scottish public when questioned indicates that they are very satisfied with the advice and services obtained from his/her own solicitor. They find the solicitor they deal with for their personal affairs to be honest, trustworthy and hard-working. This is a great tribute to the Scottish legal profession.
Composition of the Commission

Preliminary remarks: Hypocrisy by MSPs?

Perhaps it would be useful, when Justice 2 and MSPs on the floor of the Scottish Parliament are considering this matter, if they consider their own situation. As stated later in this paper, there is considerable public concern about dishonesty amongst MPs and MSPs, particularly relating to expenses. If MSPs apply the principles of “independence, openness and transparency” to themselves (as well as to the legal profession), then they would be judged by a Committee containing some MSPs, but the majority would be non-MSPs and the Chair would be a non-MSP. Let us say, for example, that senior members of the legal profession were to be in the majority on such a Standards Committee of the Scottish Parliament and from now on they would consider questions of conduct of MSPs. If the terms of this Bill were applied to this supposed Committee to them, the Committee would enjoy wide investigatory powers and would financially penalise MSPs in respect of any complaint made, irrespective of whether the complaint was proved or not (as set out in Section 19 of the Bill).

If MSPs would be happy with this situation for themselves, then it is perfectly reasonable for them to go ahead and vote in favour of this Bill. If they would not be happy about imposing such a regulatory regime on themselves, then they are hypocrites to vote in favour of this Bill.

Lay members: Double standards?

I note that, in its present form, the Bill splits members of the proposed new Commission into “professional” and “lay” members. It is not clear to me if professional members must be qualified lawyers, i.e. admitted as advocates or solicitors in Scotland. In my view, it is essential that professional members must be legally qualified. A regulatory body requires to be well-informed about the matters it adjudicates upon.

The fact that an independent body should be set up to deal with complaints against a solicitor does not mean that the body has to have a majority of non-lawyers. There has to be a balance between independence and ignorance. The more independent the composition of the Commission (that is to say, the more non-lawyers on the Commission), inevitably the more ignorant the Commission will be about the matters on which it is to adjudicate. That is because the work of a solicitor in many legal transactions is incredibly complex. For example, as a solicitor who specialises in the law of contempt, defamation, intellectual property, privacy, and the like, I would not be able to carry out a commercial lease transaction or a PFI funding transaction. However, other solicitors do that sort of work expertly on a daily basis. I would be not adjudge myself competent to sit on the Commission to judge lawyers in respect of complaints arising out of these areas of legal practice.*

Double standards? Cf Consultation paper on Judiciary

To bring in lay people and expect them to judge complaints against legal practitioners on a huge range of difficult legal transactions is, on the face of it, absurd. In another current consultation paper (“Strengthening Judicial Independence in a Modern Scotland”), the Scottish Executive has emphasised the need for those who wish to be judges in Scotland to be rigorously tested on their abilities to fulfill that important function. At the same time, in this paper the Executive proposed to create a Scottish Legal Services Commission containing a majority of people who are totally unqualified for the task which the statute will impose on them. This is the Scottish Executive applying double standards.

*An example of this arises within the Justice 2’s Call for Evidence documentation on the Scottish Parliament website. Under the heading “What we will do with your evidence”, there is a sub-heading “Defamation Material”. In this, it is stated that the Parliament will not publish defamatory statements or material. It further says that such statements “cannot be considered by the Committee.” It indicates that the Parliament will destroy such statements or material.

This section of the website must have been inserted on the basis of advice given by the Scottish Parliament’s lawyers. No doubt these are able lawyers in the areas in which they...
practise. However, I have been a defamation practitioner for 25 years, and I know that this advice is completely wrong. It is perfectly clear from numerous decisions of the courts in Scotland, and indeed of the House of Lords as our supreme civil court (eg Reynolds v Times Newspapers), that statements made in response to an invitation to submit evidence to the Scottish Parliament would easily satisfy the common law “duty and interest” test. This means they would not in law be defamatory. That is even if they are grossly insulting of individuals or groups of individuals.

The fact that the Scottish Parliament, and the Justice 2 Committee, has been given incorrect legal advice on this matter illustrates the point I make rather well. If a complaint were to be made by MSPs against their solicitor to the new Scottish Legal Services Commission for “inadequate professional service”, that complaint would go to a body populated in the majority by lay people who would have the greatest difficulty in understanding the legal point. The fact that experienced Scottish Parliamentary solicitors have got this matter so hopelessly wrong is, in my submission, a clear indicator that it is perverse, reckless and foolish to appoint a Commission with a majority of lay persons to determine such cases.

Complainants generally

In my 20 years as a solicitor in private practice (the latter 11 years as a partner), I experienced some complaints from clients; many complaints from members of the public in my acting for newspapers, particularly The Glasgow Herald and The Evening Times; and now in my public practice within BBC Scotland, I experience numerous complaints about programmes from members of the public. There is a child-like tendency nowadays to assume that complainants make well-founded allegations. The truth of the matter is that, on any objective view, a large percentage of complaints are misguided. Some are malicious – being made for no other reason than to obtain an advantage (usually monetary) for the complainer. Nor should it be forgotten that some complainants have quite serious mental health problems. This is not just true in the case of lawyers. No doubt MSPs know of cases themselves.

Of course, complaints must be fully and rigorously investigated. Of course, if they are justified, then compensation is due to the wronged member of the public, and in certain cases the solicitor should suffer an appropriate and reasonable penalty. However, some of the naive remarks by MSPs in the debates thus far about this matter indicate an anxiety that some sort of shooting war breaks out between the public and the legal profession.

Need for trust

One of the essentials of a professional relationship with a client is trust. No professional can operate without trust. Trust has to be earned. It is a delicate matter and can be easily destroyed. MSPs are well aware of the fact that trust as between the public and politicians in the United Kingdom has been shattered due to the many political scandals of recent years. Again, this has been exacerbated by tabloid newspapers. MPs and MSPs, sadly, are now held in very low regard by the public. They are not trusted.

Despite their own parlous position as regards public trust, MSPs should not be anxious to destroy trust where it exists elsewhere. It most certainly exists between the Scottish public and the legal profession. The evidence on this is clear from the results of many surveys. If there is an attempt by MSPs through the new Commission to “get” the legal profession, then that essential trust will be put at risk. This will be to the detriment of the public who require trusted legal advisors to represent them against others and against authority (such as the Scottish Minister and the Scottish Parliament).

Specific sections of the Bill

Section 18 – Annual General Levy

There must be considerable public concern about the Scottish Executive’s track record of inefficiency in setting up quangos, which run up significant unjustified costs which the public have to meet. For example, for many years the Scottish legal profession operated the
Scottish Legal Aid system for minimal cost to the Scottish public. Now the Scottish Legal Aid Board probably employs at least ten times as many people to carry out Legal Aid functions as was the case with the Law Society. I have not seen figures, but I would be surprised if the Scottish Legal Aid Board did not cost about 10 times as much as what the Scottish public paid the Law Society under the old Scottish Legal Aid system.

Second-class provision for the poor and needy

It has to be remembered that, if the Scottish Executive is as inefficient as usual in running this new quango, the costs of maintaining the quango (which have to be paid by solicitors in terms of the Bill) will have to be passed on to clients. In poor areas, where the solicitors currently act for legally-aided clients and people of very low means, there will be no way of passing on the cost. There will be cash crises for such solicitors’ firms. Such solicitors’ offices will be forced to close. This will mean that there will be no legal services in Scotland in poor areas. This is a very backward step.

The closure of legal services will be the direct and natural consequence of this levy. It is entirely foreseeable that this will happen. It is not credible to think that, for the first time, the Scottish Executive will set up a quango that works efficiently and is able to match the low cost service provided by the Law Society of Scotland.

I note that the Bill proposes some sort of second rate advisors for poor people. They would be unqualified and trained only to a very low level. MSPs would hardly be so cavalier if there were dealing with the health of poorer members of the Scottish public. Taking the medical context further, this form of reasoning would lead to allowing butchers to perform minor operations. It seems odd that an Executive comprising the Labour and the Lib-Dem political parties should be proposing that poor citizens are given second class services on legal matters – but that is precisely what this Bill does.

Section 19 – Complaints Levy

I am amazed that this has been said by the Executive’s legal advisers to be “ECHR-proofed”. It is a clear breach of Article 6 of the Convention and doubtless the Scottish Executive will lose (as usual) in the court and have to pay costs to the first solicitor who has to pay this unjustified penalty in a case where he/she is found “not guilty”, ie the complaint is dismissed. This proposal is precisely the same as imposing a fine on a person who is acquitted in the criminal court.

Section 25 – Commission’s duty to provide advice

It is something of a paradox that, when the Scottish Executive sets up the Commission to address the problem of perceived conflict of interest that it enacts a conflict of interest into the statute! Although in theory the advice which is to be proffered by the Commission is on process only, the reality is that it will stretch into the merits. Someone making a complaint to the Commission should have to obtain their own advice from an independent individual or body.

Again, it seems to me that there is a failure to understand the basic principles of constitutional justice. There is also a failure to impose openness and transparency in this proposal. This body is being given the power to adjudicate on the future of lawyers brought before them, in effect as accused persons. They have the power to fine up to the extent of £20,000, which is a figure wildly in excess of the normal fines imposed by our criminal courts in the majority of criminal cases involving quite serious violence or dishonesty.

If, putting the matter into the context of the courtroom, a Judge were to intervene to give help to one side before the merits of the case before him/her had been explored, that would be seen as bias and a possible grounds for setting aside any decision he reached. The same is true of this proposal.
Conclusion

The key question for MSPs as representatives of the Scottish public should be to ask if the Bill will improve the standard of legal services enjoyed by the Scottish public. Plainly, it will not. It will destroy the provision of legal services to poorer areas and it patronisingly suggests that a second-rate service be provided to poor people – this to be carried out by people with no qualifications whatsoever. It intends to set up a two-tier system of law, with poor people very much on the lower rung of the ladder. A huge percentage of lawyers currently practising in Scotland came from relatively lowly backgrounds. To us, this is highly offensive.

Lawyers are generally committed to the principles of equality and fairness before the law. For the Scottish Parliament to propose setting up a system whereby they deliberately set out to destroy equality and fairness is not something with which we wish to be associated. Nor I believe do the Scottish public.

The Scottish Parliament has already built up a reputation as being a “knee-jerk” legislator. It passes laws which are not properly considered and are often in response to tabloid newspaper headlines.

Doubtless, if this Bill makes its way through Committee and through Parliament, there will be lurid tabloid newspaper headlines based on inaccurate facts. A mature Parliament would be able to examine such coverage, evaluate it and take such notice of it as is democratic. It is to be hoped that the Scottish Parliament has reached the stage in its development where it might be able to apply that kind of approach to this Bill.