19 April 2006

The Clerk
Justice 2 Committee
Room T3.60
Scottish Parliament
Edinburgh
EH99 1SP

Dear Sir

Legal Profession and Legal Aid (Scotland) Bill ("the Bill")

I am writing to express my concerns that the proposed Scottish Legal Complaints Commission ("SLCC") as set out in the Bill whilst entirely reasonable in purpose is dangerously flawed in execution to the extent that I believe it is detrimental to the interests of consumers and society in Scotland at large.

As I understand the Bill it is intended that the SLCC should be able to deal with unproven claims for negligence made by a client against his/her solicitor. It seems to me fundamental to the due process of law that a claim of negligence should be determined in a Court of Law subject to all the safeguards which are provided by the Courts in terms of testing and weighing the evidence and determining the facts and the application of law to the proven facts of an individual case. It would appear the effect of the Bill will be to create a quasi Court to deal with negligence claims where the value of the claim is likely to be less than £20,000. This is because the client can have their claim investigated and presented to the LCC entirely free of risk or cost. Given that even the grant of Legal Aid would be subject to a test of showing reasonable grounds of complaint, there is no benefit to be gained by a client raising an action of negligence in Court in such circumstances.

That being the case, it seems to me that it is imperative in the public interest that the SLCC should be structured in such a way as to administer fairly in a quasi judicial role, the administration of justice. The Bill’s proposals singularly fail in that respect because:-

♦ it would appear that the entire costs of such a claim are to be borne by the solicitor complained against whether or not the claim succeeds and whatever the merits of the claim;

♦ there is no provision in the Bill which gives any indication that cases will be decided according to the law;

♦ there is no indication in the Bill that the basic principles of fair and due process will be applied;

♦ there is no provision in the Bill which provides for an appeal on either the facts or the application of the law by the SLCC;
as the members of the SLCC will be acting in these cases in a quasi judicial capacity, it would appear that the Bill does not meet the fundamental requirements of the European Convention on Human Rights as the members of the SLCC are not appointed independently of politicians or the Executive and once appointed are not independent in accordance with the requirements of Human Rights. One hopes that the Parliament will wish to avoid a similar debacle to that involving temporary Sheriffs.

It has been my understanding that it is an essential part of the legislative process in modern times that a cost benefit analysis is provided of legislative proposals to set up other bodies. I have been unable to find any cost or cost benefit analysis for the proposed SLCC.

It also appears to me that whilst professing a public interest in promoting the Bill, the public interest has become confused and ill thought out. The Bill as it stands appears to confuse professional discipline with compensation claims. The purpose of professional discipline is to ensure that members of a profession maintain high standards of conduct in accordance with the principles established for that profession. Professional discipline does not have as a purpose the provision of compensation to those who are poorly served by the profession concerned. There are other mechanisms in law for dealing with compensation claims. It is for these reasons that the Scottish Solicitors’ Discipline Tribunal is independent of the Law Society of Scotland and that is right and proper as the Discipline Tribunal has the power to impose fines on members of the legal profession.

When setting up a new body, it also seems to me that legislators require to have regard to the consequences of the provisions which they make for the financing of that body. It would appear that it is proposed that the SLCC be financed by solicitors albeit the SLCC will be appointed by others and accountable only to the Scottish Parliament and not to those who fund it. Quite apart from any issues over the fairness of solicitors being required to pay the entire costs of complaints made to the Commission, I would suggest that the Parliament is embarking upon a very dangerous course when it seeks to set up a body such as the SLCC to be financed by a group of people to whom the Commission will not be accountable. It must be obvious given the facility to have a claim investigated and dealt with by SLCC entirely free of cost or risk will result in a substantial increase in frivolous and unjustified complaints, and that the imposition of these uncontrolled costs upon solicitors are likely to result in the closure of high street firms many of which, contrary to the image promoted by the Press and politicians, are marginally profitable and will be forced either to close entirely, or to close branch offices and concentrate resources. This may sound to those who wish to believe otherwise as something the legal profession would say anyway, but whilst I have come across small provincial partnerships which are undoubtedly successful and profitable, my experience of advising in relation to partnership disputes and the like is that there are many more where partners would earn more money as employees of city firms than they can ever hope to earn in the rural communities of Scotland or the suburbs of our larger towns and cities.

In summary, the Bill appears to be badly thought out, contrary to human rights and natural justice, and likely to operate as a strong disincentive to the provision of justice throughout Scotland. I hope its provisions will be considered afresh and substantial amendments made to the proposals.

Yours faithfully

Alistair S Burrow