Observations of Burness LLP, a law firm based in Edinburgh and Glasgow, on the Legal Profession and Legal Aid (Scotland) Bill
20/4/06

The observations are made on the Scottish Executive’s Policy Memorandum which accompanies the Bill, as introduced in the Scottish Parliament on 1 March 2006.

The comments relate to the proposed “Scottish Legal Complaints Commission”. References are to paragraph numbers of the Policy Memorandum (unless otherwise stated). Words in italics are lifted from the text of the Policy Memorandum:

3. to 5 [new body]

Judicial Review is not and never has been a mechanism for “appeal”. The purpose of judicial review is to review whether a body has acted in accordance with law, not to re-open the substantive matter addressed by the body. Provided the body has acted lawfully, its exercise of its discretion will not be overturned by the reviewing court.

“7. [Law Society’s Guarantee Fund and Master Policy]

A motorist is obliged to obtain insurance cover in respect of a breach of that motorist’s duty of care to other road users and may obtain that cover from any lawful insurance provider. A Scottish solicitor is obliged by law to obtain insurance in respect of actual or threatened lawsuits against that Scottish solicitor by clients alleging breach of the duty of care owed by that solicitor in the provision of legal services to them. But, unlike the motorist, the Scottish solicitor is obliged to obtain cover from the provider designated by the Law Society of Scotland as insurance provider of the Master Policy. The notion that the Master Policy is something to do with the complaints system is entirely erroneous. It is no more to do with users of legal services than Road Traffic Act cover is to do with road users.

12 to 17. [the evidence for “strong support”]

Of the 450 responses received, 383 (85%) were from members of the public. This was despite the fact that 6000 mailings had been made to persons who had made complaints. If this response demonstrates “strong support” one wonders what level of response would be sufficiently low to demonstrate indifference.

24. and 25 [“public demand”]

The statement that “there has remained a public demand for greater independence and oversight.” is an unsubstantiated assertion.

26 to 28 [description - compensation up to £20,000 - non-lawyer chair and a non-lawyer majority. Appointments to the Board would be made by Scottish Ministers and subject to the public appointments procedures and the scrutiny of the Scottish Commissioner for Public Appointments.

Appeals against the Commission’s decisions would be by internal review in the first instance and by judicial review thereafter.”]
It has already been pointed out that to classify judicial review as an appeal procedure is an error. The proposed Commission is to have the power to award substantial compensation for “service complaints” and to “enforce” its view on conduct complaints. It will, in effect be a tribunal. Nor is any reason given why it should not be brought under the provisions of the Tribunals and Inquiries Act 1992 (or successor legislation).

“30. The Commission will also have an oversight role in connection with the Master Policy and the Guarantee Fund operated by the Law Society of Scotland. This oversight power responds to concerns expressed by the public about delays in receiving settlement under the two schemes.”

Those concerns featured in the report by the former Justice 1 Committee mentioned above. It has been explained earlier that the Master Policy insures solicitors, in the way that motor insurance insures drivers. It is not a “scheme” under which the public receives “settlement” at all. It is insurance cover for solicitors. The comments in the Memorandum are based on a misunderstanding of the nature of the scheme. Once the scheme has been properly understood, the legislative proposals relative to it can be withdrawn. The insurance issue raised by the proposals is quite different. It is whether the insurance industry will be prepared to provide law firms with affordable cover to meet awards made by the Commission.

“33. .. concern over the appointments to the board being made by Scottish Ministers as this might open up the process to political interference” dismissal of such concern.

See comments on 73 below.

“Funding Policy objectives 35 > 38 [“The funding model of the Financial Ombudsman Service2]"

The comments in the Memorandum are the product of a mindset which regards solicitors as substantially similar to providers of financial services and law firms as large corporations like banks and insurance companies. There is a part of the activities of solicitors which is indeed comparable with the provision of financial services. In that area, “advice” may have a significance not very different from to its usage (as in financial adviser”) in relation to financial services. But a substantial part of legal service provision is not at all like financial service provision. A better comparison would be with the provision of medical services. Like a medical professional, a lawyer gives advice, based on skill and judgment and available information, to individuals who will make life-changing decisions based on it. If matters do not turn out as expected, that advice will be subjected to hostile, detailed scrutiny carried out with the benefit of hindsight. This scrutiny may have very substantial consequences for the professional concerned. That is why those who carry it out need either to possess a like expertise or to have access to expert evidence from persons who do possess it.

“Rule-making power Policy objectives 39 to 40

Exercise of the Rule-making power will, of course, be subject to the constraints of Article 6 of the ECHR.

“Effects on human rights

69 to 71 - “Article 6 of ECHR - determination of “civil rights and obligations” - right to a fair trial - the practitioner effectively loses his civil right of access to a court for most purposes” - Independent and impartial judge - appointed by the Scottish Ministers and will be a mix a laymen and lawyers - subject to the public appointments legislation
73. The removal of a solicitor’s right of access to a court does indeed mean that the Commission is a tribunal which needs to be made as competent and impartial as a court. So the question of “security of tenure of the job of being a member of the Commission” is, contrary to the assertion made, precisely the same as the considerations that apply to temporary judges.

79. The Executive has described above the reasons why it thinks that the constitution and practices and procedures of the Commission are likely to be Article 6 compatible. However, if that were not the case, the ECHR jurisprudence is that even if there is some lack of impartiality or other flaw in the way a decision-making body operates, this is not to be treated as a fundamental flaw as far as compatibility with Article 6(1) is concerned, provided there is an adequate judicial control by a Tribunal to correct any flaw in the operation of the decision-making. In other words when the administrative machinery is taken with the judicial control, the machinery operates as a whole in an ECHR compatible way. (see the main UK case which laid down this important point is R (Alconbury) v. the Secretary of State, followed in Scotland by County Properties v. the Scottish Ministers.)

The Alconbury principle is set out in paragraph 32 of that case thus: “It is not the role of article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities on questions of expediency and where the courts do not refuse to examine any of the points raised; article 6 gives a right to a court that has ‘full jurisdiction’ (cf Zumtobel v Austria (1993) 17 EHRR 116, para 32).”

A “question of expediency” is a question (such as a planning matter) on which the executive arm of government may legitimately have and implement a policy. A question of whether or not a particular solicitor should be ordered to pay a sum of money to a particular aggrieved client is not a “question of expediency” on which the executive branch of government may legitimately have and implement a policy.

In paragraph 33 of the Policy Memorandum it is stated, in relation to concerns about political influence, that “scrutiny of the process by the Commissioner for Public Appointments is intended to ensure transparency and accountability”. This is disturbing. “accountability” means accountability through the democratic political process. Such accountability is out of place in relation to the judiciary. The fact that there is no minimum term to appointments and the shortness of the maximum term (5 years) mean the Commission will be regarded as a body subject to undue influence to deliver results to justify its having been set up in the first place.

Legal challenge to the Bill as presently conceived is inevitable.