Submission from William Ruthven Gemmell for the Legal Profession and Legal Aid (Scotland) Bill

I am a Scottish solicitor and also qualified in England and Wales.

Complaints Commission Cost Effective and Proportionate

The requirement for an Independent Complaints Commission must be driven by a need for it to be considerably better and more cost effective than the existing system. As the Bill sets out few, if any, details on the way this body will carry out its work it is impossible to estimate its cost but this body must be proportionate to the benefit it provides.

Case Fee

The concept of making solicitors pay for particular cases which are accepted by the commission, in the circumstances where they are found not to be at fault, is unjust.

Level of Compensation

The level of compensation payable has recently been increased from £1,000 to £5,000 and now, without any explanation, rises to £20,000 and seems disproportionate. The same amount is proposed for England and Wales and there seems little purpose in having a Scottish Parliament if it merely copies what happens in the UK Parliament when it is legislating for England and Wales.

Independence

The lack of an external appeal for both lawyers and consumers is in the writer’s view a breach of the Human Rights legislation and must be remedied.

Whereas many of the services provided by solicitors such as property purchase are difficult to see in context of the constitutional necessity to have an independent legal profession, this nonetheless remains an exceedingly important and valuable factor in any democracy. The concern is clearly that if the Complaints Commission is appointed by the Executive, then that body may use its influence to remove, by means of its interference in conduct (as currently drafted), a solicitor who is carrying out his duties in the defence of an individual where he is being pursued by any of the Executive’s or other state agencies. It does not take too much digging into European history to see how the lack of an independent judiciary and legal profession or even the perception of one, can have a detrimental impact. Similarly, the proposed oversight of the Guarantee Fund may erode this independence and oversight of the Master Policy is inappropriate as that is operated by insurance companies who have a UK regulator, the Financial Services Authority i.e. neither the Law Society nor the Scottish Parliament are able to dictate how insurance claims are dealt with.

Costs to Consumers

The perception amongst the legal profession is that there will be additional costs involved in implementing the new system (which in itself is “not broken” and is meeting the targets set to it by the Scottish Legal Services Ombudsman) but which is being changed primarily as a matter of perception (a point conceded by The Law Society of Scotland).

Where it is possible to do so, these costs will probably be passed on to consumers. However, where a practice deals primarily with clients who require Legal Aid and clients in rural and other areas where access to lawyers is already restricted, may lead many solicitors’ firms to consider carefully the implications of continuing to offer services when the costs outweigh the return. This consequence should be realised in the Executive’s drive to attempt to provide a complaints system for the end user.

Service & Conduct
The difference between a service complaint and a conduct complaint is that a service complaint relates to the way work is done and if service is unsatisfactory the consumer deserves to have the matter dealt with correctly.

It is a different matter, however, where mis-conduct may remove an individual’s livelihood, particularly where this is decided or driven by a Commission, a majority of whom are not qualified solicitors or unlikely to be so and whose Board will not consist predominantly of solicitors.

A Profession with Professional Standards

It is the essence of running a profession that it deals with the acceptance (including tests as to an individual being fit and proper) the education and training, ensuring ethical and other standards and, ultimately, conduct leading to the expulsion of member from that profession.

Co-Regulation

Proper regulation is the corollary to the independence of a profession. Proper regulation addresses the collective independence of the members of the legal profession and the principle of proper regulation is nothing less than a structural defence of the independence of the individual lawyer which requires a lawyer to be free from all influence especially such as may arise from external pressure.