Submission from Legal Defence Union for the Legal Profession and Legal Aid (Scotland) Bill

Our comments are restricted to that part of the Bill dealing with solicitor complaints and should be read along with our earlier submission to the Executive consultation. As explained in our covering letter we would wish to give oral evidence to the Justice 2 Committee to expand on, and where necessary, to clarify our comments further. For ease, our numbering refers to the sections in the Bill.

1 (and Schedule 1) Appointment of Commission Members

The independence of the new Commission is of vital importance to establish trust both in the minds of the profession as well as the public. This independence may already have been somewhat skewed by comments from the Executive about the complainer being put at the heart of the new system. An independent system should favour neither solicitor nor complainer, be fair to both sides, be reasonably accessible to the public, and be efficient in the resolution of complaints. Given the requirement for independence, it does not make sense to have members of the Commission appointed or dismissed by the Scottish Ministers. This is surely the same point which caused the ‘Temporary Sheriff’ problems in the criminal courts.

In addition, we believe that ECHR compliance would indicate the need of an appeal mechanism which is reasonably simple and not prohibitive in cost. It may be enough in this regard, to establish an appeal panel of three members, with provision for prior certification by the Chairman of the Commission or other identified person that a significant issue of fact, law, or quantification exists in a particular case warranting an appeal. This should remove any risk that the new Commission might have its efficiency encumbered by unnecessary appeals.

2 Receipt of complaints: preliminary steps

This is one of our most serious concerns. In section 2(3), the definition of any person having an interest to complain, includes any person directly affected. We would strongly urge the Executive to reconsider this definition as it is fundamentally at odds with the reality of how the law is intended to work. There has been an unfortunate reliance on jargon about all persons in contact with the law being “consumers”, or “service – users”, or “stakeholders”. The vital distinction which must be maintained throughout is between clients, to whom solicitors owe a vast complex of duties and obligations within the law, and others who are intended to suffer adverse consequences where their interests may be in conflict or in competition with the interests of that client. It is the purpose of the law to impact on people. If solicitors did not affect the lives of other persons whose interests were in competition or in conflict with the client’s interest then they would not be doing their job. Under this definition (for example) the entire prison population of Scotland will have an automatic right to complain against the Fiscal who put them there. All disappointed litigants within groups like ‘Fathers for Justice’ will have the automatic right to complain against the Women’s Aid type of lawyer who has taken legal measures to protect the spouse or partner and children. In any event, for the reasons set out in our comments to Section 13, solicitors who have been attacked in a complaint from an “affected” non-client or adversary, cannot defend themselves by revealing information as to why they acted in the way complained about because that information belongs to the client and not to the solicitor.

4 Mixed service and conduct complaints

This mixture is quite common, affecting possibly as high as 33% of all cases. Consideration will have to be given as to whether there can be a single process of examining the factual history and leaving the determination of service or conduct issues by the appropriate body to avoid either double jeopardy or a double process which is not to the advantage of either solicitor or complainer in terms of time, cost or efficiency.
5 Conduct Complaints

We have already made clear our reservations about the way the Law Society has been handling complaints against solicitors for the last fifteen years. There is an absence of published rules, and of procedures which are open, transparent, and ECHR compliant. We would urge that the Bill provide rules for both service and conduct complaints after they are admitted through the single gateway. Solicitors and complainers must have access to published and predictable rules as to how their conduct or service complaint will be progressed within either channel of the new system.

6 Services complaint: Notice and local resolution or mediation

We approve of the principle (as per our original submission), but wonder if the intention of the Bill is to go further than mediation. Mediation normally applies to a voluntary process, and within certain recognised rules. The intention here may be to have, attached to the new Commission, an advisory and conciliation body along the lines of ACAS in the Industrial Tribunals system. We strongly support the requirement that there be no admission of a formal complaint until reasonable efforts have been made by both sides to mediate or conciliate the complaint.

7 Service Complaints: Commission’s duty to investigate and determine

Another of our serious concerns is to ensure that the whole process is fair. This section refers to allowing both the complainer and the practitioner the opportunity of “making representations”. This is one of the major problems that exist in the current system. The new system will require to ensure that such rights of representation are adequate, fair to both sides, and where necessary allow for a hearing with witnesses. See our views at 23 below which expand further on this point.

13 Power to examine documents etc

Consideration will have to be given to a crucial distinction which divides the entire body of complaints and affects questions of confidentiality, privilege, and ECHR privacy of the solicitor’s client. Where the client complains, it is beyond doubt that the client will qualify as a person having an interest to complain, if expressing some form of dissatisfaction with the legal services provided by their own solicitor. Where the client complains then clearly these issues of confidentiality etc. do not arise. When a person is admitted as having an interest to complaint, and as having expressed dissatisfaction with legal services, and is not a client, then the rights of the client (who has not complained) cannot simply be set aside. No solicitor would, in our view, be entitled to give to the Commission any information without being in breach of the solicitor’s duties to the client. Further problems arise in the case of a live litigation where the expression of dissatisfaction is from the opponent. Consideration should be given to whether, in live litigation cases, the Judge should be notified of the complaint, and whether out of respect for the sub judice rule the Commission should defer all such cases until the conclusion of the entire litigation, and the progress of any Appeal. A further problem is contractual confidentiality which is commonplace in Industrial Law cases, i.e., where the parties have signed a Compromise Agreement which specifically excludes disclosure of any relevant information by any party. We do not think either the parties, or their agents, are free to disclose information in such cases.

19 Complaints levy

We would urge strongly against any imposition of a levy on solicitors who are acquitted of any service or conduct complaint. Such a measure is so obviously lacking in fairness that it will risk bringing the entire system into disrepute from its outset. There will also however be a more practical application. There is a growing problem with access to justice. Because of a number of measures in recent years, solicitors in general practice and in Legal Aid (who will attract the vast majority of complaints under the new system) are no longer able to adhere to
the time-honoured principle of the legal profession being open to all persons of all kinds and with any kind of problem. The factors behind this change are often well-intentioned but have had an unforeseen adverse effect on the availability of legal services. The Ombudsman has commented on a number of occasions on the difficulty of solicitors refusing to take on certain clients who are known Complainers. The Code of Conduct and good professional practice warns solicitors against taking on any case which they do not have the financial or professional resources to handle to a conclusion. Solicitors are therefore in recent years increasingly driven to ask if they can afford even to start taking instructions for certain categories of work. In any event solicitors have always had the fundamental right to decline instructions in any individual case. This clause will accentuate that trend, and in the long term act against the public interest.

23 Duty of Commission to make rules as to the practice and procedure

We would wish to see the publishing of rules requiring equivalent procedures to deal with service complaints handled by the Commission and conduct complaints handled by the professional organisation. The present system operated by the Law Society of Scotland is seriously lacking in transparent, predictable rules. In particular, while there are logistical problems about having a right to a live hearing in every case, there has to be power to the Commission to fix, in appropriate cases, some form of live hearing where witnesses can be examined. No Court or Tribunal, or adjudicating body of any sort, can properly deal with issues of reliability or credibility without those who are entrusted with the responsibility of fair and reasonable judgement having an opportunity to see and assess the witnesses and to hear the parties argue their case. We would also regard it as essential that the new Commission and its staff would show the same accountability that is expected from the solicitors it will be regulating. That means there must be a complaints process for those who show prima facie reasonable grounds for complaint as to the way they have been treated by the Commission or its staff.