Submission from Scotch Whisky Association for the Legal Profession and Legal Aid (Scotland) Bill

This Association is the trade association of the Scotch Whisky industry. Its members represent over 95% of Scotch Whisky production. One of the Association’s main functions is to protect the Geographical Indication “Scotch Whisky”. In order to carry out this function the Association employs 5 solicitors as in-house lawyers whose sole function is to protect Scotch Whisky from unfair competition throughout the world, if necessary by the institution of legal or administrative proceedings.

The Association’s in-house lawyers hold practising certificates from the Law Society of Scotland (“the Society”). As such, they are members of the Society and pay the full annual subscription. However they do not contribute to the Scottish Solicitor’s Guarantee Fund on the grounds that they are employed as officers of a “designated body” by reason of being a solicitor, and are not engaged in private practice.

The cost of the annual subscription is met by the employer - The Scotch Whisky Association - and its in-house lawyers are not entitled to provide legal services to members of the public. In recognition of this fact, the Association is not required to maintain professional indemnity cover for its lawyers.

The Association believes that similar arrangements exist in other commercial organisations which employ Scottish solicitors. Amongst the Association’s members there are a number who employ legally qualified personnel.

The level of the subscription to The Law Society is approved by its Council, which is directly elected by the profession. The subscription funds the whole range of services provided by the Society, of which complaints handling is only part. The current subscription arrangements, therefore, differ considerably from the proposed compulsory Statutory levy provided for under clause 18 of the Legal Profession and Legal Aid (Scotland) Bill.

The Association strongly objects to clause 18 of the Bill which will impose a compulsory levy on in-house lawyers (who comprise 27% of the profession) solely for the purpose of funding a complaints handling body which will deal principally with complaints generated by solicitors in private practice. This is disproportionate in two respects.

Firstly, the levy will be directed at a significant proportion of the profession which does not generate complaints. The Scotch Whisky Association, like most other organisations employing in-house lawyers, has its own internal disciplinary proceedings and there is no likelihood of inadequate performance by an employee being referred to the Scottish Legal Complaints Commission. That is quite a different situation from independent solicitors who provide advice to fee paying clients.

Secondly, the levy is in effect a tax on those organisations in the commercial and public sectors who employ Scottish solicitors. It is difficult to see why the Scotch Whisky industry, or for that matter any other organisation which is not engaged in providing legal services to the general public, should pay for complaints handling by the proposed Scottish Legal Complaints Commission.

The Association employs practicing solicitors because their expertise will assist when instructing or giving evidence in legal proceedings, both in the UK and abroad. There is, however, no particular requirement for the Association’s in-house lawyers to be Scottish solicitors. The levy will act as a disincentive to bodies in both the commercial and public sectors who wish to employ Scottish solicitors – they may either employ solicitors from other jurisdictions or non-solicitors.

Whether the levy is paid by the solicitor himself, or the cost is borne by his employer, the imposition of a levy is a restriction on the freedom of solicitors to carry on their business. In its Report on Competition in Professional Services, the European Commission recommended that in assessing whether any rule or decision infringed Article 81 of the EC Treaty, it is
necessary to apply a proportionality test, ie whether the restriction pursues a clearly articulated and legitimate public interest objective, whether it is necessary to achieve that objective and whether there are no less restrictive means of achieving that objective. The Association believes that if that test were applied to Clause 18, it would fail on the last two counts since a levy on in-house lawyers is neither necessary nor indispensable to achieving the desired objective.

The Association has seen the opinion of Lord Lester obtained by the Law Society to the effect that the Bill is in certain essential elements incompatible with the European Convention on Human Rights, and to that extent is outside the legislative competence of the Scottish Parliament. The Association notes that one of the aspects highlighted is the lack of proportionality in the funding arrangements for the general levy. The Association believes that the funding arrangements are also potentially incompatible with EU Competition Law, and to that extent are also outside the legislative competence of the Scottish Parliament.

The Association therefore recommends that the funding arrangements for the Scottish Legal Complaints Commission be reviewed, and that solicitors not engaged in providing legal services to the general public should be exempt from the levy.

The Association understands that the Society will be making submissions on the Bill, which will include submissions by the Society’s In-House lawyers Group. The Association wishes to support those submissions.