Submission from Mackintosh & Wylie for the Legal Profession and Legal Aid (Scotland) Bill

As a firm we have been considering the impact which the passing of this Bill would be likely to have on us, our clients and our profession. We have a number of concerns which we would like you to consider. Those concerns relate primarily to the role and function of the proposed Scottish Legal Complaints Commission and as we appreciate the Committee will be reading through many comments on the Bill, we shall try to summarise the points as succinctly as possible.

1. The Make-up of the Commission

We understand that there is no requirement for a solicitor to have any input to the consideration or determination of a complaint. We feel that people who have no experience of the work of solicitors within the legal profession are not the best judges of whether the services provided may have been inadequate.

We suggest that there should be a requirement that every case of a complaint against a solicitor is reviewed by a solicitor.

2. The Source of Complaints

Apparently the Commission will be able to consider complaints from people who may not have had any professional relationship with the solicitor complained about. The circumstances of any such complaint must be made absolutely clear as it is by no means obvious how a solicitor could have any liability for inadequate professional services to someone who is not a client.

3. The Funding of the Commission’s Budget

We are told that, after the initial set-up costs are met by the Scottish Executive, the Commission must be self-funding, and that there is to be a general levy on the profession and a specific levy from any solicitor about whom a complaint is made.

The existing Complaints Committee of the Law Society of Scotland is funded by solicitors as part of our annual practising certificate fee. There is no levy in relation to individual complaints. The proposed change is fundamental and has far-reaching and palpably unfair implications.

3.1 The general levy will be higher than the amount currently allocated out of the annual fee, which will increase our fixed costs as a firm. We have 9 solicitors in our firm and the cumulative effect of that increase will be significant. However, the potential additional costs which would arise in the event of complaints are impossible to assess in advance. A commercial view will have to be taken of the risk of such extra costs and fees will have to be increased to cover the actual and potential increased costs.

There are some areas of our practice however where there will be no scope for us to increase our fees. This will apply particularly in Legal Aid practice, which is already largely unremunerative. The result is likely to be that we will have to restrict areas of work, including Legal Aid, which may attract the greatest risk, and that will limit the public’s access to justice.

3.2 It is, in our view, fundamentally unfair to require solicitors to pay a specific levy simply because they have a complaint made against them, whether that complaint proves to have any merit or none. It is said that this is on the principle that ‘the polluter pays’. If so, that principle is wholly misconceived in this context. The result is not only a presumption of guilt, but a finding of guilt in that there will be a penalty paid by the solicitors whether or not the complaint is upheld. That is entirely contrary to natural justice and probably a breach of human rights.
3.3 The scheme as proposed is a charter to a disgruntled client to obtain no-fault compensation since the threat of a complaint to the Commission would have cost implications for the solicitors, but none for the complainer. We would suggest that any finding of costs against solicitors should arise only in the event that the complaint is upheld. Indeed, we consider there should be some provision for a complainer being found liable for costs if the complaint is found to be frivolous or vexatious.

4. The Level of Compensation

The £20,000 level of compensation which may be awarded shows a massive increase over the current level of £5,000, which is a recent increase from £1,000. That produces a 20-fold increase over the space of a couple of years. The profession has no idea what type of inadequate service might give rise to the upper level of compensation. Clear guidelines should be published.

5. No Right of Appeal

It is a breach of natural justice to have a body with power to impose fines/compensation without any provision for representation before the body, or any right of appeal from the decision of that body. It is a serious indictment of the Executive’s attitude to the legal profession that it should propose such a scheme.

6. Exhaustion of Contractual Appeal Procedure

There is no provision in the Bill requiring a complainer to pursue and exhaust the complaints procedure of the firm he/she has been dealing with. All firms must have a designated Client Relations Partner whose function is to deal with concerns or complaints about the service the firm is providing. It should be a requirement that any complainer raising an issue with the Commission should first have exhausted the firm’s complaints procedure. There is an analogy with applications to Employment Tribunals where, in the majority of cases, applicants must show that they have operated their employers’ grievance procedure before their application will be registered by the Tribunal.

Concluding Remarks

There is a perception that most solicitors have a very high income and that they will be able to absorb the increased costs which this scheme will impose. The reality, we would suggest, is that the perception of high income comes from large city firms who carry out specialist work for clients who would not consider the complaints procedure to be relevant to them. Firms like ours provide a broad service to local clients. In the days of scale fees we used to be able to cross-subsidise other areas of work which were unremunerative, including legal aid. As a result of pressure from the consumer lobby, scale fees were abolished many years ago and one result was that we could no longer provide a service to some clients. We have no doubt that there will be a further loss of service to the public as a result of the proposals in this Bill.

The demand for our services is such that all of the partners in this firm work on average a 50-60 hour week. There is little prospect of that continuing when there will be increased costs associated with complaints issues. The more likely scenario is that our fees will have to increase, and we will limit our work in those areas which are deemed to be the highest risk.

Over 99% of solicitors’ work in Scotland is complaint-free. Of the remainder, most complaints are resolved within the firm. The overall effect of the proposed scheme is that some (very few) clients who have legitimate complaints against their solicitors will benefit from the new scheme, but the vast majority of the public will suffer, either by facing increased fees or finding that they cannot obtain the service they require.