Submission from David A Smith for the Legal Profession and Legal Aid (Scotland) Bill

My Interest in the Bill

1. My full name is David Alexander Smith. I qualified as a solicitor in 1971 and I have been a partner in Shepherd+ Wedderburn, Saltire Court, 20 Castle Terrace, Edinburgh EH1 2ET, since 1974. I am, however, providing these comments as an individual and my views should not be taken as representing the official views of Shepherd+ Wedderburn.

2. I have considerable experience of complaints against solicitors for inadequate professional service. For a number of years I have provided legal opinions on questions of professional negligence involving the actings of solicitors, and I am currently the Client Relations Partner at Shepherd+ Wedderburn which involves the investigation of complaints against solicitors/former solicitors in the firm.

3. In the course of dealing with complaints over a number of years, I believe that these can be broken down into the following categories:

- Endowment mis-selling complaints.
- Complaints by clients/former clients who have suffered demonstrable financial loss as a result of the actings of their solicitor.
- Complaints by clients/former clients who have not suffered any actual financial loss, but who consider that the performance of their solicitor fell below the standard they had expected.
- Complaints by clients/former clients who have a grievance against authority in general and blame the firm for no reason other than being part of "the system".
- Complaints by parties who have never been clients of the firm but who consider that they have been directly or indirectly affected by the actions of a solicitor within the firm. These parties can include individuals who are on the other side of a litigation raised by the firm on behalf of clients, or parties who are critical of the firm for having accepted instructions to represent a particular client with whom they are in dispute or of whom they disapprove.

The Current Arrangements

4. As you are aware, all firms of solicitors are now required to have a Client Relations Partner who is responsible for trying to resolve complaints "at source". It should be borne in mind that it is relatively easy to resolve a complaint where the complaint is upheld and it is a great deal harder to resolve the complaint at source if, after further investigation by the Client Relations Partner, the complaint is rejected. In such cases, the complainer is currently entitled to refer the complaint to the Client Relations Office of the Law Society of Scotland who, if they consider that there is a prima facie case to answer, will invite the solicitor against whom the complaint has been made to provide a comprehensive response to the heads of complaint and the matter will then be considered by one of the Society's Complaints Committees. Once again, if the complaint is upheld, it is likely that the complainer will be satisfied. If the complaint is not upheld the complainer is likely to remain dissatisfied and he/she has the right to refer the Society's handling of the complaint to the Legal Services Ombudsman for determination.

5. You will appreciate from the above comments that by the time a complainer refers the matter to the Legal Services Ombudsman or resorts to other means to voice disapproval at the handling of the complaint he/she will have had the complaint
investigated and rejected on two separate occasions. It is hardly surprising therefore
that individuals who fall into this category will be inclined to blame the complaints
handling process for failing to deliver a satisfactory result. You should be aware that
any new arrangements for investigating and determining complaints will be likely to
produce a range of outcomes not dissimilar to the present arrangements and that
there will continue to be complainers who believe that the whole process is unfair and
biased against them. It should not be thought that an Independent Legal Complaints
Commission will be a "cure all" for aggrieved clients.

The Bill

6. Under the Bill, complaints which cannot be resolved at source will, if they are
complaints about inadequate professional service, be dealt with by the new Scottish
Legal Complaints Commission.

7. The profession has, I believe, now accepted that however rigorous the current system
of investigating complaints is (and I believe that it is rigorous), the perception in the
minds of members of the public is that there is something fundamentally flawed about
complaints against lawyers being investigated by lawyers, just as the public has
reservations about complaints against MP's being determined by a Committee of
MP's, complaints against the police being determined by a police officer from another
force, and complaints against doctors being determined by a group of doctors. My
firm responded to the Scottish Executive's Consultation Paper last year and the view
which we took at that time was that in order to secure public confidence in the
investigation of complaints against solicitors, there was merit in such complaints
being investigated by an independent body. The Bill goes some way towards
achieving this, but I have reservations about specific aspects of the Bill.

8. By way of introduction, I would hope that it would be accepted that if a new system for
handling complaints against lawyers is to be established, that system has to be seen
by members of the public and members of the legal profession to be an improvement
on the previous system. Simply creating a new statutory body to investigate and
determine complaints is not in itself sufficient. The body must be independent, the
investigation of complaints must be robust and strike a fair balance between the
interests of the complainer and the lawyer against whom the complaint has been
made, any entitlement to compensation must have regard to the fact that if a client
has a genuine claim against a lawyer for inadequate professional service which
amounts to negligence (ie that the actings of the lawyer fell below the standard to be
expected of a reasonably competent lawyer acting with ordinary skill and care in
relation to the subject matter of the complaint) the complainer can pursue a claim
(and has always been entitled to pursue a claim) through the Courts and a number
choose to do so every year, and there requires to be a right of appeal available to the
complainer or the lawyer complained about to an independent appeals body. The
definition of what is a complaint is too broad. Section 34 of the Bill provides that a
complaint includes "any expression of dissatisfaction". In my opinion, that goes much
too far. To trigger an investigation of complaint for inadequate professional services
a complainer should require to demonstrate actual financial loss or material distress
as a result of receiving an inadequate professional service. Any complaint which falls
short of this should not require to be investigated by the Legal Complaints
Commission although it may still trigger an investigation of professional misconduct
or unsatisfactory professional conduct by the relevant professional body.

The composition of the Complaints Commission

9. I have no objection to the proposal that the Complaints Commission should be
chaired by a non lawyer and that the 8 members of the Commission should represent
an equal spread between lawyers and non lawyers. I am aware that the Law Society
has a concern that of the 4 lawyers to be appointed to the Commission there is no
guarantee that a solicitor will be amongst their number. I share the Society's concern
on this point as there are nearly 10,000 practising solicitors in Scotland compared
with around 500 practising Advocates, and it is likely that there will be a very small number of parties who qualify under paragraph 2 (6) (c) and (d) of Schedule 1 to the Bill. I would therefore suggest that there should be at least 2 solicitor members of the Commission as it is likely that the largest volume of complaints about inadequate professional service will be against solicitors (simply because of the number of transactions undertaken by solicitors compared with others who provide legal services) and it will surely assist the deliberations and understanding of the Commission to have the first hand views of solicitors who are likely to have greater knowledge and understanding of many of the circumstances giving rise to a complaint and who will be able to express an opinion as to whether the acting of a particular solicitor were in accordance with recognised professional practice in respect of the subject matter of the complaint.

10. I do have a concern about the proposal that members of the Legal Complaints Commission are to be appointed by the Scottish Ministers. I note that the Policy Memorandum which was produced at the same time as the draft Bill states in paragraph 72 that the appointment system has to be subject to the Public Appointments legislation and this ensures that the appointees will be appointed on merit and impartially so that the Scottish Ministers are really "nominal appointers". I do not subscribe to this argument as it does, I believe, still render the appointment system "tainted" by political influence. It would be a relatively simple matter for members of the Commission to be appointed by an independent body chaired for example, by a member of the Judiciary. If the previous system was perceived to be lacking independence because it was administered by the Law Society, why introduce a system which is also perceived to be lacking independence because the members of the Commission are appointed by the Scottish Ministers?

The Level of Compensation

11. The level of compensation is, in my opinion, too high. There will be a tendency on the part of members of the public who make a complaint to believe that if they are successful they will receive a substantial amount of money. In my experience of dealing with complaints the actual "loss" to a client is often not easily quantified in terms of money. Where loss is capable of being easily quantified in terms of money, a client will still have an entitlement to raise proceedings against the lawyer on the grounds of negligence or breach of contract. Contrary to popular belief, many solicitors are willing and able to take instructions from an aggrieved client of another solicitor to act in a claim against another member of the profession.

12. In my experience, an award of compensation for inadequate professional service should be capped at a reasonable level (well below the figure of £20,000 suggested in the Bill), otherwise there is a danger that aggrieved clients will use the complaints system as an alternative to the Courts and I do not believe that the investigation of complaints by the Complaints Commission is intended to be as exhaustive as the consideration of a claim in a Court of Law where oral evidence requires to be lead by both sides and the facts and legal arguments are weighed in the balance by an experienced and highly qualified judge. I see no reason to increase the maximum compensation figure from the current level of £5,000 which was approved in 2005, although I acknowledge that the figure should be increased from time to time in line with inflation.

The Right of Appeal to an Independent Appeals Body

13. In my opinion, the proposed legislation is flawed in failing to recognise the need for an independent appeals body. It is not clear to me from reading the Bill what number a quorum of the Commission will comprise, but I assume that it is likely to comprise at least three members including the chairing member. It is not clear to me what the quorum will be for the Appeals Committee, but I assume that it will also comprise at least three members. That means that if a complaint is investigated and the decision of the Commission is appealed it is likely that at least two thirds of the members of
the Commission will either have investigated the original complaint or have dealt with
the appeal. That proportion will increase if the quorum is increased. As the Scottish
Executive is very strong on the perception which a particular course of action might
create in the minds of members of the public, perhaps MSP's should be aware of the
perception which might arise in the minds of both the public and the legal profession
namely that the Appeals Committee is more often than not likely to give its backing to
the decision of the Complaints Commission, as it will be made up of a small group of
"similarly minded" individuals and there will not be the rigour of independent scrutiny
that a proper appeals procedure requires. This is particularly relevant if the maximum
level of compensation remains at £20,000. The Courts exist to deal with claims for
breach of contract or negligence (which at the end of the day is what many instances
of inadequate professional service amount to) and there is a real danger that
complaints against lawyers will increase substantially if the maximum compensation
remains at £20,000, as the complainer can make use of the complaints system free of
charge, whereas the member of the legal profession against whom the complaint is
made requires to pay for the cost of the investigation of the complaint irrespective of
the outcome. How can that be fair? Why would a member of the public consider
raising legal proceedings against a lawyer (with the risk of incurring legal expenses)
when it is a great deal simpler to make a complaint to the Independent Complaints
Commission, with the prospect that the Commission, comprising a majority of lay
members, might just uphold that complaint and award a significant amount of
compensation to the complainer, all without financial risk to the complainer and
without the requirement for a robust investigation of all the evidence?

14. Unless these aspects of the Bill are amended, I suspect that there will be a
considerable number of applications for judicial review of the decisions of the
Complaints Commission and the Appeals Committee by lawyers who consider that
the investigation of the complaint against them has not been conducted on a fair and
equitable basis and by complainers who consider that the Appeals Committee is no
more than a rubber stamping exercise in support of the original decision of the
Complaints Commission. This is hardly the appropriate basis upon which to
introduce a wholesale reform of the complaints handling process. As I have indicated
above, if we are to introduce a new system it requires to be an improvement on the
previous system. These proposals do not produce such an outcome.

The Funding of the Complaints Commission

15. At present, the investigation of complaints against solicitors is funded by the
profession out of the annual subscription which solicitors pay to the Law Society of
Scotland. I understand that the Law Society’s Client Relations Office currently
employs a total of 38 staff and, in addition, there are over 200 reporters who
investigate complaints and prepare reports for consideration by the Client Relations
Committees. There are approximately 2 solicitor reporters for every non-solicitor
reporter. My understanding is that the fees paid to reporters bear no relation to the
actual time which they spend on the investigation of a complaint and the preparation
of a report. To this extent therefore the reports are prepared on a "pro bono" basis.
This will presumably change under the new procedures and the cost of dealing with
complaints will therefore rise.

16. The Bill proposes that the Independent Complaints Commission will comprise
between 50 and 60 staff, excluding Board members. It is anticipated that the cost of
the Commission will be funded partly by an annual general levy on all solicitors and
advocates (estimated at £120 per capita) and partly by a specific levy of £300 on
practitioners who generate a complaint. The specific levy is to apply irrespective of
whether the complaint is upheld or rejected.

17. Whilst such a method of funding complaints may appear superficially attractive, I
suspect that it will lead to an enormous increase in the number of complaints, simply
because clients who consider that they have obtained a service which is lower than
their expectations have absolutely nothing to lose in making a complaint. In my
opinion, it is essential that a fee is charged for the making of a complaint and that fee should be subject to reimbursement in the event that the complaint is upheld. Provided the fee is more than a nominal fee, it is likely that most mischievous complaints would be eradicated from the system at the outset. If the proposal is that there should be specific levy of £300 on practitioners who generate a complaint, I see justification for a fee of £300 for the submission of a complaint on the grounds that this fee would be forfeited if the complaint was not upheld and the fee would be reimbursed if the complaint was upheld.

18. I consider that the financial burden of operating an independent Complaints Commission will be significantly higher than the figures quoted in the financial memorandum, as I suspect that unless a realistic fee is charged for the lodging of a complaint there will be a significant increase in the number of complaints and, in consequence, there will require to be a significant increase in the number of staff requiring to be employed by the Commission. The fact that it is intended that all of these costs will be met by the profession will lead to the perception in the minds of the legal profession that the Scottish Executive and Scottish Ministers are only interested in providing a forum for complaints to be dealt with at no additional cost to central funds, without giving any consideration as to whether the system strikes a reasonable balance between the interests of the complainer and the party complained against. The method of investigation of complaints is another area of potential difficulty. If non lawyers carry out the investigations, how will they be able to judge whether a particular action by a lawyer was in accordance with good professional practice or whether it was outwith the normal range of actings by a competent lawyer?

The Guarantee Fund and the Master Policy

19. When the Scottish Executive issued their Consultation Paper on reforming complaints handling and building consumer confidence last year, I was surprised at the inclusion of questions relating to the operation of the Master Policy (for compulsory professional indemnity insurance) and the Solicitors’ Guarantee Fund. I am equally surprised at the inclusion in the Bill of powers in favour of the Scottish Legal Complaints Commission to monitor the effectiveness of the Scottish Solicitors’ Guarantee Fund and the professional indemnity arrangements of the profession.

20. It appears to me that the proposed powers are an unwarranted and unnecessary interference into the manner in which the members of the Law Society of Scotland obtain adequate insurance cover to meet financial claims which may be made against them. Although I have not undertaken a comprehensive review of the position in other jurisdictions and professions, my understanding is that the Scottish Solicitors’ Guarantee Fund is unique in providing a safety net for former clients of solicitors who have lost money as a result of the dishonesty of a solicitor, so that the former client is provided with financial recompense in respect of any loss which he or she has suffered. The Guarantee Fund is the cornerstone of a responsible profession which is willing to assist clients of former solicitors who otherwise have no legal redress. If the Executive does not acknowledge the manner in which the profession endeavours to safeguard the interests of its disadvantaged clients by leaving it to administer this Fund without interference from a government appointed Complaints Commission it should come as no surprise if the profession decides to wind up the Guarantee Fund in order to reduce the expense which its members will incur in relation to the new complaints process.

21. Professional indemnity insurance is a requirement for practising solicitors up to a minimum level of £1.5 million. Whether a solicitor or a firm of solicitors carries insurance above this level is a matter for the solicitor or firm to determine in light of the nature of the work which they undertake on behalf of clients. The professional indemnity insurance market is a highly volatile market and in my experience the level of cover obtained by Scottish solicitors through the Master Policy compares favourably with the level of cover which is available to other professions, whose
members are responsible for making their own professional indemnity insurance arrangements. The handling of claims under the Master Policy is dealt with by the insurers and neither the Law Society nor the solicitor against whom the claim has been made is in control of the management of the claim. What benefit the monitoring by the Legal Complaints Commission of the effectiveness of the profession's professional indemnity insurance arrangements might have on the whole process is hard to imagine. If for example the Commission decided that the minimum level of cover should be doubled it is probable that a substantial number of firms would be driven out of business as premiums are already very high. Some professions have difficulty in securing very modest amounts of cover. It may interest the Committee to know that the cost to my firm of securing Professional Indemnity Insurance Cover during the past three years has been:

2003/04 - £3,081 per solicitor;
2004/05 - £3,158 per solicitor;
2005/06 - £2,687 per solicitor.

These figures are in addition to the cost of the annual Practising Certificate which every solicitor requires to obtain from the Law Society.

22. In my opinion, the Scottish Legal Complaints Commission should have no role in monitoring the effectiveness of the Guarantee Fund or the professional indemnity arrangements of the Law Society of Scotland and these provisions should be deleted from the Bill.

Conclusions

23. As my firm indicated in its response to the Scottish Executive's Consultation Paper last year, there is a concern within the legal profession that the Executive and the Scottish Ministers have been "hijacked" into believing that the whole complaints handling system is flawed and requires radical reform. Having been involved in the investigation of complaints and the provision of expert reports in litigation against solicitors, I believe this to be an erroneous view. I acknowledge that there are cases where clients have been let down by the system and we need to identify what went wrong and how the system might be improved in order to minimize the risk of such problems happening again. I do not, however, believe that there are large numbers of people who fall into this category. Many of the people who have secured maximum publicity in their efforts to denigrate the present system are individuals who have failed to obtain the legal remedy which they were seeking against a lawyer or a firm for reasons which have been determined in open court or in correspondence from the Law Society's Complaints Committee or the Scottish Legal Services Ombudsman, but who still consider that the entire system has failed them. There will always be such people under any system for dealing with complaints. Not every complaint is justified. The purpose of this Bill is well intentioned and the Law Society has indicated that it supports the creation of an independent body for the investigation of complaints against solicitors. Please allow that process to be truly independent and do not "build in" a bias in favour of the complainer and against the lawyer. The legal profession does take its obligations to society very seriously and it does recognise the need to take action against those members who fall short of accepted professional standards. The public interest dictates that Parliament should steer a straight path without favouring one interest group as against another. This Bill fails to strike the necessary balance as it stands. Hopefully the Committee's deliberations and consideration of all the evidence which is presented to it will enable the Bill to be modified and refined so that it produces a new complaints handling process which earns the respect of the complainer and the legal profession in equal measure and which is demonstrably an improvement on the former system.