Submission from Alistair Buttery for the Legal Profession and Legal Aid (Scotland) Bill

Over the past few weeks the Law Society of Scotland have highlighted a number of very serious concerns over this proposed Bill. I attach a copy of an email received recently from the Society. I agree fully with the Society's concerns and would align myself with them.

While I can see there being merit in a new body being set up to deal with service complaints the proposals with regard to funding by levies imposed on the profession and on practitioners are wholly inequitable and contrary to justice. As the proposals stand it would appear that the practitioner against whom a complaint is made will require to pay a levy of about £300 irrespective whether there is any merit in the complaint or whether it is upheld. In my view it is wholly unreasonable and unjust to expect a practitioner to pay a levy in a case where a complaint is not upheld. In such a case that levy should be paid by the complaining party. Any proposals to the contrary taint the legal system which we serve.

In my experience the vast majority of solicitors take very seriously their duties to their clients and the Courts, and try to provide a good legal service acting with honesty and integrity. Work is still done by local firms under the Advice and Assistance and Legal Aid schemes despite the poor rates of remuneration. In many cases work is still done on a pro bono basis. Without doubt, if legislative effect is given to the proposals that practitioners pay a levy in every case, the effect will be that it will no longer be possible to take on that less remunerative or pro bono work since at the very least every case will need to generate fees of at least £300 to cover the possibility of a client complaint, whether justified or otherwise.

While I would never wish to see that happen, since I have been brought up to believe that it is a necessary part of a solicitor's role to assist and represent the vulnerable and less able, that will be the economic reality of the situation. It would be shameful for the Executive to drive the profession to that position and effectively deny access to justice for that part of society.

I trust the Executive will give consideration to these submissions and revise the proposals in the draft Bill to take into account the Society's objections and concerns.

Thank you
Legal Profession and Legal Aid (Scotland) Bill - Summary of Content

The Scottish Executive introduced this Bill to the Scottish Parliament on 1 March 2006. The Bill has five Parts. Part 1 – the Scottish Legal Complaints Commission, Part 2 – Conduct Complaints: Other Matters, Part 3 – Legal Profession: Other Matters, Part 4 – Legal Aid, and Part 5 – General, and has four schedules.

Part 1: The Scottish Legal Complaints Commission

Part 1 of the Bill establishes a new statutory body in addition to the existing legal professional bodies to handle complaints about the service provided by solicitors, advocates, conveyancing or executry practitioners and those exercising a right to conduct litigation or a right of audience under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The Bill covers firms of solicitors, incorporated practices and limited liability partnerships.

The new Scottish Legal Complaints Commission will act as a gateway for complaints about practitioners from any person having an interest; generally speaking, but not exclusively, clients. The Commission will handle complaints about inadequate professional service (IPS) instead of the Society and the Faculty of Advocates as well as some functions of the Scottish Legal Services Ombudsman and the Scottish Solicitors Discipline Tribunal in relation to service complaints.

The powers of the Legal Services Complaints Commission are similar to those which the Society currently exercise under the Solicitors (Scotland) Act 1980 but have some significant differences. Most important is the power in Section 8 – to direct a practitioner to pay compensation of up to £20,000 to the client (including an amount for loss suffered or inconvenience or distress caused to the client as a result of the IPS). The current upper limit of IPS is £5,000. The Commission will be able to enforce its decision in the same way as an extract registered decree arbitral in its favour bearing a warrant for execution issued by the Sheriff Court.

The legal professional bodies and their discipline tribunals will continue to handle professional misconduct and unsatisfactory professional conduct complaints. The Commission must refer complaints about the conduct of lawyers to the professional bodies for investigation but can oversee the handling of conduct complaints. The Bill will abolish the Scottish Legal Services Ombudsman. There is no appeal to the court under the Bill. Courts can only become involved through an action for judicial review of the Commission’s decisions.

The body will be funded by a general levy on legal practitioners and a levy on complaints. The first will be a general levy on every practising legal practitioner, the second will be a specific levy on practitioners who have a chargeable complaint (i.e. a services complaint) made to the Commission which has not been resolved at source and which the Commission determines is eligible for consideration.

The financial memorandum published with the Bill estimates that the running costs of the Commission will be £2.4 million pounds met from funds generated by both levies. On that basis the memorandum states that the level of the annual general levy would be £120 and that of the specific levy £300. The Executive is funding the start-up costs estimated at £450,000. The financial memorandum estimates that the Commission
will have a staff of between 50 and 60 people.

The Commission will also be given, under Section 29 of the Bill, a power to oversee the effectiveness of the Guarantee Fund and the Master Policy and it is expected to monitor turnaround times in settling claims. The Commission will publish an annual report which Scottish Ministers will lay before the Scottish Parliament.

**Part 2: Conduct Complaints: Other Matters**

Part 2 provides further powers for the Law Society of Scotland to deal with unsatisfactory professional conduct including the powers to censure solicitors, direct solicitors to attend education or training courses, direct solicitors to pay the Council a fine not exceeding £2,000 and direct the practitioner to pay the client compensation not exceeding £5,000. The Scottish Solicitors Discipline Tribunal is also provided in Section 38 with power to award compensation for professional misconduct up to £5,000.

**Part 3: Legal Profession: Other Matters**

This part covers issues such as the Constitution of the Scottish Solicitors Discipline Tribunal, which will in future comprise equal numbers of solicitors and non-solicitor members; increasing the borrowing limit of the Scottish Solicitors Guarantee Fund to £1,250,000; increasing the Society’s powers to safeguard the interests of clients where a solicitor is struck off or suspended; allow unqualified persons who have rights of audience or rights to conduct litigation under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 to prepare court documents and to ensure that Notaries Public will require to be practising solicitors.

**Part 4: Legal Aid**

Part 4 concerns Legal Aid and transfers the power to grant legal aid in solemn cases from the courts to SLAB, gives further powers to SLAB to fund non legally qualified advisors, and makes technical changes in the arrangements for contributions in payments out of property recovered in civil legal aid cases.

**Part 5: General**

This general part deals with certain exceptions of services which are reserved to the UK Parliament to legislate upon, ancillary provisions and the powers relating to regulation of orders, interpretation, minor and consequential modifications and the short title and commencement.

The schedules deal with further detail about the Scottish Legal Complaints Commission and its appointment, constitution and dis-establishment. Under schedule 1 the Scottish Ministers are empowered to appoint the members of Commission, they are also entitled to remove a member from office. The Commission’s remuneration is determined by Scottish Ministers and the Commission with the approval of Scottish Ministers appoints the Chief Executive.

Schedule 1 also makes provision for the Commission to establish an Appeals Committee and determine the composition of its Committees and give the Commission general powers, including powers of delegation. Scottish Ministers will also have an overriding power to give directions as to the exercise of functions by the Commission. Schedule 2 provides further powers to the Commission to require the delivery of documents.
Schedule 3 provides further rules as to the Commission’s practice and procedure and Schedule 4 contains minor and consequential modifications.

**Legal Profession and Legal Aid (Scotland) Bill - Summary of Key Areas of Concern**

The Society made it clear when it called for an independent complaints handling body that it must be demonstrably better than the current system, particularly so given the cost and disruption involved. There are a number of areas where the Society believes this is not the case.

**Issues Affecting Solicitors**

**Cost**
There is no proper cost or cost-benefit analysis of the proposed new Scottish Legal Complaints Commission. However, it is likely to cost more than the Society’s existing Client Relations Office, particularly as the work currently carried out largely on a voluntary basis by committee members and Reporters will be conducted by paid employees. This will be met by a general levy on the legal profession as well as fees charged to solicitors for every case considered, whether upheld or not.

**Compensation**
The increase in compensation for Inadequate Professional Service from £5,000 (a level which was raised from £1,000 just last year) to £20,000 is excessive and no explanation for such a large rise is given. The English white paper on complaints handling introduced the £20,000 figure – it appears that an English solution is being imported to resolve a perceived Scottish problem, despite the promise of Scottish solutions for Scottish issues.

**No-fault liability**
The charging mechanism for the Commission is based on the principle of “polluter pays”. Yet the system would be more accurately described as one based on the principle of “solicitor pays” as the practitioner will be expected to pay case fees whether or not a complaint is upheld. In addition, the solicitor will pay the full costs of mediation through the Commission. The Society would rather that where a complaint is upheld the solicitor pays a higher case handling fee rather than a flat handling fee applying to all cases.

**Conduct issues**
The Commission will have the power to force the Society to action certain conduct issues. Losing control of conduct goes right to the heart of what it means to be a profession.

**Guarantee Fund/Master Policy**
The Bill gives the Commission the power to oversee the running of both the Master Policy and the Guarantee Fund. The justification for such powers is not clear and there was no mandate for their introduction in the Scottish Executive’s consultation. The administration of the Master Policy and claims made under that policy are not decided by the Society. These are unique and robust public protections. However, they also represent a further expense to solicitors – in addition to regulatory costs and potential compensation pay-outs – which will have to be taken into account when carrying out risk management audits.
Issues Affecting Solicitors and their Clients

“Access to Justice”

The Bill may cause particular problems for legal aid practitioners. Firstly, practices with marginal profit levels would not be able to absorb the increased costs. Secondly, risk management considerations may lead practitioners to conclude that certain types of work present too much of a risk for too little return. In other words, a routine piece of civil legal aid work bringing in £150 may not be worth taking on when it could attract a complaint fee of several hundred pounds and, potentially, a compensation claim of up to £20,000. Also, the bread and butter of High Street firms around Scotland – conveyancing, matrimonial and family matters – often involve demanding clients and are more likely to lead to complaints than other types of work.

There is the prospect that a combination of the above factors – general costs, excessive compensation levels, the high-risk/low pay of Legal Aid Work and the general unfairness of the proposed new system – could lead to a number of firms either ceasing to trade or deciding not to do particular types of work which traditionally have brought complaints. This could mean, particularly in rural areas with small firms, that the number of solicitors decline and that in some areas it might be difficult for clients to get advice about particular types of business. Law Centres could be hit harder than most as their workload is based on this type of work and often involves the most difficult clients. In other words, “advice deserts” would be created. This would clearly not be in the public interest.

Issues Affecting Solicitors, Clients and the Wider Public

Economic Impacts

In addition to the damaging effect on access to justice, a downturn in the solicitors’ profession could have potentially serious economic impacts, particularly in rural areas. The turnover of the profession approaches £1 billion per annum and solicitors’ businesses employ around 20,000 people. Yet the profession is more than 99% complaint-free.

Independence

The Commission will not be considered independent if, as proposed, appointments to its board are made by Scottish Ministers.

Human Rights

It is unlikely the new system will comply with the European Convention on Human Rights because: the board will be appointed by Ministers and will not guarantee solicitor representation; case fees will be paid even if a solicitor is exonerated; there will only be an internal right of appeal for the public or the profession about a decision by the Commission on a service complaint.

Negligence

The Commission will take on the functions of the courts in negligence matters where the claim is less than £20,000, even though there is no consultation mandate to do so. Again, this is likely to raise issues in relation to ECHR compliance. The Society believes negligence should remain a matter for the courts.