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

As a Scottish firm of solicitors we have considered the Legal Profession and Legal Aid (Scotland) Bill and would wish to make the following submission.

We are in principle supportive of the formation of an independent complaints handling body, along the lines of the Scottish Legal Complaints Commission. Having considered the detail of the Bill however we have a number of significant concerns regarding the detail thereof and its likely impact on both the Scottish legal profession and the clients serviced by that profession. In this connection we would generally support the areas of concern with the Bill that have been publicly expressed by the Law Society of Scotland and in particular the following points.

Independence and Fairness

We consider that the new Commission cannot be regarded as truly independent if appointments are made by Scottish Ministers. Furthermore, the Commission will be unable to properly exercise its functions in the absence of a guarantee of solicitor representation. Furthermore, there should be provision for a right of appeal against any decision by the Commission. The absence of such a provision is likely to result in unnecessary litigation and cost. In the absence of dealing with such issues the process envisaged by the Bill will fail to fairly represent the rights of the legal profession and will fail to allow it a fair opportunity to resist unfounded complaints.

Cost

The Bill proposes that the cost of the new Commission will be met by a general levy on the legal profession as well as fees charged to solicitors for every complaint considered. We are concerned that the cost of running the Commission may be significantly higher than the cost of the current complaints system. This will result in increased overheads for solicitors and a potential corresponding increase in fees to the clients serviced by the profession. In addition, we are concerned at the proposal to charge solicitors for the cost of an investigation whether or not a complaint is upheld. Accordingly, for every complaint the solicitor will require to pay a fee regardless of the fact that the complaint may be entirely unfounded. This may encourage frivolous or vexatious complaints simply in the hope of persuading a solicitor to reduce his fee particularly in minor matters. This obviously has an adverse impact on the legal profession but in addition detrimental consequences for clients serviced by the profession. In the first place it may result in solicitors electing to discontinue the provision of certain services which undoubtedly result in a higher level of complaints. In particular it may result in less solicitors carrying out work for private individuals in relation to areas such as matrimonial disputes, domestic conveyancing, or private client matters. These are areas where a number of solicitors have already discontinued providing such services and the current Bill would simply exacerbate the problem. Similarly, solicitors may elect only to act on one side of transactions or disputes (e.g. for employers in relation to employment disputes but not employees). This could result in the absence or unavailability of legal advice in certain areas or inequality of available advice depending on whether you are a company or an individual. Alternatively, it may result in an increase in fees in these areas in order to cover the risk of additional costs associated with complaints.

Compensation

We are concerned that the proposed increase in compensation for inadequate professional service is from £5,000 to £20,000. No adequate explanation for such a large rise has been given and it appears entirely disproportionate to the proposed level of compensation for professional misconduct. The reality of increasing the compensation level to such a figure is that the new Commission will in practice take on the function of the courts in complaints of negligence where the claim is worth less than £20,000. We consider that negligence complaints should more properly remain within the jurisdiction of the courts. In addition, the increased level of compensation coupled with the cost concerns highlighted in the previous section may result in a decline in the number of solicitors, particularly firms
operating on tight margins or small firms dependent on keeping overheads at a low level. This may result in difficulty for clients in obtaining access to necessary legal advice and may also have a wider economic impact.

Conduct Issues

The Bill does not adequately address how complaints involving both service and conduct issues are to be dealt with, given that it is proposed that the Law Society should continue to deal with professional misconduct and unsatisfactory professional conduct complaints. In the absence of satisfactory clarification this will result in confusion and an unsatisfactory position for both the legal profession and its clients.

Conclusion

We would hope these submissions are taken into account in any further consideration of the Bill.