Submission from Glasgow Bar Association for the Legal Profession and Legal Aid (Scotland) Bill

Glasgow Bar Association (GBA) represents solicitors who appear regularly in Glasgow Courts. These solicitors deal, on a daily basis, with clients who are in the Court system, either as accused persons or parties to a civil action. They are dealing with people who have some kind of problem that needs to be resolved by the Court.

GBA does not always agree with the Law Society. GBA accepts that there is clear conflict imposed on the Law Society by the Solicitors (Scotland) Act section 1. The Society cannot act in the interests of the public and the legal profession without a conflict of interest arising at some time. A large number of our members are of the opinion that the Law Society does not act fairly when discipline matters arise. The public probably wouldn’t agree but it is felt by some of our members that the Law Society does not act impartially when dealing with a complaint; instead they can be oppressive towards the solicitor complained about.

Glasgow Bar Association agree that complaints against the legal profession should be investigated properly and quickly, that it is in all parties interest for a decision to be made as soon as possible to resolve the complaint and for some form of compensation to be considered in the event of a finding against the solicitor. This Bill, however, goes too far, will result in a number of difficulties and is fundamentally flawed due to the absence of an external right of appeal. Our comments will relate to criminal and civil matters only:

1. Parts 1 and 2 of the Bill are fundamentally flawed and will be challenged by every solicitor who has a finding made against him/her. The flaw lies in the lack of the right to appeal against the decision of the SLCC to a Court. Every finding of inadequate professional service (IPS) must be reviewed, if requested by the Solicitor. A failure to allow the Solicitor to exercise this right will not be accepted. Challenges will be made under Human Rights Legislation.

2. GBA is concerned that the fear of compensation awards of £20,000 added to the complaints levy, will lead to a reduction in access to justice for a large number of people. Solicitors who take on difficult cases, or those that generally involve a high degree of emotion, (divorce, contact actions etc) will consider, more carefully, whether to take on such a case. Every Solicitor, can generally, spot the difficult or demanding client as soon as they walk in the door. Some of these clients will be difficult because they are more demanding but there are others who are more difficult because we would perhaps regard them as vulnerable. These may be clients with mental health or personality problems. These clients may not now be allowed to sit down. The Solicitor acts as a buffer between the difficult client, the other party, (who will generally also see themselves as the victim or wronged party) and the Court. Solicitors ensure that the rules are observed. Difficult clients, with no representation, will not even be aware that there are rules. An unreasonable, difficult or vulnerable client is advised on how the case should be conducted. Vulnerable clients sometimes cannot understand the advice given. If they are unable to understand the advice or accept the advice they are likely to complain. Solicitors very rarely refuse instructions and always act in the best interests of the client, bearing in mind their obligations to the Court etc. The difficult client will not now be accepted. This will result in the clients who should have legal representation to protect them, the opponent and the Court, being unrepresented. Solicitors are under no obligation to accept instructions at the outset and may now refuse instructions from any client they perceive as one who will make a complaint. This will result in a denial of justice to a group who may need access to justice most.

3. By the very nature of our work there will always be a “winner” and “loser.” The winner is unlikely to complain but the loser is more likely to, particularly if he is aware that there could be up to £20000 to ease the pain of losing. We foresee a huge rise in the number of complaints being made. The knock on effect of this is that there will be more delays in dealing with cases. The knock on effect of this is that the SLCC will
need more and more staff to deal with more and more complaints. A client who genuinely should be awarded compensation will have that award delayed. This in itself is unfair. In addition it will mean that any claim against solicitors with a value of less than £20,000 will be investigated free of charge by the SLCC thus meaning that those of greater means will not pay anything for claims to be investigated free of charge and risk, such rules not applying to the solicitor and accordingly immediately being inequitable. There is a public interest in the fairness of the administration of justice. If costs have to be borne by one side whether or not the claim succeeds then there is inequality. There are no provisions for cases to be decided in accordance with fair procedure and according to law.

4. The size of the possible amount of compensation is clearly excessive. The small legal aid practitioner could end up sequestrated. Due to the lack of reasonable rates of remuneration for conducting legal aid cases, which is already seeing more and more solicitors refusing to do legal aid work, the effect of this could be catastrophic. The payment to ultimately be obtained from conducting a case may be grossly outweighed by the possible award of compensation. Solicitors will also consider the extra inconvenience, distress and work in dealing with the Complaint. They are likely to “cherry pick” cases to the detriment of legal aid cases. There is no reason for matters, which do not amount to professional misconduct to have such excessive levels of financial penalty. The penalties should be comparable to other professions such as Doctors, Dentists, Accountants and Politicians.

5. There appear to be no factors referred to that would allow for a reduction in the award, where, for example, there clearly is fault that can be placed at the door of the “complainer,” (call it contributory negligence) e.g. a lack of proper instructions or any mechanism for taking account of the means of the Solicitor or relevant circumstances pertaining to their inadequate services.

6. The Executive will have seen the effect that needing to comply with the Code of Practice and registration has had on the provision of Criminal Legal Assistance in some areas. There has been a drop of approximately 25% in the number of Solicitors who were registered to carry out this type of work, from 1999 to now. This is due to the poor rate of remuneration and onerous conditions imposed by registration. The Executive will also be aware of the reduction in solicitors carrying out civil legal aid work. It will be aware, from figures published by SLAB, of the amount of work carried out by firms of Solicitors in smaller jurisdictions and more rural areas. It will see that a large number of firms carry out a small amount of Legal Aid or Legal Advice and Assistance work. These Firms are likely to refuse to take instructions. These Firms appear to be providing a service rather than making a living from this type of work. The amount of income derived from this service is likely to be disproportionate to the potential loss by providing the service. We see the loss of this service and consequently a resultant gap in the access to justice. This will lead to an area of unmet legal need. The Executive cannot allow this to happen.

7. Schedule 1 does not impose a requirement for a solicitor to be a member of the Commission. It is not acceptable to have decisions made against solicitors by a body that does not have at least one solicitor as a member. A lack of knowledge of the law or the understanding of the way solicitors work will hinder the working of the SLCC. We see more challenges being made to findings of IPS if there appears to be ignorance. Justice must be seen to be done and in our view a lack of a solicitor on the Commission will lead to the perception that justice is not seen to be done.

8. The majority of clients do not complain. If the Solicitor has to meet extra costs of finding money to pay the annual general levy and the complaints levy then this increase in expense will be passed on to clients by virtue of an increase in fees charged. This is contrary to the interests of the general client.
9. It is disgraceful that the proposal is that the Solicitor pays the complaints levy, whether the complaint is upheld or not. If the SLCC makes a finding that the complaint was frivolous, vexatious or without foundation there should be a levy against the “complainer.” The Executive is encouraging a huge increase in unjustifiable claims by making the Solicitor pay. We would accept that the solicitor pays reasonable costs if a finding is made against him. We do not accept that Solicitors should pay a complaints levy if the complainer is found to be making a false or vexatious claim. This simply allows complaints to be made in the hope that a complainer will receive an award. If they do not have to pay they do not have to worry about false claims. This is unacceptable. The cost of the levy made against a complainer could be on a sliding scale but there should never be an open door to allow any complaint to be made whether it has substance or not. The cost of the complaint could be decided by the SLCC at the end of the process and taking all the factors of the complaint into account. Can the Executive explain why a Solicitor should be forced to pay a fee for a complaint against him that can, under no circumstances, be justified or accepted as reasonable? This section of the Bill should and will be challenged. Perhaps the Executive would think it appropriate that an accused person who is acquitted in a court should pay the Sheriff and Procurator Fiscals’ salary for the privilege of being falsely accused and then exonerated? The GBA suggests that the same rules relating to complaints against MSPs should be introduced as what is sauce for the goose is sauce for the gander and those dealing with unreasonable constituents would never vote in this proposed system.

10. We are concerned about the impartiality of the SLCC. We believe that the independence of the Commission may be challenged. It reminds us of the problems that arose relating to the appointment of part-time Sheriffs (Starrs v Ruxton 2000 Scottish Criminal Case Reports), where the independence of Sheriffs was called into question. Scottish Ministers will appoint members of the SLCC for a period of five years. Scottish Ministers will therefore have an unfettered discretion as to who is appointed to the SLCC and more importantly, who retains that appointment. There is concern that those appointed will wish to be re-appointed and as a result will carry out the perceived wishes of the Executive. The appointments should be by the Lord President through the Judicial Appointments Board.

11. We are concerned about the ultimate financing of the SLCC. Sections 17 and 18 provide no limit to the amount of general levy that can be raised. As we have indicated above (Point 3) we see the number of complaints rising and more delays. As a result the SLCC will require more funding to meet the targets that are undoubtedly set. This will lead to year on year rises in the annual general levy. The Executive is well aware of its failure to control expenditure in projects so far. The cost of the Scottish Parliament building is an example of the Executive getting it completely wrong. The proposed provisions contain no restrictions or limitations upon the facilities or services, which the SLCC may acquire for itself at the expense of the legal profession. There appears to be no mechanism to make the Commission act “with due regard to economy” in the same way solicitors are required to act under the Legal Aid Regulations. If solicitors have to fund the SLCC then there has to be accountability to them for finance. If the Executive does not want accountability to solicitors then they should fund the system accordingly.

12. We have no difficulty in solemn legal aid being transferred to SLAB. Legal Aid must however be available to cover the initial appearances of an accused on petition. An accused requires to be represented at this difficult time and legal aid must be in place until the application is considered by SLAB.

13. This Bill seeks to allow a two-tier system of advisors. Solicitors are trained for six years before being allowed to practice, are subject to continued training every year (Continuing Professional Development), have insurance in place in case something goes wrong and have the SLCC watching over them with power to award £20,000 if they are not good at their job. Why do we need the Advisors created by this Bill? It is
a disgrace that the Executive, on the one hand, put so many regulations in place to ensure that the public are represented by a well qualified, properly trained and regulated legal profession and then allow Advisors who need have no qualifications, insurance, training, or be subject to discipline, to represent the same public. These Advisors are then employed by the State, through SLAB, and will be representing clients in the poorer areas in claims against the State relating to housing and benefit problems etc. Solicitors are independent whereas Advisors will not have that independence.

14. It is likely that when solicitors refuse to act for someone with a problem we will refer them to their MSP to complain about their inability to receive representation.

15. The proposals are contrary to natural justice and will fail in the inevitable challenges before the courts. It would be simpler to have a wider consultation and look at other complaints procedures and draw guidelines along similar grounds. MSPs complaints procedures and findings of inadequate service should be similar to those representing the same members of the public. The purpose of professional discipline is to maintain high standards of conduct. It is not to add fuel to the compensation culture. The bill confuses these issues. There should also be a clearer understanding between what constitutes inadequate professional service and professional misconduct. It is only when these issues are addressed that we can move towards an equitable system that serves the interests of justice and as a consequence all parties involved.