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

General comments:

Which? campaigns actively for all consumers. With around 700,000 members in the UK, we are the largest consumer organisation in Europe. Entirely independent of government and industry, we are funded through sales of our consumer magazines, online products and books. Which? welcomes the opportunity to respond to this consultation and has responded purely on the issue of legal complaints handling in this instance.

Which? comments on the proposed Legal Profession and Legal Aid (Scotland) bill introduced in the Scottish Parliament on 1 March 2006

The regulation of legal services according to the professional qualifications of the lawyer is complicated and confusing for the consumer. Consumers who wish to complain about a legal service first need to establish the status of the lawyer and then the appropriate body; usually the Faculty of Advocates or the Scottish Law Society.

We welcome the aim of the Scottish Legal Complaints Commission (the ‘Commission’) as a single gateway for complaints about service or conduct where it has not been possible to resolve the complaint at source. This implements one of the key recommendations of the Justice 1 committee.

Section 2 Receipt of complaints

Section 2 sets out the power to deal with frivolous or vexatious complaints. We support the need for such a discretion but the limits of this power need to be made clear by defining these terms. Failure to do so will result in an impression that complaints may be rejected for other reasons under this ground. We feel it is important in any case not to exaggerate the incidence of ‘vexatious’ complaints which in our experience are not at all prevalent. In 2003-2004 the Ombudsman received 145 complaints from clients who felt that the Law Society had dismissed their complaint. In 20% of such cases the Ombudsman found that the Law Society had failed to recognise a complaint that it should have investigated according to its statutory obligations and its own policies. Of those cases that were initially dismissed, 35% were upheld.

We support the approach adopted in the Bill (section 2) in relation to interested complainants; those directly affected in relation to service complaints and a wider undefined group in relation to conduct issues. In practice we should like very few complaints rejected on the basis of a lack of locus standi of the complainant.

Section 4 determining the nature of complaint

Where the complaint raises both issues of conduct and service the bill provides that the Commission must consult with the relevant professional body before determining which track the complaint should take. We are concerned that this may result in a bottleneck for complaints and that, depending on the particular track chosen, it may lead to one aspect of the complaint being dealt with but not the other. A way round this might be to deal with both the service and conduct issues arising from the same complaint together unless this is impossible.
Section 6 Services complaint

Section 6(2) of the Bill allows the Commission to refer a complaint back to the practitioner where it has been made prematurely (as defined in section 3). Complaints are best resolved at source and without formal intervention. However this power must be used with the aim of affording the practitioner the opportunity to resolve the complaint. If he has had this opportunity and he has provided his final response the power should not be used to compel further action and delay the complaint further. Any referral back should be without prejudice to the time limits referred to in section 6.

Section 8 Commission upholds a services complaint

We would recommend that the limit of £20,000 on the amount of compensation that may be awarded by the Commission is set too low. While this may deal with the majority of cases, there will be some in which a higher award will be justified. In such cases the complainant will be forced to take court action in order to obtain appropriate compensation. It is worth noting that the Financial Ombudsman Service may award up to £100,000.

Section 10 Determination under section 7

We are concerned that the client’s right to take court proceedings is protected in relation to cases where an award of compensation is made under s.8 (2) (d) only and that it may be read that in other cases, it is not possible for the client to take proceedings where a complaint has first been made to the Commission. It must be clear that the client may take proceedings whatever the outcome of the Commission’s decision.

Section 13 Power to examine documents

We welcome the powers of the Commission to require documents including; books, accounts, deeds etc. The power must include electronic versions of such documents in order to reflect modern business communications and data storage.

Section 14 Enforcement of Commission directions

While we welcome the Commission’s right to enforce its directions through the courts, we would like to see the failure to comply with such a direction to be itself a conduct matter for investigation by the relevant professional body.

Section 15, 16 and 17 Abolition of the Scottish Legal Services Ombudsman

The bill provides for the abolition of the office of the Scottish Legal Services Ombudsman with the transfer of powers from that office to the Commission. We have previously criticised the fact that the Scottish Legal Services Ombudsman has been unable to investigate the original complaint (unlike her English equivalent). Her inquiry was therefore limited to the way in which the complaint was dealt with by the professional body rather than the end result. Complainants who received a poor service from a professional body were further exasperated that they should have to allow that same organisation to reinvestigate their complaint with all the attendant delay and hassle that entails. We should like to see the Commission’s powers extended so that it may investigate the substance of the original complaint and provide the complainant with a faster and more independent result. The bill does not provide for this and we would urge that it is amended to address this shortcoming.

Under section 16 of the Bill the Commission may make certain recommendations which broadly reflect the current powers of the Ombudsman. In most cases the recommendations are followed but there have been instances where the professional body has rejected such a
recommendation. On 26 November 2004 the Ombudsman set out details of two instances on her website where the Society paid a reduced amount of compensation to the complainant than the sum ordered by the Ombudsman. The Ombudsman was so troubled by the Society’s actions that she took the unprecedented step of drawing attention to the notices by placing an advertisement in the Herald newspaper.

The bill should be amended so that the professional body is obliged to follow any recommendation of the Commission. Allowing the professional body to reject a recommendation will open the commission to a charge of being toothless and undermine confidence in it.

Section 18 and 19 annual general levy and complaints levy

We approve of the adoption of a ‘polluter pays’ principle in relation to the complaints levy. We are concerned that the complaints levy may be varied to reflect different circumstances. The complaints levy should provide encouragement to practitioners to resolve complaints at source. It should not be used as a punitive measure. We would recommend that the complaints levy should be fixed annually and it should not be varied.

Section 24 Duty of professional bodies to forward complaints

Professional bodies should be obliged to forward complaints to the Commission to enable it to fulfill its functions as a monitor and gateway for complaints. The professional bodies must be made aware of their obligations in this regard.

Section 25 Commission’s duty to provide advice

We welcome the imposition of a duty on the Commission to provide advice to complainants. Informing consumers about how to make their complaint effectively is essential to the success of the system. We also welcome the obligation to monitor trends and to issue reports and guidance and recommendations proposed in section 27. In order that the Commission can carry out this function, the professional bodies must have a duty to publish the outcome of all complaints.

Section 28 Obtaining information from relevant professional organisations

It is essential for the operation of the Commission that it may require the production of information or documents from the professional bodies or from practitioners. This should be augmented with the sanction that the failure to provide such information in the case of the professional body may lead to a fine imposed by the Commission or, in the case of a practitioner, a fine and/or disciplinary action.

Section 29 Monitoring effectiveness of guarantee funds etc

The Commission may monitor the effectiveness of the Scottish Solicitors Guarantee Fund or similar professional indemnity insurance arrangements which apply to other parts of the legal profession. We agree that the Commission has an interest in the operation of the arrangements as an integral part of the overall mechanisms for providing redress for clients who have suffered as a result of dishonesty or poor service. In the event of a recommendation by the Commission in relation to professional indemnity arrangements, the professional body responsible for those arrangements or that profession must provide detailed reasons why such a recommendation has not been followed.
Section 32 Reports: Privilege

We support the proposal that the reports made by the commission are to be privileged for the purposes of the law of defamation unless the publication is proved to be made with malice. We feel that this qualified privilege should be extended to communications by the parties to a complaint, that is, complainants and practitioners. The law of defamation may be used by the parties to intimidate the other side and this would be an unhealthy chilling effect on the complaints system. Some of the benefits claimed for reform may be lost in this way.

Section 33 Giving of notices etc. under part 1

It should be possible to provide for notices under part 1 to be given electronically, subject to the proposed safeguard that in the case of an individual, their consent must first be obtained to the use of electronic communications. This safeguard should also be applied to individual complainants who may also consent to receiving notice electronically rather than on paper provided that it is provided in storable format, for example, email.

Section 34 Definitions

‘Complaint’ is widely defined to include ‘any expression of dissatisfaction.’ we support the adoption of such a wide definition and we look forward to its application in this form to cases to avoid the problems of the past where the professional bodies failed to recognise cases as complaints and to deal with them accordingly.

Conduct and service complaints

We find the notion of professional misconduct as distinct from inadequate professional misconduct and inadequate professional service both complex and outdated. In terms of conduct the issue is twofold; firstly, application of a sanction by the professional body in relation to the deed and secondly the issue of fitness to practice in the future. The distinction between conduct and service is artificial and a significant proportion of cases raise both conduct and service issues. The distinction has an impact on who may complain as it narrows the categories of persons who have the locus standi to make a complaint and who is entitled to redress. For example it is easy to see that a person who is not a client of the lawyer may be affected by a breach of the practice rules and that they may be entitled to compensation.

We would recommend replacing the terminology relating to conduct and service with notions of fitness to practice and inadequate professional practice in relation to antecedents.

Inadequate professional service

The definition of ‘inadequate professional service’ as services which fall below the standard that could reasonably be expected of a competent practitioner will include negligence. However we are pleased to see that negligence is specifically referred to in the definition.

 Unsatisfactory professional conduct

This is a newly created concept which is defined to mean professional conduct which is not of a standard that can be reasonably expected of a competent and reputable advocate but which falls short of professional misconduct, yet it is more than inadequate professional service. It would be helpful to have some further indication of what this means and what it is intended to cover, perhaps by reference to types of behaviour.
Part 2 Conduct complaints and other matters

Section 35 duty to investigate

We welcome the imposition of an unequivocal duty upon the professional body to investigate a complaint; subject to the provisions relating to vexatious complaints described above. We feel that this duty should be augmented with a sanction in the event that it is breached so that the Commission may require the professional body to investigate where it considers that the duty has not been fulfilled.

Section 36 unsatisfactory professional conduct: solicitors etc

We are concerned that the limit of compensation for a client who suffers loss as a result of unsatisfactory professional conduct of a solicitor is limited to £5000. While we would expect this limit to cover most cases, some exceptional cases will justify higher awards. Claimants in such cases should not have to face the prospect of making a claim in negligence by retaining another solicitor with the attendant delay and risk that entails. Therefore this limit should be raised to a significantly higher level.

Section 38 Power of Tribunal to award compensation for professional misconduct

The limit of £5000 for an award following a finding of professional misconduct should be increased immediately to cover more cases.

Part 3 Legal profession: Other matters

Section 39: Constitution of Scottish Solicitors discipline Tribunal

The bill proposes that there should be an equal split between solicitor and non-lawyer members. This is welcome from the current position where the Tribunal has a majority of lawyer members. However we feel that the role of lawyer members of the Tribunal must be to provide insight into the details of the cases. This may be achieved with a minority lawyer tribunal which will bring with it the added benefit of being demonstrably fair.

Section 40: Scottish Solicitors Guarantee Fund: borrowing limit

We support the proposal for the increase in the borrowing limit from £20,000 to £1.25m. It would be prudent to make such provision for the fund to cover claims up to £2m after which the stop loss cover of between £2 and £5m is triggered.

Section 41 Safeguarding the interests of clients

We approve of the proposal to safeguard clients’ interests by permitting the Society to operate the client account in certain circumstances.

Part 5 General

Section 47 Financial services regulation

Under section 47 nothing in the bill applies to complaints about, or the provision or services or activities in relation to financial services (inter alia). The Law Society of Scotland will continue
to deal with complaints arising from financial services as a designated professional body under the Financial Services and Markets Act 2000 where firms provide incidental investment advice. Where advice is provided as a mainstream activity, the firms involved will provide it under the supervision of the Financial Services Authority.

Complaints about the way in which the Law Society of Scotland has handled such cases are made to the Ombudsman.

However in her report of 2004-5 the Ombudsman reported a surge in complaints mainly attributable to complaints about endowment mis-selling. Some complaints fell between the regulatory gap between legal and financial services. We are not convinced that the new arrangements will succeed in closing this gap.

Schedule 1 The Scottish Legal Complaints Commission

We welcome the proposal for a majority of non-lawyer members to be enshrined in the constitution. Whereas the actual number of members may be varied the principle that there must be a non-lawyer majority will help to promote public confidence in the Commission as an independent body free of bias.

We welcome the proposal that members should have experience of the areas set out and in particular, consumer affairs and complaints handling and legal education and training. We also welcome the proposal for the appointment of a chief executive directly accountable to Parliament.