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

McGrigors is one of the largest commercial law firms in Scotland. For regulatory reasons the business is currently carried out by 3 partnerships: one in Scotland, one in England and one in Northern Ireland. Across the UK there are 73 partners of whom 53 are Scottish qualified and around 210 qualified solicitors (150 admitted in Scotland and a significant number admitted or qualified in 2 UK jurisdictions). On 1 October we plan to transfer the business of McGrigors and McGrigors London to a multi-national limited liability partnership incorporated in Scotland. We support the creation of a Legal Complaints Commission but have some general concerns regarding the Bill. In particular:

1 Independence

It is essential that the Legal Complaints Commission (the “Commission”) is independent and free from political interference. Under the Bill the Scottish Ministers make appointments to the Commission and have the power to alter the number of members and the proportion of lawyer/non-lawyer representation. We believe appointments to the Commission should be by an independent body free from political influence. We think that the proportion of lawyer/non-lawyer members should be fixed, both in total and as regards any quorum, and that solicitors should make up a fixed proportion of the total members of the Commission. Solicitors make up over 90% of the legal profession in Scotland.

2 Fairness in the administration of justice

2.1 In our view it is unfair and inappropriate for the legal profession to meet the costs of all aspects of the Commission’s work irrespective of outcome. It is comparable to a free coconut shy, sponsored by the coconuts, with an invitation to the public to throw as many missiles as they wish.

2.2 The Bill has been described as embracing the principle of “polluter pays”. In fact, it does not. A solicitor who is the subject of a complaint will have to meet all case fees even where the complaint is wholly unfounded. In effect the solicitor is fined, regardless of the merits of the complaint. The only ground for a fine is that a complaint was raised against him.

2.3 We have experience of individuals who are habitual complainants or who make complaints as a device to avoid payment of, or obtain a reduction in, a bill. In the interests of fairness, the Commission should have power to make an award of costs and/or compensation (not exceeding £20,000) against the complainant in favour of the practitioner for inconvenience, wasted time and the distress and stress of being subject to or dealing with unfounded complaints.

2.4 There is no provision in the Bill for ‘registered advisers’ to be subject to the Commission.

2.5 The handling of conduct cases may be investigated by the Commission. Conduct cases can be appealed to the Discipline Tribunal and ultimately to the Court of Session. The handling of service complaints has no such oversight. We believe that both the complainant and the practitioner should have the right to question how a complaint (conduct or service) was handled, and to appeal the determination. It is not realistic to expect the Commission to be proficient in handling cases from day one, and it may have difficulty in recruiting sufficient staff of the calibre, quality, expertise and experience it will require to meet public expectation. We believe there is still a function for the Scottish Legal Services Ombudsman, and a requirement for a new Appellate Tribunal to whom appeals in respect of the Commission’s determinations may be taken.

3 Negligence

There is a danger that the Commission will take over the functions of the courts in negligence matters where the claim is less than £20,000. However, a compensation award from the Commission will not be covered by the Master Policy. Where there is negligence it
may not be in the interests of either the client or the solicitor for the matter to be dealt with by the Commission. As mentioned in our response to the consultation paper we believe negligence should remain a matter for the courts.

4 Funding

4.1 The Ministers’ estimate of costs and requirements appear optimistic.

4.2 It is normal practice for law firms to meet the costs of professional subscription and membership fees for partners and employees. Thus by their nature the larger firms will be biggest contributors to the annual levy. At the same time the larger firms already make considerable investment in client relations and complaints handling. Our experience over the past 3 - 4 years is that 7 complaints about us have been made to the Law Society. Only one of those complainants has been our client. The others were individuals who as the opposite party in a transaction believe they have suffered a slight through the service we provided to our client.

4.3 We estimate McGrigors will be expected to contribute £23,000 to £25,000 to the annual levy based on the figures set out in the Explanatory Note to the Bill. We also anticipate significant costs arising in respect of similar levies in England and Wales and Northern Ireland.

4.4 If half of the Commission's funding is to come from a complaints levy then there is an inherent weakness in the system. The sum to be raised under the levy reflects the Commission's financial need rather than either the number or seriousness of the matters which come before it. We believe this weakness will create a conflict of interest for the Commission. It is in the Commission’s interest to determine that complaints fall within its investigative/mediation powers because it is dependant upon the resultant levy to fund itself.

4.5 Of the service complaints to come before the Law Society Client Relations committees last year the committee found “no action” in over 60%. We have difficulty in seeing why this 60% should be compelled to meet the complaints levy. We would wish to see the levy charged only against those who incurred some sanction, yet be proportionate to the misdemeanour. In our view this will leave a gap in the Commission funding.

4.6 There is a danger that many will find it easier to pay off a complainant (as to some extent it is now) – i.e. accept the complaint – even if it is unjustified or defensible rather than incur a complaints levy if the Commission became involved.

4.7 An ever growing number of Solicitors are not in private practice. Employers of those outside private practice for whom a practice certificate is not always required are likely to view the annual levy as an unnecessary expense. Many may review their own position and regard their practice certificate as superfluous. The Bill may therefore reduce the numbers in the profession from whom the levy is payable, putting greater burden on private practitioners. This will also cause divisions within the profession and make it more difficult to regulate and maintain standards of conduct and practice. This cannot be in the interests of the public.

4.8 For these reasons we believe the Commission should receive public funding.

5 Multi –national limited liability partnerships

By the time the legislation comes into effect McGrigors will have united the Scottish and English partnerships to form one multinational limited liability partnership. It is unclear from the Bill how such a vehicle will be treated in terms of the annual levy just as it is unclear from the current proposals in England. The worst case will of course be that as a body regulated by both the Law Society of Scotland and the Law Society of England & Wales we have to contribute to each scheme directly on the total head count across the firm. We have about 50 partners and staff qualified both in Scotland and England so at minimum there will be a double levy on them. The Bill provides no clarity on the position of Registered Foreign Lawyers – practicing in Scotland or overseas. It is very likely Northern
Ireland will follow the same course, and consequently there is the possibility we will pay thrice. The Bill is also silent on the treatment of foreign qualified practitioners working in Scotland. These issues should be addressed.

6 Unscrupulous/unfounded complaints

6.1 We welcome the Commission’s powers to sift and reject complaints that are frivolous or vexatious, and to drop complaints that are not made timeously. We believe the Commission should also apply these tests to complaints made prematurely. Failure to do so leaves the practitioner having frivolous or vexatious complaints remitted to him for local resolution. The very nature of these complaints makes resolution unlikely. The action will only waste professional time and resources.

6.2 The Commission should be able to determine that the practitioner be exonerated as opposed to the current No Action.

6.3 There is no acknowledgement that unscrupulous complainants exist – albeit that they might not fall into the category of “vexatious”. The Bill should address this problem. As currently proposed this system is very open to manipulation by them. Such complainants can refuse to accept any attempt at local negotiation in order to force a practitioner to the Commission – knowingly causing him to incur levy and greater costs. The Commission should have other powers to act against them – nil awards, increased fee, or fine for costs &c.

7 Oversight of Master Policy

We have PII cover in the three UK jurisdictions. From our experience the Scottish Master Policy provides excellent cover at a competitive price. We see no justification or remit for the Commission to oversee the running of the Master Policy. The policy is provided by, and claims are handled by, reputable insurers regulated by the FSA. It is not run by the Law Society of Scotland.

8 General comments

8.1 There is already expectation within the profession that once the Law Society is unfettered by IPS complaints it can represent and defend its members most vigorously. There is a danger that this expectation and the general tenor in which the Commission is being established will create an aggressively adversarial system that provides no benefit to the public. A more positive co-operative approach would be more effective in maintaining high standards and eliminating bad service and unprofessional practitioners.

8.2 We believe that inherent in the proposed structure are similar conflicts to those perceived to plague the present system. The Commission can not fulfil its multiple duties - of gateway, investigator, mediator, overseer, tribunal, appeals body, rule maker, judge and jury - without conflict arising. Improvement of the complaints system requires an integrated tiered structure, where the Commission and the Law Society and other relevant bodies work together to provide a fair, transparent, cost effective and efficient system. We would be happy to provide further evidence to the Committee if called upon.