Submission from Walker & Sharpe for the Legal Profession and Legal Aid (Scotland) Bill

Messrs. Walker & Sharpe welcome the opportunity to make representations in connection with the Legal Profession and Legal aid (Scotland) bill currently before Justice 2 Committee for consideration.

We understand that the Law Society of Scotland will make representation itself but we wish to do so in respect of our consideration of what is proposed by the bill.

Having given the matter serious consideration, we do not think the proposed new system will be any better than the current system particularly given the substantially increased costs that will be involved (and the disruption to the handling of complaints procedure as the new system is introduced?)

We believe that there are a number of areas where the system that is being proposed cannot be said to be any better than the currently operating system.

We break our views down in respect of various headings as follows:-

Costs

There appears to have been no proper cost or cost benefit analysis of the proposed new Scottish Legal Complaints System but it is inevitable that it will cost more than the existing system supplied by the Law Society’s current Client Relations Office. The Bill proposes that these costs will be met by levys from the Profession together with fees charged to Solicitors about whom complaints are made whether these complaints are subsequently upheld or not. We believe that there is a general perception amongst politicians that Solicitors make substantial amounts of income and are considered to be wealthy. We can advise that in rural locations this is not the case and it is our belief that the escalating costs combined with the proposed method of a pay for complaints driven system will call in to question the economic viability of whether or not it is worth while continuing to practice in a rural area.

We believe that the implications flowing from this are that the choice available to clients in rural locations will be substantially reduced and as a consequence clients will be driven to larger city based firms and have to pay proportionally higher costs to city based firms for the provision of legal services.

In addition to this and as a rural practice we find it extremely difficult to attract Solicitors to this area. We believe that this situation pertains throughout rural Scotland. The consequences of the increased costs and the proposals made under this Bill are in our opinion going to give rise to the inevitable consequence of making it even more difficult to attract practitioners to rural locations. The parallel that can be drawn with this is the crisis within the dental profession of available dentists in rural localities.

Compensation

The increase in compensation for Inadequate Professional Service from £1200 last year through £5000 this year through to £20,000 as proposed under the Bill is in our view grossly excessive and no explanation has been provided as to why such a figure has been arrived at. In addition to this the complainer still has the right of recourse to the courts to pursue an action of negligence against the Solicitor involved and to receive an award of damages from the courts notwithstanding any award that might be made by the Commission. Previously it was possible to obtain a waiver of the right to apply to Court in the event that a settlement was reached following upon a complaint having been made.

As we understand it the composition of the personnel serving upon the Commission will be made up of a majority of lay people and the possibility of some legal representation being present to make the nine man panel. We understand however that there is no guarantee that there would be legal representation on the panel. We find it difficult to believe that a majority
of personnel who are not legally trained could make any valid decision in respect of a finding of negligence which up until now has always been determined in the final analysis by reference to decision made by civil courts. When this is combined with what we understand to be a lack of appeals procedure from the findings of the Commission we see ourselves and our profession being in the singularly unique position of not being able to seek recourse to the courts in respect of a technical finding of negligence by non legally qualified persons that might arise against us at the instance of a complainer. While it might be argued that this situation pertains in solemn criminal trials, any Jury has to be charged on the law by a legally qualified judge. This we find to be both incomprehensible and in fundamental breach of natural justice and of the European Convention of Human Rights.

No-fault liability

Despite what is proposed in the Bill we do not consider that no-fault liability exists within the proposed scheme. When a complaint is raised, the Solicitor will have to pay for the investigation and conduct of the complaint whether or not the complaint is upheld. It seems to us that no account has been taken of the possibility of multiple complaints being made by a vindictive or malicious complainer or complaints made that are of a spurious or groundless nature and indeed the mechanism that is being proposed will simply encourage a greater incidence of this type of complaint on the basis that the complainer will realise that the threat of such a complaint to the Commission could result in the extraction of a payment from a Solicitor simply to try to ensure that the matter would “go away”. We believe that consideration needs to be given to the possibility of the cost of such an investigation being referred onto the complainer or at least shared in the event that the complaint was found to be spurious malicious or groundless or ill founded.

Conduct Issues

It is observed that the commission will have the power to force the society to take action in respect of certain conduct issues. Losing control of conduct in our submission challenges the nature of practice of law being a profession. It seems to us that either the professional credentials of the practice of law should be recognised with safeguards provided on a professional basis for the practice of law to be maintained on this basis or it has to be recognised on the part of the Justice 2 Committee that the conduct of legal practice should become a wholly commercial trade as a consequence of which the public should be entitled to no greater protection than they would get in respect of dealing with other trades.

Conduct Complaint

With regard to such complaints it is not clear from the bill in its present terms the extent to which the Commission would be entitled to oversee the way in which such complaints are handled. If the Commission is involved in overseeing the way in which the Scottish Solicitors Discipline Tribunal will determine such complaints in relation to professional misconduct that would clearly be incompatible with Article 6 of the ECHR.

Guarantee Fund/Master Policy

The bill gives the Commission the power to oversee the running of both the Master Policy and the Guarantee Fund. There is no justification for this and it was not part of the consultation process. The Master Policy is wholly within the control of the Professional Indemnity Insurers and the Law Society has no function in dealing with matters of policy in relation to the Master Policy. Additional costs will inevitably arise in connection with carrying out risk management audits which is yet another cost that Solicitors will have to bear as a consequence of this bill should it be enacted in its present form.

Access to justice

It is a matter of fact that the margins made in legal aid work are minimal. The hourly rates supplied by the Scottish Legal Aid Board for payment to practitioners in the conduct of their legal aid work are equivalent to those of a time served tradesman. The duties of care owed by
a Solicitor to the client in the conduct of this practice import in respect of legal aid work are onerous and substantial. The nature of the work that is carried out is contentious and sometimes confrontational and often results in a determination of facts and circumstances by a court. It is often the case that the unsuccessful litigant is unhappy about his lack of success as a result of the litigation as a consequence of which complaints are likely to arise more frequently with this particular area of work even when the advice tendered was reasonable. Accordingly given the critically low level of fee income derived from legal aid work it is our submission that the risk involved in taking on such work is likely to outweigh the likely benefit to be derived by us as practitioners from carrying out such work and consequently we are likely to refuse to take it on which will give rise to a diminution in the services available to those who might need it most. In our view it is likely to be the case that the levy to be raised in respect of both the general and specific complaints procedure will swallow up in whole the value of a fee that might be charged in the majority of civil advice and assistance cases.

We see a very real risk that the general costs, the excessive compensation levels, the high risk/low fee 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 take on particular types of work which traditionally have brought complaints. This could mean that for a rural practice such as ours areas of work would be denied to members of the public and it would become difficult for the public to obtain advice in particular areas of law.

**Economic Impact**

For the reasons above we perceive that there will be a downturn in the Solicitors profession which will impact most seriously on rural areas such as ours. We quote from the Law Society’s response to the effect that the turnover of the profession approaches £1b per annum and Solicitors businesses employ around 20,000 people.

**Independence**

If the Commission is to be appointed by the Scottish Ministers then it will carry political taint and will not be considered independent. It is a fundamental principle of our Constitution that there be judicial independence from the politics of government.

**Human Rights**

In our submission the new system will not comply with European Convention on Human Rights (ECHR) because:

1. The board will be appointed by Ministers and will not guarantee Solicitor representation. Accordingly the make up of the board will be of a political nature rather than an independently judicial or legal nature. It is a fundamental tenet of our constitution that the judicial system should remain independent from the political system.

2. The Solicitor will have to pay for the management of case fees giving rise to a complaint even if the Solicitor is exonerated. This is in fundamental breach of ECHR.

3. 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. This is in fundamental breach of ECHR.

We are aware that the Law Society of Scotland has taken opinion from Lord Lester of Herne Hill QC of Blackstone Chambers Temple, London and that this opinion has been made available to the Justice 2 Committee for its consideration. For the sake of brevity we will not quote at length from this Opinion but earnestly encourage Justice 2 Committee to give serious consideration to the terms of the Opinion given by a Barrister who is wholly independent of the Scottish Legal System but who is considered to be an acknowledged expert in relation to the application of ECHR. Indeed the contents of his opinion are such that they give rise to
serious concern on our part as to the nature and quality of legal advice that has been
tendered to the Justice 2 Committee to persuade it thus far that the proposed bill is ECHR
compliant.

Negligence

We again emphasise the point that the potential make up of the Commission might not
comprise any legal representation. In any event and based upon the Opinion of Lord Lester
the Commission will take on the function of force in respect of the determination of negligence
matters where the claim is less than £20,000. There is no consultation mandate for this. In
our opinion such a proposal is in fundamental breach of ECHR compliance. Negligence for
virtually every matter of profession and trade is one which has thus far fallen to be determined
by the courts. We continue to believe that the definition and finding of negligence should
remain a matter for decision by the courts who are a wholly independent from a system of
political appointment and influence.

We ask you to give due consideration to the representations made.