INTRODUCTION

This Memorandum of Evidence is prepared on behalf of the Law Society of Scotland. The Society is the statutory body under the Solicitors (Scotland) Act 1980 representing 11,777 solicitors on the Roll of Solicitors in Scotland. 53 Council members represent the solicitors and clients in each of their constituencies and the response represents the majority view of the solicitor’s profession in Scotland.

The Law Society of Scotland has radically changed and improved its complaints system over the last five years and supports further change which benefits the public and the profession.

The Parliament and the Justice 1 Committee supported the changes made. They were achieved by a committed team in the Client Relations Office and dedicated solicitor and non-solicitor committee members and reporters. The Justice 1 Committee and the Scottish Executive agreed in 2002 that complaints handling functions should remain with the Society. To work, the new body should handle service complaints only. Reach into conduct, negligence, overview of the Master Policy for Insurance or the Guarantee Fund risks compromising the independence of the legal profession, breaching the law, limiting access to justice and inflating costs.

The Society shares the Justice Minister’s commitment to “reforming and modernising our justice services to meet the needs of all who use them”¹ and agrees that “most people receive an excellent professional service from their lawyer”. Less than 0.4% of the business solicitors undertake for their clients results in a complaint. That reflects the high standards and successful regulation of solicitors in Scotland. The Executive acknowledged this when they passed the regulation of conveyancing and executry practitioners to the Society in 2003.

The impact of the bill’s proposals on legal businesses, clients and the Scottish economy needs careful consideration by the Committee. Scotland is recognised as having the highest standards of regulation and a good track record where England and Wales are not. The Scottish Parliament has promised Scottish solutions for Scottish issues but many of the Executive’s proposals are based on English systems and coincide with Department for Constitutional Affairs policy in England and Wales. England and Wales have very different complaints issues in a different marketplace.

The Society believes the legal advisers proposed in the legal aid section of the bill should be regulated by the SLCC and is concerned that bureaucracy and potential costs involved in becoming an adviser will mean low uptake under the scheme.

¹ Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland page i
The Society has given evidence on many bills considered by the Scottish Parliament to improve the law of Scotland for people in Scotland. The Executive’s proposals show neither a holistic understanding of regulation nor the impact of the new process. The proposals risk serious consequences for clients, businesses and professionals in Scotland. The Society believes they will not work effectively. The bill needs substantial and fundamental change if it is to improve the current system, while remaining cost-effective, proportionate and fair.

**SOME KEY STATISTICS**

**Complaints in Perspective**
The Client Relations Office handled 4,852 complaints in 2005. That represents 0.4% of recorded business – approximately 1.2 million items of work recorded by solicitors in 2004. Much more unregistered work and general advice is undertaken by 9,637 practising Scottish solicitors working in firms and in-house (in business, local authority and government) but it means that over 99.6% of the publicly recorded business is completed without complaint to the Society as detailed in Appendices 1 and 5.

**Solicitors in the Scottish Economy**
Every solicitor’s firm is a business and the 1,265 firms in Scotland make a significant contribution to the economy and community, turning over more than £1 billion per annum and employing around 20,000 people. The impact of some of the proposals will probably be damaging to those businesses, their employees and clients as well as the wider economy – for no significant benefit.

**KEY ISSUES**
The Society has examined each section of the bill and is principally concerned about five issues: independence; compliance with the law; access to justice; cost; and viability.

1. **Independence**
The independence of a country’s legal profession is the foundation stone of any democracy. That independence guarantees that a person can be represented in an action against the state, defend themselves against accusations of crimes and enforce their rights.

The Scottish Legal Complaints Commission (SLCC) as proposed is not independent of Government. That is a direct threat to the rule of law. The range of powers proposed by Ministers mean that the SLCC will be a cipher for the Scottish Executive – a government controlled quango.

The Bill states that Scottish Ministers will have power to:
- appoint the SLCC’s Board members for up to 5 years under scrutiny of the Scottish Commissioner for Public Appointments;
- remove members from office if satisfied that they are “unfit to discharge the functions of a member or … unsuitable to continue as a member”;
- approve the appointment of the Chief Executive;
- direct the SLCC on the appointment of employees and their terms and conditions of their employment;
- approve pay for the staff. (Schedule 1, paragraph 8);
- change the SLCCs duties and powers (Clause 31);
- direct the SLCC in the exercise of its functions.

These powers should be independent of government control. This view is reflected by Professor McCrone in his Review of Governance which is attached as Appendix 2. Powers of appointment and deselection should be made by Ministers acting with the Lord President.

2. **Compliance with the law**
The Society believes the Bill breaches Article 6 (1) of the Human Rights Act and the Scotland Act and that it is incompetent and unlawful.

**Right of appeal**
The SLCC will take over from the Scottish Courts in deciding issues of fact and law in negligence and other matters yet there is no right of appeal against SLCC decisions on service complaints to the Court of
Session or other independent, impartial tribunal. As the Society has repeatedly stated to the Scottish Executive, that contravenes human rights law. There must be a proper external right of appeal rather than an internal right of appeal or review.

Unlike the existing system, the bill gives no meaningful appeal for solicitors or equally or more importantly their clients.

Opinion

The Society obtained the Opinion of Lord Lester of Herne Hill QC, who is a leading authority on Human Rights law. In his opinion, which is attached as Appendix 3, he states that the proposals to reform complaints handling in the legal profession are “flawed...and wrong in law”. The opinion continues:

“For the reasons set out below, in my view, the scheme proposed in the Bill is not fully compatible with Article 6 (1) of the ECHR, because:

(i) the proposed Scottish Legal Complaints Commission (“the Commission”) would not be an independent and impartial tribunal in determining service complaints against practitioners;

(ii) the lack of an external appeal from a determination by the Commission to uphold a services complaint would not be compliant with Article 6 (1);

In my view, if the Bill were enacted in its present form, the Act would, by virtue of Section 29 (1) of the Scotland Act 1998, be outside the legislative competence of the Scottish Parliament to the extent of the incompatibility identified in my advice.”


The Society believes that the bill will limit access to justice by forcing solicitors out of certain markets and leaving advice deserts for clients.

In addition to ordering the refund or reduction of fees, the bill allows the SLCC to order payment of compensation of up to £20,000 for inadequate professional service. The limit for compensation was £1,000 from 1991 until 2005, when it was increased to £5,000. £20,000 is the amount the Department for Constitutional Affairs proposes for England and Wales. The impact of this dramatic increase in Scotland will be considerable and does not take account of the marketplace in Scotland.

Unacceptable Business Risks

All solicitors have professional indemnity insurance. The profession’s insurers have increased the self-insured amount per partner in private practice to £6,000. This ensures that the compensation limit for service complaints is not covered by the Master Policy for Insurance. It is not clear how the insurers will react to an increased compensation limit of £20,000. Practitioners are clear that the business risks of taking on important but low value work will lead to firms refusing certain business and, depending on the cover agreed by the insurers, could lead some solicitors to cease practice.

High street practice

The increased costs of insurance and of practice will have a knock-on effect on firms as businesses. That will impact on clients and areas of work where the increased costs of practice cannot be met, for example in legal aid work and in law centres.

For high street solicitors, the business risks and the cost of practice will force some hard business choices. The prospect of paying a fee for a complaint which is not upheld is an unfair penalty. The likelihood is that solicitors will cherry pick new business, refuse to advise potentially difficult clients or to take on contentious work. Others may decide to close their doors and make their staff redundant. That could create advice deserts particularly in rural areas of Scotland.

Impact on legal aid

The Scottish Legal Aid Board’s figures confirm that in 2004-2005 the gross payments of legal aid made to 52% of registered firms across Scotland totalled less than £20,000 per annum. Civil litigation; divorce and separation; family and matrimonial; interdict; state benefits; housing; hire purchase and debt; and criminal court work are the areas clients seek the majority of advice. If each piece of business carries the risk of a complaints levy as well as the risk of a compensation order for up to £20,000 then legal aid work
may become too high a risk. If most practitioners receive less from legal aid in a year than the risk for each piece of business, then solicitors will be further discouraged from legal aid work.

Limiting Access to Justice through the Scottish Courts
The SLCC will have no claims handling experience but is to be given the same power as the courts to decide issues of professional negligence up to a compensation limit of £20,000. The potential for inappropriate and disproportionate compensation awards must be avoided by having a proper appeal.

4. Cost

The Executive has stated their costs are guesstimates and that their costings are based on the Financial Ombudsman’s Service and the Law Society of England and Wales which are inappropriate comparators. The proposals for financing the new quango are neither independent nor fair. To meet the level of independence the public expect, SLCC must be funded at least in part by the taxpayer. The public expect that level of independence.

Funding the SLCC
The SLCC will be funded by two types of levy on the legal profession. The amount and balance of the levies will be decided by the SLCC after consultation. The Financial Memorandum suggests “for purely illustrative purposes” the annual general levy on each practitioner could be £120 and the specific levy for each case £300.

It is unjust to have to pay a levy to prove one’s innocence. The charge creates negative incentives for the SLCC to increase funding by accepting more complaints and solicitors who pay a financial penalty for not resolving every complaint at source. The SLCC levy for every complaint applies whether the complaint is upheld or not and whether mediated or not. This is being described as “polluter pays” but it is in fact “practitioner pays”.

Fraudulent Complaints
The experience in the Financial Services industry indicates that advisers cannot prevent fraudulent complaints when customers have nothing to lose by complaining. The Bill will create just such a system; one where there is no risk to the fraudulent complainer and considerable risk to the solicitor complained against. The complainer may not even be the client of the solicitor who will none the less have to pay and go through the complaints procedure.

Lack of Independence
The current complaints system is funded by the profession and creates the perception of a lack of independence so the funding should change. The Ombudsman’s office has, to date, been funded by the taxpayer and has been seen as independent. Those savings should be put towards the new body, aspects of which should be funded by the taxpayer.

Increased Costs
The Society will still handle conduct complaints. Some savings will be made as service complaints pass to the new body but they will not be enough to fund the SLCC, even on its estimated costs. The cost of handling service complaints will be disproportionate to the costs of all other regulatory functions and significantly more than at present. A more searching assessment of costs is in the Society’s response to Financial Memorandum, attached as Appendix 4.

Cost of CRO
The current cost of a practising certificate for all regulatory functions and services including complaints handling is £550 per member. The Society has 12 Client Relations Committees underpinned by 254 reporters of whom 168 are solicitors and 86 are non-solicitors. Those preparing reports and attending Committee meetings are paid a nominal fee but give their services on a voluntary basis. The new body will not be able to rely on a similar resource which has tremendous value in terms of input, independence, quality of decision-making and cost.

5. Will it work?

The SLCC is likely to be slow, rule-based, bureaucratic and expensive. The Society believes it will push firms out of business and create advice deserts for clients. The new system should take the best of the current system and improve on it, rather than reinvent the wheel and lose the benefit from lessons already learned.
Slower System
Just as the Society is increasing the speed of complaints handling, meeting and exceeding its targets of handling 90% within 9 months and 75% within 6 months, the new system is likely to slow complaints handling down and is directly contrary to the objectives set by the Ombudsman.

Vexatious Complaints and Conciliation
The introduction of a statutory sift for vexatious complaints is necessary and must be robust. The Society’s current system encourages the complainer to raise any dis-satisfaction with their firm’s Client Relations Partner and successfully promotes conciliation and dispute resolution of many complaints. In 2005, 518 cases were resolved before going to a committee, reducing the time, cost and inconvenience of complaints for all concerned.

More Red Tape and Bureaucracy
The Society’s success with sifting complaints and conciliation was achieved without the bureaucratic notice-based system envisaged in sections 6, 7 and 11 of the Bill. This will take more time than the current system and benefit neither client nor solicitor.

Insufficient Detail
One of the difficulties with the proposed system is that there is little detail provided although from discussions with the executive the Society have formed the view that the proposed system is likely to be inflexible and rule-based. Legal complaints are often complex, opinion-based and emotions can run high. That is why the Society’s system has tight targets built around a more flexible system.

Oversight and Over-complication
The Guarantee Fund and Master Insurance Policy are regarded as consumer protections which operate to the highest standards. The Master Policy has passed the closest scrutiny by the OFT and the Guarantee Fund is an unrivalled protection for the Scottish consumer. The unspecific provision for SLCC oversight of these functions smacks of state control and interference, is unspecific and potentially damaging. The over-complication in the proposed legislation is neither justified nor in the public interest.

Substantial Change
The SLCC, as currently proposed in the bill, will not improve the existing provisions. It will cause more delay, bureaucracy, expense and inconvenience than the current system. It undermines the independence of the solicitors profession, risks being declared illegal, has a negative effect on access to justice, its costs don’t add up and it will not work effectively. Any change must improve on the current system and provide the best possible complaints system for clients and solicitors. To achieve that, the bill needs substantial change. The Society remains willing to support and work towards change for the better. SPECIFIC COMMENTS ON THE SECTIONS OF THE BILL

PART 1 – THE SCOTTISH LEGAL COMPLAINTS COMMISSION

Establishment

Section 1 – The Scottish Legal Complaints Commission

The Society is concerned about the status and constitution of the Scottish Legal Complaints Commission (SLCC).

1) The SLCC is not an “independent and impartial tribunal” within the meaning of Article 6 of ECHR when it is determining a service complaint.

2) There is no provision in the bill for an appeal to any judicial body which can re-hear the issues. Instead, provision is to be made by rules made by the SLCC for a “review” of the SLCC’s determination by an Appeals Committee: apart from that there could be judicial review. These options are not sufficient to provide the kind of “judicial control” required by ECHR.

Society comment

The proposal is problematic because, under the existing law, there is an appeal from the determination of the Society in service complaints to the Tribunal and from there to the Court of Session. There is also an appeal from the Tribunal to the Court of Session in conduct cases. These appeals fully comply with Article
6 of the ECHR\(^2\). No rationale has been advanced to dispense with these rights of appeal. The current architecture in the bill fails to comply with Article 6 of ECHR, not only for the benefit of solicitors, but for that of the public also.

**Schedule 1 – The Scottish Legal Complaints Commission**

The composition of the SLCC is also of concern to the Society. The Society is fundamentally opposed to any potential political control mechanism which would intrude in the independence of the legal profession. The SLCC must be able to withstand considerable political pressure. The suggestion that Scottish Ministers should appoint the SLCC and also have power to remove members is unacceptable. This body will have substantial impact on lawyers, their professional bodies and the Scottish consumer: in order to respect the rule of law the independence of the legal profession must be upheld. The bill fails to meet this responsibility.

The Society is of the view that the Lord President should be included in the appointment process and that there should be a guarantee that the SLCC should have a solicitor with a practising certificate and substantial expertise of private practice in Scotland as a member.

To the extent that the SLCC is intended to act as an independent adjudicatory body determining service complaints, it ought to be made into a tribunal and be brought under the supervision of the Scottish Committee of the Council on Tribunals.

**Conduct or service complaints against practitioners**

**Section 2 – Receipt of Complaints: Preliminary Steps**

This section details that the SLCC must take certain steps when analysing a complaint. The SLCC, in terms of section 2, acts as a gateway for all forms of complaint –

a) professional conduct – “conduct complaints”; and

b) inadequate professional services – “services complaints” including complaints of negligence.

**Society comment**

The Society welcomes the introduction of this statutory sift of complaints. However, the SLCC will need time to develop the expertise necessary to make the sift work properly.

**To whom can complaints be made?**

The Society considers that it is uncertain whether it is intended that all complaints must be made to the SLCC and that the professional bodies can only deal with complaints which have been remitted to them by the SLCC.

The bill makes provision for when the SLCC receives a complaint, but also does not require all such complaints to be made to the SLCC. There should be a provision which prevents complaints being made directly to the Society.

The consultation paper “Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland” (“the consultation”) intended that the SLCC should be the required gateway for all complaints and that the SLCC should remit them, as appropriate, to the relevant professional organisation. The bill provides, in section 24, that where a professional organisation receives a complaint from a person about the conduct or services provided by a practitioner, it must send the complaint to the SLCC. This is a roundabout method of giving effect to the policy.

Section 20 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 envisages that the Society may inquire into whether a conveyancing or executry practitioner is guilty of professional misconduct or provided inadequate professional services, whether or not a complaint is made to them. Section 20 is not amended in Schedule 4. It is, therefore, uncertain what is intended by the Bill. It is noted that section 37 enables Scottish Ministers, by regulations, to modify enactments to give the Society powers as respects conduct complaints about such practitioners, but it is not clear what is intended.

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\(^2\) Robson v Council of the Law Society of Scotland 2005 S.C.125

Gordon Coutts Thomson (a firm) v Council of the Law Society of Scotland 2001 S.C.L.R. 61
The bill should give effect to the policy clearly, by providing that all complaints should be made to the SLCC. If necessary, it could then be provided, but only as an ancillary provision, that if such a complaint is made to the professional organisation, it should send it to the SLCC. It should also be made clear that the Society should have the power to investigate professional misconduct or unsatisfactory professional conduct on its own initiative, without any complaint made to it.

Who can make complaints?

The Society is uncertain as to who can make a complaint and as to how this question is to be determined. A complaint can be made, in terms of section 2(1), by or on behalf of “any person having an interest”.

In section 2(3), the bill provides that this expression means, in relation to a service complaint, “any person who appears to have been affected directly by the alleged inadequate professional services”.

There are issues about who is “directly affected”. Paragraph 7.4 of the consultation states: “The Executive is aware that, in practice, an ‘interest to complain’ has been quite narrowly interpreted and proposes that anyone who has been directly affected by anything a legal practitioner has said or done, should have such an interest. This would include, for instance, litigants who considered themselves to have been disadvantaged by the incompetent or unacceptable actions of their opponent’s legal adviser.”

However, it is not clear who would be caught by referring to a person “directly affected” by anything a solicitor has said or done. It is not even clear whether it would include the example set out by the Scottish Executive in the consultation paper.

The relationship between a solicitor and a client is a contractual one of agent and principal. That contract provides rights and obligations and is set out in a letter of engagement which the solicitor must send to the client when the contract is agreed. Giving rights to complain to third parties who are not party to the contract creates potentially difficult consequences and introduces the issue of “remoteness” into the test of who is directly affected by a solicitor’s actions.

In the current adversarial system, a solicitor must act in the best interests of his or her client subject to the interests of justice and the duty owed to the court. The overarching nature of these responsibilities inevitably impacts adversely on third parties.

Frequently both parties in litigation are advised by solicitors and it is the responsibility of either party’s solicitor to act on the incompetence or unacceptable behaviour of the opponent’s solicitor.

As a matter of fact the Client Relations Office already handles complaints from third parties where the solicitor’s conduct has a direct effect on the third party and might amount to professional misconduct if proved.

The Society is of the view that the definition proposed in section 2(1) needs clarification:-

a) to take account of the adversarial system and the role of the court and in particular of the role of solicitors employed by the Crown or by local authorities;

b) to recognise the obligations owed by a solicitor to his or her client by contract or by custom;

c) to recognise the nature of the extent of the duty of professional care owed by a solicitor to his or her client; and

d) to acknowledge that some unscrupulous complainers could use the provision to undermine or disrupt legitimate activity by their opponent’s solicitor in order to further their own objectives in negotiation or litigation for example, where a litigant complains about his or her opponent’s solicitor to gain some advantage in litigation.

There is no provision in the Bill as to how the test of who is ‘directly affected’ is to be determined. It gives the impression that it is an objective test but, in practice, it will be for the SLCC to determine it according to its own subjective opinion. As there is no appeal to any appellate court which can substitute its own opinion for that of the SLCC, this means that the view of the SLCC will prevail unless it can be set aside by judicial review. It may be very difficult to do so. For example, the view of the SLCC can be set aside if it can be shown that the SLCC has reached an opinion so unreasonable that no reasonable body could

3 Batchelor v. Pattison and Mackersy (1876) 3R 914
ever have done so. Even if that test is met, the court cannot substitute its own opinion, but can only require the SLCC to re-determine the matter.

Where the service complaint also raises a negligence issue, it is not clear whether the person making the complaint should require to have both “title and interest” which he would require to have at common law before raising an action for damages in the courts.

There is no definition in the bill of person with an interest in relation to a conduct complaint.

The fact that a definition is provided in one case and not in the other case increases the uncertainty as to what it means. Can a person have an interest to make a conduct complaint even although he or she is not “directly affected” by the conduct? Does a person have to have both title and interest, as under the common law, in order to make a service complaint, especially one based on an act of negligence? These matters should be clarified by having a definition to cover both provisions and ensuring the provision is lawful.

The definition of a conduct complaint

A conduct complaint is defined as complaint suggestion professional misconduct or unsatisfactory professional conduct.

However, there is no definition of what is meant by professional conduct. It will, therefore attract its common law meaning. At present, this is defined in the case of Sharp v Council of the Law Society 1984 SC 129 as “conduct which would be regarded by competent and reputable solicitors as a serious and reprehensible departure from the standards of conduct which could reasonably be expected of a competent and reputable solicitor”.

Unsatisfactory professional conduct is defined in section 34 as certain kinds of professional conduct which does not amount to professional misconduct or comprise merely inadequate professional services (IPS). However, it may not be clear what IPS and unsatisfactory professional conduct. It may, for example, be thought that IPS must, almost by definition, always constitute unsatisfactory professional conduct. The difference is, however, important both at the stage when the SLCC is determining whether a complaint is a conduct or a services complaint and later even when the SLCC has determined it to be a conduct complaint. This is because the Society is under a duty, under section 11, where it considers that a conduct complaint which is mediating or investigating may constitute (in whole or in part) a services complaint, to suspend the mediation or investigation and send the complaint to the SLCC.

Society comment

Professional misconduct should be defined in the bill in order to make it clear (a) what it means (b) whether it is restricted, as is the definition of “unsatisfactory professional conduct”, only to certain kinds of professional conduct and (c) what is meant by “unsatisfactory professional conduct” because it is defined as professional conduct which does not constitute professional misconduct.

The Bill should also clarify the distinction between unsatisfactory professional conduct and inadequate professional services.

The definition of Inadequate Professional Services (IPS)

IPS is defined in section 34 as including “any element of negligence in respect of or in connection with the services”.

The Society is of the view that IPS should not include any element of negligence.

The Society is of the view that:-

1. There is no consultation mandate for the proposition that the SLCC should have a jurisdiction to deal with negligence issues.

2. The question of whether there is negligence raises a question of civil rights which is a matter for the courts.
3. It is contrary to Article 6 of ECHR to enable the SLCC to determine questions of negligence, at least without providing for an appeal to a judicial body which should have power to re-determine both the facts and the law.

4. The reference to “negligence” in section 34 is undefined. At the very least, an indication must be given as to what this term means. Further comment is made on this at section 34.

**Preliminary steps**

The preliminary steps which the Commission must take are –

1. to determine whether or not the complaint is frivolous or vexatious; and
2. where the complaint is either frivolous or vexatious, it can -
   a) reject the complaint; and
   b) give notice in writing that the complaint has been rejected.

**Society comment**

The Society has the following comments in relation to the preliminary steps which must be taken in a complaint:

1. It is unclear if the bill gives the SLCC the power to determine whether all complaints (including conduct complaints) are frivolous or vexatious.

2. There should be provision in the bill which requires the SLCC to determine whether the complaint is made by a person having an interest and to reject it if it is not. Provision should also be made to notify the complainer and the practitioner of the SLCC’s determination and the reasons for it. The SLCC should do the complete initial sift and there should be a provision for an appeal or review mechanism as there is at present.

3. The Society is of the view that determinations by the SLCC (section 2(2)) should be accompanied by reasons and that there should be a provision which requires the SLCC to give reasons for its determinations.

**Section 3 – Complaint not made timeously or made prematurely**

This section obliges the SLCC to –

1. refuse to consider a complaint which is not made timeously; and
2. not take any further action on the complaint.

A complaint is not made timeously if the complaint is made after the expiry of the time limit fixed by the SLCC and the SLCC does not extend the limit.

The current time limit for making a complaint is two years.

Section 3(4) also provides that the SLCC need not take steps in a complaint if those steps would be premature. A complaint is premature if:-

a) the complainer has not informed the practitioner about it and given the practitioner an opportunity to deal with it; or

b) if the SLCC rules give the SLCC discretion to deal with the complaint.

**Society comment**

Will the 5 year prescriptive period for negligence will apply to service complaints on that ground? There are also issues about when the prescription starts to run and what can interrupt it.
Section 4 – Determining Nature of Complaint

This section provides that the SLCC must decide if a complaint is one of – a) conduct or b) services. If the complaint is a mixed conduct/services complaint, the SLCC must consult the professional bodies before making a decision.

Society comment

The Society is of the view that the decision-making process in section 4 is very important, highly complex and has major consequences for the solicitor and client alike. This step is a further example of how the scheme is bureaucratic and given to delay.

Section 5 – Complaint Determined to be Conduct Complaint

This section provides that if the SLCC determines that a complaint is a conduct complaint it must –

a) remit the complaint to the professional body; and

b) notify the complainer and the practitioner that it has been remitted and to which body.

Society comment

The Society is concerned that there are a number of provisions in the Bill (of which this is one) which require the SLCC to make a determination or a decision and send a copy of it to the Society, the complainer or solicitor, but do not expressly require the SLCC to give reasons for its determination or decision. The Bill only requires reasons to be given in one case in section 16(3) (handling complaints) and the inference from this must be that reasons are not required in other cases. However, if no reasons are given, this renders it virtually impossible for a complainer or the solicitor to contest the decision, whether by judicial review or otherwise.

The Society, therefore, suggests that the Bill should require reasons to be given in all cases. This applies, in particular, to sections 4, 7, 9, 11, 15(3), 16(6) and 18(7). This comment is not repeated.

Section 6 – Services Complaint: Notice and Local Resolution or Mediation

This section provides that –

1) if a complaint is identified as being a services complaint this decision must be intimated to the parties;

2) if the complaint is premature, or there has been no sufficient attempt to negotiate a settlement the SLCC may refer the complaint back to the practitioner requesting that he or she should attempt to achieve such a settlement;

3) where the SLCC refers a compliant back to the practitioner, it may require the practitioner to give a response and explanation of the steps taken to achieve a negotiated settlement within 21 days;

4) the SLCC may offer to mediate in relation to the complaint, but this can only happen if both the complainer and the practitioner accept the offer; and lastly

5) the SLCC may discontinue mediation in relation to a complaint and if it does so, it must give notice in writing.

Society comment

The Society notes that this process is bureaucratic and time-consuming. There are also intrinsic difficulties in compulsory mediation. It is of the nature of mediation and the Society’s experience, that it is more likely to be successful if it is voluntary. Any element of compulsion devalues the process and will lack the confidence of the participants.

Section 7 – Services Complaint: Commission’s duty to investigate and determine

This section applies when local resolution and mediation fails. The SLCC must investigate the complaint after giving both the complainer and the practitioner an opportunity to make representations.
Society comment

The Society notes that this follows the pattern already employed by the Society but, in view of the rule-based system, the process will be slow and bureaucratic and inflexible. Section 7 is unclear as to whether it permits representation in person.

Section 8 – Commission upholds services complaint

The powers which the SLCC may be able to exercise when it upholds a service complaint are very similar to the powers currently available to the Society under section 42A(2(a–d)) of the Solicitors (Scotland) Act 1980 when they uphold a complaint of IPS, except that the amount of compensation which may be awarded has been increased from £5,000 to £20,000. Scottish Ministers are given the power, by order made subject to negative resolution procedure, to substitute a different amount.

Society comment

The Society considers that the power conferred on Scottish Ministers, by order, to substitute a different amount should be subject to draft affirmative resolution procedure because this power could increase quite considerably the amount of compensation payable.

The Council suggests that the opportunity should be taken to get rid of the distinction drawn in section 8(2) between the SLCC determining and direction certain matters. This complicates the drafting of this section and sections 9 and 10 unnecessarily. In terms of section 11, only a direction is subject to summary diligence.

Section 9 – Services Complaint: Notice where not upheld or upheld

This section provides that the SLCC must give notice of its decisions.

Society comment

The Society has no comment to make on this section.

Section 10 – Determination under Section 7 or taking of steps under Section 8(2): Effect in relation to proceedings

Section 10 provides that a decision by the SLCC to take any steps in relation to redress under section 8 is not to be founded upon in any court proceedings for the purposes of showing that the practitioner in respect of whom the steps were taken was negligent. A direction under section 8(2)(d) to a practitioner to pay compensation to a client will not prejudice the right of the client to take proceedings against the practitioner for damages in respect of any loss which the client claims to have suffered. Any amount directed to be paid to the client under section 8(2)(d) may be taken into account in the computation of any award of damages.

This provision is fairly similar to the terms of section 56A(2) of the Solicitors (Scotland) Act 1980.

Society comment

The Society is of the view that in the provisions of section 10(2) regarding the award of damages, the court should be under a duty to take into account any amount directed to be paid to the client under section 8(2)(d) in the computation of damages.

Section 11 – Complaint appears during mediation or investigation to fall within different category

Section 11 provides the procedure where a complaint which has initially been determined to be either a conduct or services complaint appears to appear to fall wholly or partially within the other category during the course of mediation or investigation by the professional body or the SLCC. In such circumstances, either the professional body or the SLCC shall suspend the mediation or investigation, consult the other on the matter and give both the complainer and practitioner a note of the outcome. The SLCC must then either — 1) confirm, or 2) alter its original decision and give the practitioner, complainer and professional organisation notice of the outcome of its review. The SLCC is required to remit any complaint assessed to be a conduct complaint to the professional organisation to investigate. The SLCC, of course, has its own duty to investigate service complaints.
This section highlights the confusion which can emerge in dealing with different bodies with different competences. Issues of conduct and service can have common features: it can be looked on as a behavioural continuum, with some clearly service issues, whilst others are clearly conduct. That is why there needs to be clear expression in the Bill to make sure that the differences which are fundamental to solicitors and clients can be clearly recognised.

Section 12 – Power to monitor compliance with directions under section 8(2)

Where the SLCC has issued a direction to a practitioner to provide redress to a complainer under section 8(2), this section provides that it must require the practitioner, by notice in writing, to give an explanation of the steps he or she has taken to comply with the direction within a period of 21 days. This requirement is suspended if the practitioner appeals against the direction pending the outcome of the appeal.

Section 13 – Power to examine documents and demand explanations in connection with conduct or services complaints

This section empowers the SLCC to give a notice in writing to the practitioner, for the purposes of sections 2, 3, 4, 6, 7, 8, 11 or 12. Such a notice can require –

a) the production or delivery to any person appointed by the SLCC... of all documents to which this section applies – i.e. books, accounts, deeds, securities, papers and other documents in the possession or control of the practitioner or a trust of which the practitioner is sole or co-trustee which are in the possession or control of the practitioner; and

b) an explanation within 21 days regarding the matters to which the complaint relates.

Schedule 2 makes further provisions about the powers of the Commission under this section.

Society comment

The Society is of the view that this provision should be amended to provide:-

a) that any person, who is required by such a notice to provide any information or to produce any document, is to comply with that requirement, notwithstanding any duty of confidentiality owed by that person to any other person (whether the complainer or not) so that the documents can be passed over without question;

b) that, if any person, who is required by such a notice to provide any information or to produce any document, refuses or fails to provide that information or to produce that document, the Society or SLCC may apply to the [sheriff/ Court of Session] for an order requiring that person to provide that information or produce that document to a person appointed by the Society at a time and place specified in the order;

c) that any information given by a person, which that person was obliged under this section to provide, shall not be admissible in any criminal proceedings against that person. This is required in order to be compatible with ECHR requirements; and

d) that, for the purposes of this section, a person shall be taken to comply with a requirement to produce a document if that person produces a copy of, or an extract of the relevant part of, the document.

Section 14 – Enforcement of Commission Direction under Section 8(2)

This section provides that a direction by the SLCC under section 8(2) is enforceable in the same way as an extract registered decree arbitral in its favour bearing a warrant for execution issued by any Sheriff Court in Scotland.
The Society notes that this procedure only makes provision for summary diligence. It does not allow any court to investigate the reasons, or even the legality, of the direction being made.

The SLCC has the powers of the Sheriff Court, but is not judicially constituted. The Society requires to go to the Scottish Solicitors' Discipline Tribunal, where representations must be made before orders are granted.

Handling by relevant professional organisations of conduct complaints

Section 15 – Handling by relevant professional organisations of conduct complaints: investigation by Commission

Section 15 provides that the SLCC can investigate complaints about the manner in which a professional organisation has dealt with a conduct complaint. This is referred to as a “handling” complaint and is based upon the old jurisdiction of the Scottish Legal Services Ombudsman under sections 34 and 34A of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The SLCC is prohibited from investigating a handling complaint where either –

a) the professional organisation has not completed its investigation; or

b) the handling complaint is made after the expiry of the period of six months after such date as Scottish Ministers may specify.

The SLCC can investigate a conduct complaint if the complaint is that the professional organisation has acted unreasonably in failing to start an investigation into the complaint, or that having started such an investigation has failed to complete it within a reasonable time, or that the SLCC believes that an investigation is justified.

The SLCC can make a written interim report in relation to the investigation which it must send to the person who made the handling complaint and the relevant professional organisation.

The Society notes that it is proposed that the SLCC will deal with handling complaints regarding the professional bodies. What happens if a complainer has a complaint about the way in which the SLCC handles a service complaint?

Section 16 – Investigation under Section 15: Final Report and Recommendations

This section requires the SLCC to make a written report of its conclusions; and send a copy of the report to a) the person who made the handling complaint; b) the relevant professional organisation; and c) the practitioner concerned in the conduct complaint to which the handling complaint relates.

The SLCC can make recommendations:

1. That the professional organisation gives to the complainant such information about the conduct complaint and how it was dealt with.

2. That the conduct complaint be further investigated or reconsidered by the professional organisation and that the relevant professional organisation consider exercising its powers in relation to the practitioner concerned.

The SLCC can also recommend that the relevant professional organisation pay compensation of up to £5,000 for loss suffered by the person, inconvenience or distress caused to the person as a result of the way in which the conduct complaint was handled and that it pay to the person making the handling complaint an amount specified by the SLCC by way of reimbursement of the cost or part of the cost of making the handling complaint.

If the SLCC is satisfied that the professional organisation has decided not to comply wholly with the recommendations, or is of the opinion that the organisation has not complied wholly with the recommendations, it may direct the organisation to comply with the recommendations.
The Society is of the view that this extension of the SLCC’s role is inappropriate. The SLCC was never envisaged as having a role to investigate conduct complaints. This section changes the SLCC from a service complaint body into a state-controlled regulator of the legal profession. This outcome is not in the interests of the public, the consumer or the profession. It undermines the rule of law and the independence of the legal profession. This provision erases the former Justice 1 Committee’s recommendation of maintaining the regulatory system with increased oversight and replaces it with a dangerous structure which is inimical to democracy and the rule of law. This section undermines the professional bodies’ roles as the promoters and enforcers of good professional conduct. The Society is also of the view that section 16(6) gives the SLCC too strong a power for a newly-constituted organisation. Any system requires to have the confidence of the public and also the profession: without that confidence the system will not work.

The Society is also of the view that the unaccountable potential increase which could be made by Scottish Ministers is too draconian.

Section 17 – Abolition of Scottish Legal Services Ombudsman

This section abolishes the office of the Scottish Legal Services Ombudsman.

The Society notes the abolition of the Scottish Legal Services Ombudsman. The abolition of the Ombudsman raises the issue of oversight of the SLCC. There is no body charged with that duty. What is to happen if a complainer is dissatisfied with the investigation carried out by the SLCC? How is oversight of the SLCC to be achieved?

Finance

Section 18 – Annual General Levy

This section requires an annual general levy to be paid to the SLCC in respect of each financial year by solicitors, advocates, conveyancing or executry practitioners and those who exercise a right to conduct litigation or right of audience under section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The levy is to be collected from the members by the relevant professional organisations and paid to the Commission.

The provisions regarding the finance of the SLCC are lacking in detail and specificity. The comments on the Financial Memorandum referred to in Appendix 4 are relevant at this point.

The Society is of the view that there requires to be a definition of the group the bill will affect. The Society should also be able to recover from the SLCC the costs of collection and remittance of the levy.

In relation to the Annual General Levy, the Society is of the view that this should be dealt with directly by the SLCC. If the Society is required to gather in this fee on behalf of the SLCC, it should be able to recover the costs of carrying out this task. This must be clarified and costs taken into account.

The Society is very concerned at the lack of a defined budget for the SLCC or any detail of expected costs.

Section 19 – Complaints Levy

This section requires a practitioner to pay a levy to the Commission in respect of a complaint about the services provided by that practitioner which was dealt with by the SLCC. The levy is payable in respect of all complaints which the SLCC considers to be eligible.

The Society is of the view that the complaints levy should only be payable where the SLCC upholds a service complaint rather than where it investigates a complaint. The SLCC should also be able to issue expenses awards against unsuccessful parties. The specific levy acts as an incentive to accept complaints to increase its revenue and leaves solicitors paying to prove their innocence. There is also an
incentive for solicitors to settle the complaint with the client, even if he or she feels that the complaint is unjustified. The results of this proposal are unjust to solicitors.

Section 20 – Amount of Levies and Consultation

Section 20 provides that the SLCC will fix the amount of the annual general levy and the complaints levy for each financial year. The SLCC must consult the professional organisations and their members in January each year on its proposed budget for the following financial year. The SLCC has the power to propose different levels for the complaints levy in different circumstances.

The annual general levy must be the same amount for each of the individuals who are liable to pay it, but the complaints levy can alter to meet different circumstances.

Society comment

The Society envisages considerable problems arising from this 2-stage approach. For example, the access to justice issues which are stated in the introduction will come into sharp focus as a result of this policy. Furthermore, the taxation nature of the levy is unfair, as it will affect public sector lawyers who may never be subject to the SLCC’s jurisdiction.

The bill proposes that the amount of the levies is to be determined by the SLCC each year. However, this means that there is no effective control over the SLCC’s budget. How can the SLCC be made accountable to the profession or the Parliament in these circumstances?

The professional bodies must be given the right to reject the budget; otherwise this is effectively taxation without representation.

Section 21 – Grants or Loans by Scottish Ministers

This section provides that Scottish Ministers may make grants to the SLCC and that Scottish Ministers shall also be able to make loans to the SLCC.

Society comment

The Society is of the view that the Scottish Ministers should not be able to make loans to the SLCC. Loans require to be repaid and the only proposed source of repayment is the income derived from the profession. It is unacceptable that the professional bodies should be burdened by debts over which they have no control.

The Society questions the necessity of giving the Scottish Ministers a power to make grants of loans. These costs would ultimately require to be paid for by the profession and clarification of this issue is critical at this point. The Society is of the view that costs should be met by the State, even in relation to costs of the Board and fixed costs and the profession possibly being charged for variable costs. The Society would query what is to become of the £400,000 per annum which will be saved by the Executive decommissioning of the Office of the Scottish Legal Services Ombudsman.

Section 22 – Guarantees

Section 22 authorises Scottish Ministers to guarantee the discharge of any financial obligations incurred by the SLCC.

Society comment

The Society has no comment to make on this section.

Rules as to Commission’s practice and procedure

Section 23 – Duty of Commission to make Rules as to Practice and Procedure

The SLCC must make rules as to its practice and procedure. Schedule 3 provides detail about what the rules must include. There are obligations on the SLCC which must consult with Scottish Ministers, relevant professional organisations and consumer groups.

Society comment
The Society’s has already expressed its view of the bureaucratic and inflexible nature of a rule-based system. These rules should, in view of their importance, be subject to the supervision of the Parliament. This may be done directly by requiring them to be made by Statutory Instrument and subject to the negative resolution procedure, as in the case of Rules of Court.

Forwarding complaints, advice, monitoring etc.

Section 24 – Duty of Relevant Professional Organisations to forward Complaints to Commission

This section imposes upon professional organisations an obligation to send to the SLCC any complaint about the conduct or services provided by a practitioner, or the handling of a conduct complaint under sections 5(a) or 11(5)(a).

Society comment

The Society is of the view that this provision creates delay and bureaucracy. Section 24 must be amended to ensure that the professional bodies can take up conduct complaints directly. The Society has invested considerable finance and effort to speed up the complaints system as recommended by the Justice 1 Committee. This will slow it down.

Section 25 – Duty to Provide Advice

This section obliges the SLCC to provide advice to any person who requests it as respects the process of making a services complaint or a handling complaint. The SLCC is required to provide the information by any particular means preferred by the person requesting it.

Society comment

The Society is concerned that the bill provides that advice should be about “the process of making” a complaint. It may, however, be difficult for the SLCC not to stray into the substance. This gives the appearance that the SLCC may be partial and therefore affect the assessment whether it is an “independent and impartial tribunal” for the purposes of Article 6. The Society recommends that the duty should be altered to providing information only about the processes of complaints making.

Section 26 – Services Complaints: Monitoring, Reports, Protocols and Information Sharing

This section requires the SLCC to monitor practice and identify in any trends in practice as respects the way in which practitioners have dealt with matters that result in services complaints. The SLCC is also obliged to publish a report on any trends in practice which it identifies.

The SLCC is also under an obligation to enter into protocols with the relevant professional organisations as regarding the sharing of information in respect of the numbers of service complaints dealt with, any trends it can identify in relation to such complaints, determinations upholding services complaints, or failures by practitioners to comply with directions.

Society comment

The Society notes that this is a unilateral obligation. How can this work unless a corresponding duty is placed on the professional organisations? The SLCC is also obliged to share information with the relevant professional organisations. What is the mechanism for enforcement of such an obligation?

Section 27 – Conduct Complaints: Monitoring, Reports, Guidance and Information

Section 27 obliges the Commission to monitor practice and identify any trends in practice as respects the way in which practitioners have dealt with matters that result in conduct complaints, or that the relevant professional organisations have dealt with conduct complaints so remitted. The SLCC is obliged to publish a report on such trends in practice and can also give guidance to the relevant professional organisations regarding the timescales within which the aim to complete investigations and make recommendations about the organisation’s procedures for dealing with conduct complaints. Each relevant professional organisation must consider the recommendation made by the SLCC and notify it of its decision regarding the recommendation.
The SLCC is given the discretion to carry out audits of records held by professional organisations relating to conduct complaints.

**Society comment**

The Society is concerned that there may be a suggestion that the SLCC is being required to monitor not simply trends in practice as to the way in which practitioners have dealt with any complaints, but “matters that result in” such complaints. This is an unclear, intrusive and impractical power for a State-sponsored body to have. This seems to give the SLCC power to monitor how, for example, practitioners may carry out their professional practice, such as conveyancing. This proposal does not appear in the consultation paper and the Society does not believe that the SLCC should have a role to provide guidance in relation to the area of setting standards of professional practice. That is the role of the Law Society of Scotland and there is no reason to create an alternative standards body.

The Society is also concerned that there may be a suggestion that the SLCC is being required to supervise how professional organisations deal with conduct complaints, to audit their records and to make recommendations about their procedures. This infringes upon the independence of the Society to regulate its own procedures and consequently undermines the independence of the legal profession.

Section 28 – Obtaining of Information from Relevant Professional Organisations

This section empowers the SLCC to get information or documents from professional organisations or from practitioners, being information which the SLCC considers relevant for the purposes of sections 15, 16 or 27. There is a provision which nullifies any obligation of confidentiality which the professional organisation owes a party to a complaint. The SLCC can compel a practitioner to provide it with all the information which he or she has.

**Society comment**

There needs to be a saving for legal professional privilege or for obligations of confidentiality to third parties. Legal Professional Privilege and confidentiality are concepts which enable clients to discuss private matters with their legal advisers in the knowledge that such matters will not be disclosed except in restricted circumstances. It is necessary to preserve these protections because clients may be less willing to give information if they think it could be disclosed to a government agency. The interests of justice will be undermined unless the client’s confidence is maintained by specific provision.

Section 29 – Monitoring Effectiveness of Guarantee Funds etc.

This section gives the SLCC powers to monitor the effectiveness of –

a) the Scottish Solicitors Guarantee Fund;

b) Professional Indemnity Insurance arrangements; and

c) any other funds or arrangements maintained by any professional organisation for purposes analogous to the Guarantee Fund or the Professional Indemnity arrangements.

**Society comment**

This is another example of where it is proposed that SLCC may be given inappropriate powers to supervise the arrangements which the professional organisation may have entered into. This issue was not consulted upon. The consultation asked about providing the Scottish Legal Services Ombudsman with such powers and the consultation results were evenly split on that topic. It is not clear:-

a) what the justification is for taking such powers which may have nothing to do with how complaints are handled;

b) what is meant by “monitoring the effectiveness” of the guarantee funds or other professional indemnity arrangements;

c) how it is expected that the professional organisation can give effect to any of the SLCC’s recommendations when it may not have the power over how claims are dealt with.
The Society would stress that it does not, itself, handle claims under the Master Policy. Such claims are dealt with by the insurers of the Master Policy and claimants can refer any unsatisfactory settlement to the relevant Ombudsman.

The Scottish Solicitors Guarantee Fund

Every client of a Scottish solicitor is protected from financial loss, resulting from any dishonesty by the Solicitor, under the Scottish Solicitors Guarantee Fund. The entire cost of claims and of administering the Fund is borne by practising solicitors. It is not funded by the taxpayer. The Society has developed a system to monitor regularly the financial arrangements of every solicitor who holds clients’ funds, to require all solicitors to comply with the rules and if necessary to take disciplinary action against those who fail.

The Guarantee Fund Committee, which meets monthly, oversees the operation of the Guarantee Fund under powers delegated from the Society’s Council. Members of the Committee presently consist entirely of members of the Council, however, the recruitment of non-solicitor representation is underway. Apart from the Convener of the committee its members work without remuneration. (Appendix 6(a))

The criteria for making a claim are set out in section 43 of the Solicitors (Scotland) Act 1980. (Appendix 6(b)). To qualify for a grant from the fund there must be shown to be dishonesty on the part of a solicitor resulting in financial loss and there must be no other means of recovering the money. (See further Justice 1 submission –Appendix 6(c))

A claim is made in writing giving details of the amount claimed and the solicitor involved. Evidence requires to be produced in respect of all aspects of the claim. Any claim must be notified within one year of the loss coming to the attention of the claimant. A report is then prepared and submitted to the Guarantee Fund Committee for decision.

The total amount of losses resulting from the dishonesty can be claimed without financial limit. In almost all cases the full amount is paid. The claimant may also be given an amount towards all or part of his or her solicitor’s fee regarding the submission of the claim.

If the claim is accepted the claimant will be expected to assign the right to recover the money from the solicitor to the Society. This allows the Society to recover funds paid out.

The Society does not have control over the time taken by some of the processes in determining a claim. For example, a Judicial Factor may take a long time to review the position as this may require the complete revision of the accounting records of the firm. Forensic examination of the books of account can only be verified by obtaining evidence from third parties e.g. lenders, banks and individual clients who may number many hundreds.

Where the dishonest solicitor was operating within a partnership, the clients’ claims against the innocent partners will be covered under the Master Policy. Recompense for the client may, therefore, come through the Master Policy rather than the Guarantee Fund. Resolution of these issues takes time.

If hardship is being experienced by the claimant, the Council can take emergency measures to assist. For example, the Guarantee Fund has in the past underwritten a bridging loan in circumstances where a house purchase may not have proceeded had they not so acted. The discretion given to the Society under the Act allows flexibility in making decisions.

The Society operates a risk management system to improve standards of solicitors’ accounting, to minimise losses to the Guarantee Fund and to reduce the opportunity for solicitors to misappropriate clients’ money. The following arrangements are in place to allow the Society to carry out this function.

The Solicitors (Scotland) Accounts etc. Rules 2001

The Rules have been developed over the years to ensure that proper records are kept which show the true financial position of a firm at any time. Some of the issues covered by the rules are detailed in Appendix 6(d).

Every solicitor who keeps clients funds must submit to the Society half yearly certificates of compliance with the Rules. This is an effective and valuable mechanism.
A programme of inspection is operated whereby the books of account of solicitors' firms are inspected routinely by way of a two/three yearly rolling programme. The Guarantee Fund employs twelve inspecting accountants who audit the accounts of solicitors. They check solicitors half yearly certificates, review client accounts and review the firm's financial position to find out whether the firm and its partners are under financial pressure. The results of these inspections are reported to the Committee. The Committee considers them and if necessary orders appropriate action to remedy problems.

The Society has developed a training programme for solicitors to familiarise them with the requirements of the Accounts Rules. (For details of training see Appendix 6(e))

The Committee has various sanctions or other actions at its disposal (see section 4).

The Committee may also call any of the partners of the firm to interview before a panel of the Committee. This could be either for disciplinary or guidance purposes. On average 32 firms are interviewed each year.

If the behaviour of a solicitor amounts, in the view of the Committee, to professional misconduct, a solicitor will be prosecuted before the SSDT. The SSDT's powers and the sanctions available to it in matters of Professional Misconduct are set out in the Act at section 53.

The Committee also has the power to withdraw a solicitor's practising certificate in circumstances where he persists in breaching the Account Rules (section 40 of the Act - Appendix 6(f)).

Judicial Factors

In very serious cases the Committee will consider applying to the court to have a Judicial Factor. (section 41 of the Act - Appendix 6(g))

A Judicial Factor can be appointed by the Court of Session to take over the responsibility for running the firm. The Factor will run the business in order to protect client interests and to minimise losses. This will mean staffing the office, examining the accounts to establish which clients' business requires immediate attention and investigating the solicitor's activities.

Any dishonest activity on the part of a solicitor or their staff will be referred either by the Society or the Judicial Factor to the Crown Office for criminal prosecution.

Overview

The Guarantee Fund and the associated monitoring and compliance system together with the training provided affords to the public a system:

- Without financial limit of indemnity
- At no cost to the public.
- Affordable by solicitors and economically run under the control of the solicitor profession which meets the whole cost
- Which maintains high standards of accounting and honesty among the profession of which it is rightly proud.
- Carried out by experienced staff accountants and solicitors who are able to deal with the work in a way which is effective, economic, confidential and sensitive as a result of their knowledge of the subject matter of the case work
- Has proven effectiveness in reducing claims.

In the periods 1992/93 and 1993/94 claims on the Fund of almost £5 million were met. This bad claims experience arose from the success of the introduction of a revised inspection system in the early 1990s, which identified problems in the first cycle of visits. Since the initial bad claims experience, which involved almost entirely on two firms, the annual average experience of claims has been at the level of less than £250,000 per year. In the most recent year, 2004/5, claims of £214,000 were met. There were 1250 legal firms and 3729 principal solicitors, a relatively constant population size over the last 10 years. The improved claims experience can be largely attributed to the regular inspection of all firms that handle client funds, together with the system of self certification by solicitors, already referred to, which was introduced in 1998.

(Claims experience and comparison to The Law Society of England & Wales - Appendix 6(h))
The Scottish system of Solicitors Accounts and Guarantee Fund Regulation is internationally renowned as being a model to follow. (Appendix 6(i))

**Section 30 – How Practitioners deal with Complaints: Best Practice Notes**

This section enables the SLCC to issue guidance about how practitioners can deal with complaints about professional conduct or professional services. This guidance may recommend, or include recommendations, as respects standards for systems by practitioners for handling complaints.

**Society comment**

The Society is of the view that the SLCC should not have a role in giving the profession guidance about conduct issues: that is the responsibility of the Society. The SLCC has no experience in this area and giving the SLCC this power will undermine the independence of the legal profession and a system which operates effectively and efficiently at the Society.

**Miscellaneous**

**Section 31 – Power by Regulations to amend Duties and Power of Commission**

This section provides that Scottish Ministers can, after consulting the SLCC, the relevant professional organisations and such other persons or groups of persons as it considers appropriate modify Part 1 of the bill to adjust the duties imposed, or the powers conferred on, the SLCC. Regulations may contain such incidental, supplemental, consequential, transitional, transitory, or saving provision as Scottish Ministers consider necessary or expedient.

**Society comment**

These powers are commonplace in many pieces of legislation. However, they are problematic when dealing with a supposedly independent regulator of the legal profession. Such regulations are to be made by affirmative resolution procedure. The Society is of the view that there should also be consultation with relevant stakeholders before such Orders are made.

**Section 32 – Reports: Privilege**

This section provides that certain reports made by the SLCC shall have qualified privilege for the purposes of the law of defamation.

**Society comment**

The Society agrees that the SLCC’s reports should attract qualified privilege.

**Section 33 – Giving of Notices etc. under Part 1**

This section provides rules for notices under the bill.

**Society comment**

The Society is of the view that the power to make regulations under subsection 2(a)(v) should be reconsidered and the provisions should be set out in the bill.

**Section 34 – Interpretation of Part 1**

This section provides definition for many of the terms used in the bill including “client”, “complainer”, “inadequate professional services”, “practitioner”, “relevant professional organisation” and “unsatisfactory professional conduct”.

**Society comment**

The Society is particularly concerned at the definitions of “Client” and “Inadequate Professional Services” (IPS) which are defined as:-

“client” —
(a) (in relation to any matter in which the practitioner has been instructed) includes any person on whose behalf the person who gave the instructions was acting;
(b) where the practitioner is an employee of a person who is not a practitioner, includes (in relation to any matter in which the practitioner has been instructed by the employer) the employer;"

In relation to the above definition in (b), does this mean that a firm can complain about an assistant in its office? More particularly, would this proposed provision include solicitors employed by firms/companies other than solicitors/firms? If so, this would add unacceptable costs to such solicitors and would create a disincentive for them to remain as solicitors.

“inadequate professional services”—

(a) means, as respects a practitioner who is —...

(v) a solicitor, professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor;

(b) includes any element of negligence in respect of or in connection with the services;"

The issue relates to section 34(b) which purports to include in the definition of IPS “any element of negligence”. This concept is not defined in the bill. The law of negligence is a large, complex and developing area of law which is difficult to adjudicate without proper court processes.

Negligence is part of the law of delict, a branch of the law of obligations, where the law imposes on an individual a legal obligation to compensate for a breach in the duty of care owed to another person. General principles of the law of negligence include title to sue, liability defences and exemptions, contributory negligence, remoteness of damage and remedies. It is not a simple issue. The bill is not clear about the nature of “negligence”, nor how the general law will be applied. There will be difficult issues where non-solicitors and solicitors share liability. The bill is silent on the extent to which the court-based remedies are excluded, or how they will apply in complex cases involving non-solicitor defenders. The consultation proceeded on a false premise, the responses to the consultation were not conclusive. The reference to “negligence” in section 34 should be deleted.

PART 2 – COMPLAINTS: OTHER MATTERS

Section 35 – Conduct Complaints: Duty of Relevant Professional Organisations to Investigate etc.

This section imposes a duty on professional organisations to investigate conduct complaints which are remitted by the SLCC and to report to both the complainer and practitioner about the facts established and what action the organisation proposed to take.

Society comment

The Society has no comment to make on this section which is analogous to the provisions of section 33 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Section 36 – Unsatisfactory Professional Conduct: Solicitors, Firms of Solicitors, Incorporated Practices or Certain Limited Liability Partnerships

This section amends the Solicitors (Scotland) Act 1980 to give the Society powers over unsatisfactory professional conduct. Section 34 defines unsatisfactory professional conduct as “professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor”. This section obliges the Society to determine a complaint after it has investigated it and made a written report and given the practitioner an opportunity to make representations. The sanctions which the Society can impose are censure; direct a practitioner to undertake such education or training as regards the law or legal practice as the Society considers appropriate; fine the practitioner up to £2,000; direct a practitioner to pay to the client compensation up to a maximum of £5,000.

The Society can take account of any previous determination upholding a complaint against a practitioner or unsatisfactory professional conduct, unless an appeal is pending or a decision which has been ultimately quashed on appeal. Society is obliged to intimate any determination by it to both the complainer and the practitioner. The practitioner has a period of 21 days to appeal to the SSDT against the determination.
Scottish Ministers can make a Statutory Instrument to increase the figure of compensation. The Society is also obliged to require every practitioner who is subject to a direction made under this section to give, before the expiry of 21 days, an explanation of the steps taken to comply with any direction. Scottish Ministers are given broad powers to make such modification of any enactment, including the Legal Profession and Legal Aid (Scotland) Act 2006, as they consider appropriate for the purposes of giving the Society, the Tribunal or the Court further powers as respect conduct complaints.

**Society comment**

The Society is of the view that the wide power to make subordinate legislation under section 36(4) should be considered carefully. Such a power is very substantial and cuts across the role of Parliament. It would be better legislative practice for the policy to be adopted to be set out in the bill.

**Section 37 – Unsatisfactory Professional Conduct: Conveyancing or Executry Practitioners etc.**

This section enables Scottish Ministers to make regulations to deal with conduct complaints of unsatisfactory professional conduct by conveyancing practitioners or executry practitioners.

**Society comment**

The Society is of the view that this wide power to make subordinate legislation under section 37(1) should be considered carefully.

**Section 38 – Power of Tribunal to award Compensation for Professional Misconduct**

Section 38 increases the powers of the SSDT to direct a solicitor, or conveyancing or executry practitioner, who is found guilty of professional misconduct, to pay compensation up to £5,000.00.

**Society comment**

In response to the consultation, the Society responded that there was no reason, in principle, why compensation cannot be ordered in cases of misconduct on the basis that this would promote the interests of the profession by ensuring that solicitors who contravened the standards of professional conduct could be penalised in an effective way and promote the interests of the public in providing a tangible expression of the profession’s view of the breach of trust committed by the guilty solicitor.

The Society does not agree that the maximum compensation level should be increased to £5,000 on the basis that this is disproportionately high.

**PART 3 - LEGAL PROFESSION: OTHER MATTERS**

**Section 39 – Constitution of Scottish Solicitors’ Discipline Tribunal (“SSDT”)**

Section 39 amends the Solicitors (Scotland) Act 1980 by providing that the SSDT should be constituted have not more than 28 members with equal numbers of solicitor and non-lawyer members. This amends Schedule 4 of the 1980 Act for the SSDT to have not less than 10 and not more than 14 solicitor members and 8 non-lawyer members.

**Society comment**

The Society agreed to the composition of the SSDT being 50% solicitor and 50% non-solicitor.

**Section 40 – Scottish Solicitors Guarantee Fund: Borrowing Limit**

This section increases the borrowing limit available to the Law Society of Scotland in respect of the Guarantee Fund from £20,000 to £1.25 million.

**Society comment**

The Society requested this increase for the following reasons:-

1. The Scottish Solicitors Guarantee Fund has no cap on claims arising from dishonesty, but does have stop-loss cover for losses from £2 million through to £5 million, which means that the Fund has to pay losses up to £2 million from its own resources.
2. The Society does not hold £2 million as assets of the Fund but expects to be able to finance between £800,000 and £1 million. On that basis, the Society considers an overdraft limit of £1.25 million would be sufficient to cover the shortfall.

Section 41 – Safeguarding Interests of Clients

This section amends section 45 of the Solicitors (Scotland) Act 1980 to provide for a client account held in the name of a solicitor, or solicitor’s firm, to vest in the Law Society of Scotland where a sole practitioner has been restricted from acting as a principal by the SSDT.

Society comment
This section was requested by the Society.

Section 42 – Offence for Unqualified Persons to prepare Certain Documents

This section amends section 32(2) of the Solicitors (Scotland) Act 1980 which made it an offence for unqualified persons to prepare inter alia court documents.

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 did not change section 32 in relation to members of professional or other bodies who had acquired rights to conduct litigation or rights of audience and consequently, a member of such a body who sought to exercise such rights would be guilty of an offence under section 32. Accordingly, this provision allows members of bodies that have made successful applications for rights to conduct litigation or rights of audience to prepare documents without fear of breaking the law.

Society comment
The Society has no objection to this provision.

Section 43 – Notaries Public to be Practising Solicitors

This section amends the 1980 Act to provide that only solicitors currently holding a practising certificate can be included in the Society’s Register of Notaries Public. This amendment to section 58 of the 1980 Act requires the Society to remove a person’s name from the Register of Notaries Public if that person no longer has in force a practising certificate.

Society comment
This is a change which will ensure notaries participate in the Society’s public protections.

PART 4 – LEGAL AID

The response to Part 4 of the Bill was formulated by the Access to Justice Committee of the Law Society of Scotland. This Committee comprises equal numbers of solicitors and non-solicitors and has as its principal objective to ensure that members of the public have adequate access to legal advice and assistance in all circumstances where this is necessary.

Section 44 – Criminal Legal Aid in Solemn Proceedings

This section amends the Legal Aid (Scotland) Act 1986 by transferring the power to grant criminal legal aid in solemn proceedings from the Courts to the Scottish Legal Aid Board.

Society comment
The Society sees practical difficulties with this provision. Automatic criminal legal aid is available under section 22(1)(b) of the Legal Aid (Scotland) Act 1986 until such time as the application for legal aid under section 23(1)(a) of the Act has been determined or the accused is admitted to bail or released.

However, there are situations where an accused person is fully committed at the first hearing or a solicitor does not make an application for criminal legal aid until the full committal proceedings. It would therefore be important to extend the provisions of regulation 15 (matters of special urgency) of the Criminal Legal Aid (Scotland) Regulations 1996 to include applications under the proposed section 23A of the Act.
Section 45 – Register of Advisers: Advice and Assistance

This section amends the Legal Aid (Scotland) Act 1986 to enable the Scottish Legal Aid Board to fund advisers who are not lawyers in order to provide legal advice and assistance.

SLAB is obliged to establish a register of approved advisers who must not be solicitors, advocates, conveyancing or executry practitioners, or persons who have rights of audience. This provision enables SLAB to make payments out of the Legal Aid Fund to registered advisers and inserts a new Schedule 6 into the Legal Aid (Scotland) Act 1986. This sets out how an adviser may be registered, the application of an adviser code to registered advisers and organisations, the monitoring of registered advisers by SLAB and the removal of persons from the register.

Society comment

The Society accepts that, in certain circumstances, advisers who are not fully legally qualified may be in a position to provide advice, in particular areas of the law, which is of the same quality as advice provided by solicitors. Indeed, the Society has already recognised, in the context of the reform of legal aid and assistance, that there are areas where advice sector bodies may have specialist skills which may make them, in certain circumstances, an equivalent source of advice. The Society welcomes the Strategic Review of Legal Aid to develop a balanced approach to the provision of all publicly funded legal advice. The Society supports the general principle that public funding should be available to support the provision of such advice.

There are, however, a number of practical reservations about this section as it stands, which is not in line with the approach recommended by the Strategic Review:-

1. The Society is not persuaded that the provisions as currently drafted are likely to have a significant take up by the advice sector. There requires to be a registration process for advisers and SLAB is most obviously placed to undertake that task. Nonetheless registration is likely to involve a considerable investment of time and money. If it is unclear to the registered adviser the extent to which they can expect take up by the public then, since remuneration is to be linked to individual clients, or at least cases, most advisers will probably not be inclined to make that investment where there is uncertainty as to reward.

The Society feels that a more appropriate way to fund unqualified Advice services from the legal aid budget would be by service level agreements which would guarantee a minimum payment to registered advisers against a "contract" with SLAB to undertake a minimum number of cases in any given year.

2. The level of remuneration for registered advisers is unclear in the Bill. Under the current legal advice and assistance scheme only a solicitor can provide legal advice. An unqualified employee employed by a solicitor may provide assistance. There is a significant differential between the rate paid for fully qualified advice and assistance and unqualified assistance. It is unclear what level of remuneration registered advisers will receive. On the one hand if they are paid at the current unqualified rate then the level of the reward is so inadequate that there will be little or no interest from the advice sector. If payment is made at the qualified rate however, it would be an anomaly that a person registered with the Board (and with only a limited amount of training) could be paid at a higher rate than a trainee solicitor who has, even at the commencement of his or her traineeship, already undergone a minimum of 4 years legal education.

3. Individual case charging is alien to most of the advice sector. Solicitors are used to charging on an individual case basis and most solicitors undertake civil advice and assistance only as one part of a wider practice involving not only private work but work undertaken under the civil and criminal legal aid schemes.

In the advice sector there is also the principle that advice provided is free. The current advice and assistance scheme however operates on a contributory basis which would involve the advice agencies having to assess means and collect contributions. This issue of principle is likely to mitigate against a significant take up of the Bill’s provisions.

4. As presently drafted, the provisions in respect of

   a) complaints against registered advisers;
b) the qualifications to be a registered adviser; and

c) the requirement to have in place adequate consumer protection and oversight of SLAB as the “regulator” of advisers

are inadequate and need more detail.

Advisers should be subject to the SLCC in respect of service complaints and there should be an appropriate disciplinary procedure created to deal with issues of adviser misconduct.

5. Schedule 1A(3) which provides for SLAB to employ registered advisers is not clear. The Society does not believe that registered advisers will be able to operate adequately or to assess unmet legal need if directed centrally from the Board’s office in Edinburgh.

In the Society’s view, registered advisers should be employed locally by existing agencies, of which the most obvious are the member Bureaux of Citizens Advice (Scotland) but which should also include independent welfare rights agencies and charities operating in specific areas such as mental health.

If advisers are to be employed directly by SLAB then provisions need to be put in place to monitor the quality of advice and cost efficiency of the service. Such monitoring would have to be independent of SLAB.

In summary, whilst the Society welcomes the principle of advice provided by non fully legally qualified advisers being funded under the legal aid scheme, it is not persuaded that the Bill’s provisions set out a scheme which is likely to have any significant take up by the advice sector. The Society believes that the provisions of Section 45 should be fundamentally rewritten to enable such advice to be funded on a service level agreement basis. Whether there is any scope for case by case funding might then be considered in the longer term.

Section 46 – Contributions and Payments out of Property Recovered

This section amends the Legal Aid (Scotland) Act 1986 by providing that sums paid for Advice and Assistance, as well as sums paid in respect of Civil Legal Aid, shall be included in the calculation of the net liability of the Legal Aid Fund in relation to proceedings in respect of which a person has been granted Civil Legal Aid.

Society comment

This is a tidying up amendment which has the support of the Society. In the course of the Strategic Review which preceded this legislation there were however a large number of other elements of the current legal aid scheme which were identified as being in need of legislative tidying up. It is unclear as to why this provision alone has been chosen for attention at this time.

PART 5 – GENERAL

Section 47 – Advice, Services or Activities to which Act does not apply

Section 47 excludes from the terms of the bill advice services which relate to Consumer Credit Act 1974; Insolvency Act 1986; Immigration and Asylum Act 1999; or the Financial Services and Markets Act 2000.

Society comment

These categories of advice or services are covered by reserved matters in terms of the Scotland Act 1998 and the Scottish Parliament does not have competence to legislate. The Scottish Executive intends that these matters should be covered by the provisions of the Legal Services Reform Bill for England and Wales. Accordingly, the legislative competence motion for the Legal Services Reform Bill will have to be scrutinised fairly closely to ensure that it is appropriately dealt with.

Section 48 – Ancillary Provision

Section 48 is a standard provision which allows Scottish Ministers to make incidental, supplemental, consequential, transitional, transitory, or saving provisions by way of an Order.
Section 49 – Regulations or Orders

Section 49 provides that any power conferred on Scottish Ministers to make Orders or Regulations must be exercised by Statutory Instrument and may be exercised so as to make different provision for different purposes. The provisions of the bill relate generally to negative procedure; only two provisions relate to affirmative procedure. These are regulations under sections 17(3) or (4), 31(1), 36(4) or 37(1) and section 48 and paragraph 2(7) of Schedule 1.

Society comment

The Society has no comment to make on this section.

Section 50 – Interpretation

Section 51 – Minor and Consequential Modifications

Section 52 – Short Title and Commencement

Society comment

The Society has no comment to make on these sections.

SCHEDULES

Schedule 2 – Further Powers of Commission under section 13 or 28

Schedule 3 – Rules as to Commission’s Practice and Procedure

Schedule 4 – Minor and Consequential Modifications

Society comment

The Society has no comment to make at Stage 1, but may put forward amendments at Stage 2 on these Schedules.

APPENDIX 1

Approximations of Scottish Solicitors’ Workload And Complaints Statistics

Registers of Scotland (2004-2005 Figures)

Land Register:

First Registrations (intake): 66,589
Transfers of Part (intake): 25,898
Dealing with Whole (intake): 267,224

Sasine Register:

Intake (Gross): 121,438

Chancery and Judicial Registers:

Intake: 46,121
Register of Inhibitions and Adjudications:
  Intake: 22,933

Scottish Legal Aid Board (2004-2005 Figures)

Advice and Assistance:
Total Civil Advice and Assistance & ABWOR (Intimations): 128,944
Total Criminal Advice and Assistance & ABWOR (Intimations): 152,174
Total Children’s Advice and Assistance: 5,687
Total: 286,805

Civil Legal Aid:
Total Number of Grants: 10,989

Criminal Legal Aid:
Total Number of Grants (Summary Legal Aid): 80,496
Total Number of Grants (Solemn Legal Aid): 13,518

Civil Court Actions (2002 Figures) (more recent figures not yet available)

Court of Session:
Total Number of Actions Initiated: 5,059

Sheriff Court:
Total Number of Actions Initiated: 115,326

Criminal Court Actions (2004-2005 Figures)

Solemn Disposals:
  High Court: 852
  Sheriff & Jury Courts: 3,611
  Total: 4,463

Summary Disposals:
  Sheriff Court: 83,355
  District Court: 41,292
  Total: 124,647

Companies House (2004-2005 Figures) (incomplete - approx)

No. of New Companies Incorporated in Scotland: 17,766
No. of Changes of Name Registered: 3,992

TOTAL: 1,213,264
SOCIETY’S SUMMARY OF PROFESSOR DAVID MCCRONE’S ANALYSIS OF GOVERNANCE ISSUES

The Law Society of Scotland commissioned a report by Professor David McCrone, co-director of Edinburgh University’s Institute of Governance, into the background to, and contents of, the Legal Profession and Legal Aid (Scotland) Bill. Professor McCrone also provided a broad analysis of the regulation of the legal and other professions. The Institute studies the sociology, politics and governance of Scotland. Key points identified by the Society include:

- Professor McCrone is scathing of the consultation exercise and analysis which led to the Bill. He describes the process as being “quick and dirty”, containing “elementary howlers”, “half-baked evidence” and misleading information about levels of criticism of the current system and options for change.

- In general, he believes the proposed system could be costly and over-elaborate – a “hammer to crack a nut”. More specifically on costs, Professor McCrone questions if the estimated running costs of £2.4 million a year are realistic and warns that costs could escalate in the future. He says “there appears a ratchet effect as regards costs”.

- He says membership of the new body seems too closely in the gift of government and politicians.

- He points out that professionals are in the majority in the regulatory system of other professions he examined – which included accountants, doctors and teachers – yet the proposed Scottish Legal Complaints Commission would have a lay majority and lay chairman, with no guarantee of solicitor representation.

THE GOVERNANCE OF LAW:

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

This report is divided into six parts:

1. Why regulatory bodies (including ‘quangos’ and NDPBs) have become more numerous and salient in contemporary social and political life in Scotland;


3. An analysis of the report on written consultation responses to the Scottish Executive’s document ‘Reforming Complaints Handling: building consumer confidence’;

4. Observations on the Legal Profession and Legal Aid Bill;

5. A review of regulatory procedures with regard to comparator professions, viz., ICAS, GTC, GMC, and Financial Ombudsman Service;

6. General observations resulting from the analysis.

The report has been written and produced by Professor David McCrone, co-director of The Institute of Governance at Edinburgh University.

1.0 REGULATORY BODIES

1.1 Recent years have seen a major growth in supervisory and regulatory bodies governing both public and private sectors. This in part reflects a process of de-regulation and privatisation of public bodies, while at the same time recognising that there is a need for public accountability and regulation in the public interest. Hence, there has been a growth in regulators and ombudsmen.
1.2 As a consequence, there has been awakened interest in ‘quangos’ and NDPBs (non-departmental public bodies), who gets appointed to them, and what their remit is. In his review of quangos in Scotland shortly after the Scottish parliament was established in 1999, Richard Parry observed: ‘Quangos represent a cluttering of the political landscape, with potentially redundant decision layers. These will be decreasingly acceptable now that a straightforward central government model of parliamentarians and ministers is available in Scotland. Delayering is all the fashion in private business, and structures that build in second-guessing or duplication of decisions are managerially dubious’ (Parry, 1999:25).

It is possible that Parry was too sanguine in his views of the impact of devolution, and in any case, the evidence in the UK as a whole, is that the ‘quango state’ is alive and all too well south of the border (Select Committee on Public Administration, Mapping the Quango State, HC 367, 2000-1). Coined by the Platsky Report on Non-Departmental Public Bodies in 1980, the Cabinet Office defined it in the following way:

‘A quango is officially defined as a body which has a role in the processes of national Government, but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm’s length fro ministers. More simply, this means a national or regional public body, operating independently of Ministers, but for which Ministers are ultimately responsible. Such bodies are formally classified as NDPBs – or non-departmental public bodies.’ (Cabinet Office, NDPBs: a Guide for Departments, 2000).

A matrix of NDPBs as they relate to Scotland is to be found at the end of this section (‘A Guide to NDPBs’).

1.3 In a Scottish context, the increasing number of regulators, commissioners and ‘tsars’ has drawn political and media attention. (The Conservative MSP Bill Aitken waspishly commented that Scotland now has more tsars than the Romanoff dynasty.) The Scottish Parliament’s Finance Committee recently (March 2006) announced its intention to carry out a review of such bodies, and whether they are value for money (‘Accountability and Governance Inquiry’). Regulatory bodies accountable to parliament include: Audit Scotland, Scottish Public Services Ombudsman, the Commissioner for Children and Young People, Commissioner for Public Appointments in Scotland. Those accountable to Scottish Ministers include: Scottish Information Commissioner, Office of the Scottish Charity Regulator, Scottish Commission of the Regulation of Care, and Standards Commission for Scotland.

1.4 The Better Regulation Task Force which was set up in 1997 estimated that the cost to the UK economy of regulation is between 10-12% of GDP, over £100bn, similar to annual income tax returns (Better Regulation, annual report, 2005). In its March 2005 report to the Prime Minister, ‘Regulation – Less is More’, BRTF identified ‘regulatory creep’ whereby over-zealous interpretation by government leads to red tape. BRTF argued for greater clarity, consistency and better communication. It commented: ‘One of the most unfortunate things about administrative burdens is that those imposing them often do not think about or cannot see the true costs which they are imposing on others.’ (BRTF, 2005, p.3) It commended to government the principle of ‘one in, one out’ whereby new regulations have to be matched by deregulatory measures. Its report had five recommendations to government:

- Government should be more proactive in seeking out proposals for simplification;
- It should adopt a ‘one in, one out’ approach to regulation;
- Departments and regulators should undertake more frequent and better post-implementation reviews of regulation;
- Government should set up effective and efficient mechanisms to deliver regulatory reform;
- Business and other stakeholders should also identify redundant or over-burdensome regulation.

1.4.1 In its evidence to the Clementi Commission (June 2004), BRTF rejected the setting up of an overarching regulator, the Legal Services Authority (LSA) on the grounds that professional responsibility would be undermined if the legal profession were entirely disengaged from the process of making the rules which govern it. It commended ‘model B+’ on the grounds that it would split regulatory and representative functions. In January 2006, BRTF became the Better Regulation Commission (BRC). It is committed to the ‘fit for purpose’ principle whereby regulatory devices should be appropriate to the task at hand, and should have built-in safeguards to prevent escalating costs.

1.4.2 The UK government cited the Better Regulation Action Plan of 2005 in support of its Legislative and Regulatory Reform Bill (January 2006) ‘to make it quicker and easier to tackle unnecessary and over-complicated regulation and help bring about a risk-based approach to regulation’, and in the context of the Better Regulation Commission’s five principles of good regulation (Cabinet Office News Release, 11th January 2006).
2.0 THE CLEMENTI REPORT AND THE WHITE PAPER (England and Wales)

2.1 Appointments:
2.1.1 Clementi argued that the appointment of Chairman and Chief Executive of the Legal Services Board (LSB) would lie between the Secretary of State for Constitutional Affairs and the Judiciary. On the one hand, the Board needs to be free from political influence; and on the other, the Secretary of State is responsible to parliament for the conduct of legal services sector. Clementi concluded: ‘The proposal of this Review is that the appointment of the Chairman and Chief Executive should be made by the Secretary of State for Constitutional Affairs in consultation with a senior member of the judiciary [Clementi suggested the Master of Rolls]’ (p.83, para. 13).

2.1.2 The White Paper opted to have Secretary of State for Constitutional Affairs appoint the Chairman, as well as members of LSB ‘following consultation with the chair’ (p.32, 5.5). The LSB would appoint the chair of OLC ‘subject to the approval of the Secretary of State for Constitutional Affairs. Members of the OLC board would be appointed by LSB, without approval of the Secretary of State for Constitutional Affairs. Appointments to be subject to ‘Nolan’ rules (Office of the Commissioner for Public Appointments).

2.2 Costs:
2.2.1 Clementi employed Ernst and Young who argued that best estimate of cost of model B+ in a simplified system (England and Wales as much more complex than Scotland) at £50.5m, including additional cost of new legal services board at £4.5m. Costs would be covered by general levy across front-line regulatory bodies; and payments from those against whom complaint is upheld (‘polluter pays’ principle).

2.2.2 The White Paper argued that costs are borne by legal profession; by LSB charging FLRs (front-line regulators) for costs of regulation. Funding of OLC on 30% from general levy on profession, and 70% from ‘polluter pays’ mechanism.

2.3 The White Paper argued for high level salience of a Consumer Panel (its White Paper is called ‘The Future of Legal Services: Putting Consumers First’), with major sections given over to discussion of Alternative Business Structures (ABS) whereby multi-disciplinary partnerships including non-lawyers are involved. Clementi devoted a chapter to this but seemed less focused on this, as indeed does the Scottish draft bill.

2.4 Issue as to who controls Guarantee Fund and Master Policy: in the England and Wales White Paper, there is some discussion of their equivalents coming under the jurisdiction of Financial Ombudsman Service (FOS) which itself comes under FSA (Financial Services Agency). I noted that Law Society of Scotland (LSS) made this point too, arguing that it is already answerable in this regard to FSA/FOS, and that there is no role for Scottish Legal Services Ombudsman in overseeing the Master Policy. Indeed, OFT investigated the Master Policy in 2004-5, and had no adverse comments to make.

3.0 REFORMING COMPLAINTS HANDLING, BUILDING CONSUMER CONFIDENCE: ANALYSIS OF WRITTEN CONSULTATION RESPONSES

3.1 The Scottish Executive was reportedly pleased (a) that 490 responses were received to this consultation, second in number only to its consultation proposing the ban on smoking in public places; and (b) that these appeared to support its stance on reforming complaints procedures.

3.2 The analysis and reporting of these responses conform to a recognisable genre for those familiar with similar consultation exercises, namely, taking each of the questions/headings in the original document, and sorting responses into these, normally adding them up in terms of being for and against (with percentages), supplemented by the use of selected quotations from written submissions. This descriptive exercise is usually described as ‘analysis’, but does not involve any or much data manipulation using quantitative or qualitative techniques.

3.3 The analysis here has been carried out by Linda Nicholson, described as The Research Shop, based in Peebles, possibly a one-person outfit, of which there are a few who take on this kind of consultancy work devoted to analysing consultation responses for government and the public sector. According to web searches, The Research Shop has carried out similar work in Scotland on, for example, dental services, NHS pharmacy services, family law, the Sentencing Commission, and organ and tissue donations. This kind of work is possibly best described as ‘cheap and cheerful’, which is not meant to
be pejorative, but simply to indicate that it is not especially sophisticated or nuanced, if only because
the budgets involved are quite modest and the time-scales very tight. There are some freelance
consultants who make a living in this way by doing such work for the Scottish Executive.

3.4 In the case of this report, it has many of the deficits as well as some merits. One cannot say that it
has skewed the findings, but one is left with doubts about the methodology which is largely
superficial, and sometimes misleading. For example:

3.4.1 **Small numbers**: there is over-dependence on percentages, even where the Ns are very
small. For example, see page 36, table 4: percentages are given for an N of 31, which means
that every single person represents three percentage points. It is not sensible to do this.

3.4.2 **Base numbers**: Even where the Ns are of a reasonable size (100+), everything depends on
the base, that is, what it is a percentage of. This can make all the difference to a conclusion.
For example, much is made of the fact that 81% of members of the public support the
government’s preferred option D. These number 417, the largest group of those responding
to the consultation. It turns out, however, that only 107 members of the public actually
expressed a view on this, and of **these** 81% support option D. In other words, the 81%
calculation is based on 107 cases, not 417. One might just as well have written: ‘**Only 25% of
members of the public supported the government’s preferred option D**’. One might, of course,
be accused of choosing a statistic which fitted one’s case, but the far more important point is
that we have to be careful and transparent about the figures percentages are calculated
upon. To take another example: in the executive summary, in answer to question 1, bullet
point one says: ‘**The majority view (84%) was opposed to the legal professional bodies
keeping their regulatory and representative functions undivided.**’ Taken at face value, we
might conclude that well over 8 out of 10 people making written submissions wanted the
functions to be split. Not so. Turning to page 22, one discovers that ‘**In total, 216 respondents
(44%) provided a clear view on whether the regulation and representation functions of the
Law Society of Scotland should remain undivided.**’ In other words, it is 84% of this 44% who
take this view, not 84% of members of the public responding, still less of the total number
who sent in written submissions. In short, the headline statement on page 2 could well have
been written as: ‘**42% of members of the public were opposed to the legal professional
bodies keeping their regulatory and representative functions undivided.**’ If one wanted to be
devious, one might point out that a clear majority (58%) were quite happy with these
functions **NOT** being divided.

3.5 Let us examine the methodology more carefully. On page 15, the report says the following:

‘The majority of responses from members of the public were from people who had requested that the
Law Society investigate their complaint against their solicitor. However, there were indications that a
small minority of submissions from the public were from people who are currently, or have been
involved in the complaints handling process, for example, as lay representatives on a Law Society
Committee, or as reporters for the Law Society. Other people declared their interest, including retired
police officers, expert witnesses, and previous Citizens Advice Bureaux staff:’ (p.16)

This is an important paragraph because it points to a significantly varied and diverse category of ‘the
public’. From the first sentence, one assumes that the researcher has been able to identify
complainants however narrowly or broadly. One might have expected her to analyse their responses
in that context, setting aside those with perhaps other axes to grind. To treat, then, ‘members of the
public’ as an undifferentiated whole – and it is the supposed weight of ‘public opinion’ which is mainly
brought to bear in this report – is to miss a very important trick. To be sure, all such consultation
exercises which invite responses have ‘bias’ built into them in the sense that they are not, and cannot
be, surveys of public opinion tout court. They plainly comprise people who have been moved to
respond to the consultation exercise, for whatever reason. That, plainly, is the nature of such
exercises. For example, the overwhelming proportion of people who responded to the government’s
consultation on banning smoking in public places were indubitably in favour of such a ban. One
cannot, however, infer from this evidence that the public as a whole is in favour of such a ban. It
turns out, of course, that the public is in favour of a ban, but we can only tell that from properly
representative surveys of public opinion. There are temptations to treat consultations as such;
witness, here, the sentence following the above:
‘Thus, the overall experience of the members of the public who had responded to the consultation
appeared to be broad with responses informed by a wide range of perspectives and involvement.’
(ibid.)
This statement may be true only insofar as it contains people who might be hostile, neutral as well as
sympathetic to the Law Society and the legal profession/system, for example, but one can only
analyse their responses in that context. What one cannot do is to treat these exercises as a quasi-
random sample on an ‘as-if’ basis.
3.6 It is good professional practice in survey research, when one has a self-selected sample, to set its parameters such as age, gender, social class and so on against those of the population as a whole; in other words, to show that x% of respondents are over 50 years of age compared with y% of the population as a whole. In this way, the reader can judge how ‘representative’ or otherwise responses are. The researcher tries to deal with this crucial point thus:

‘The consultation attracted a sizeable volume of responses from a wide spectrum of respondents representing a variety of perspectives. Remote, rural and urban locations were also represented among respondents. It was interesting to note the relatively high percentage of responses to this consultation from members of the public compared with similar consultation exercises. Considering the encouragement given to solicitor firms to respond to the consultation, it could be argued that the number of submissions from solicitors and advocates was lower than could have been expected. In addition, a small number of equality issues were raised by respondents to the consultation, suggesting that another ‘gap’ in submissions may be responses from representative equality bodies.’

3.7 In defence, one might point out that the remit is to make sense of written submissions, rather than to carry out scientific surveys of public opinion. What, in other words, can one do? It is interesting to look at how the Review of the Regulatory Framework for Legal Services in England and Wales, by David Clementi, handled these issues. The report points out that 265 written responses were received (to play the numbers game for a moment, and for effect, just over half the number received by the Scottish Executive), and these are treated as background information. In order to gauge public opinion, Clementi commissioned quantitative and qualitative research from MORI, involving a sample size of 1838 adults in England and Wales, as well as 12 focus groups. Among other questions, the survey asked about people’s views of the legal profession (mainly favourable, and well ahead of politicians and government ministers, but not as popular as teachers, doctors and nurses), their levels of knowledge of and involvement with law, when and why they consult lawyers, and their attitudes to legal services involving non-lawyers. In general terms, the survey work concluded that lawyers were not as well regarded as other professionals, less customer focused, approachable and transparent, but on the other hand, independent and providing a good quality service. The point about making this comparison between the reviews of regulatory frameworks for legal services north and south of the border is not to compare like with like, but to point to alternative ways of seeking and interpreting evidence, with a view to making policy changes in regulatory frameworks.

4.0 LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL: OBSERVATIONS

4.1 membership of SLCC:

4.1.2 all members including legal members are to be appointed by Scottish Ministers;

4.1.3 Scottish Ministers can remove a member from office;

4.1.4 there is no mention in the Bill itself of the Scottish Commissioner for Public Appointments, or of public appointments procedures, although these appear in the policy memorandum (p.6, para 26);

4.1.5 SLCC will have a Chief Executive to be appointed by the Commission, ‘with the approval of Scottish Ministers’
4.2 Costs:

4.2.1 whereas start-up costs are estimated at £451k, the running costs of the Commission are estimated at £2.4m p.a. Given that the Bill estimates that the Commission will have between 50 and 60 staff, one must ask how realistic this is;

4.2.2 Scottish Ministers can make grants to SLCC, not simply for start-up costs, but in the future, without any indication what these might be for;

4.2.3 the recurrent costs are to be met wholly by the legal profession whereas control is vested in the Commission and in Ministers. On the reverse principle that ‘he who calls the tune forces the piper to pay’, this has potential to be an open-ended and unpredictable commitment to be met by the profession;

4.2.4 complaints become much more expensive to handle. It might be helpful to give estimates for the unit costs of handling current complaints, versus future ones, given the significant fixed costs reflected in the Commission, which are to be carried by the profession, especially as there appears to be a ratchet effect as regards costs.

4.3 Interpreting the Consultation exercise: see Policy Memorandum:

4.3.1 para 15: this is a straight lift from the Report. It comments: ‘Thus, the overall experience of the members of the public who had responded to the consultation appeared to be broad with responses informed by a wide range of perspectives and involvement.’ See my comments on this in my analysis of this document. One cannot make this inference from the evidence given.

4.3.2 Para 31: ‘... overall the consultative response favoured option D...’ I have shown that this is technically incorrect insofar as a minority of ‘members of the public’ explicitly say so.

4.3.3 Para. 37: ‘... split between the public...’ (a) ‘the public’ per se did not respond to this; one is talking here of those who made submissions; (b) on its own admission, ‘members of the public’ who did so were differentiated into those who had been complainants and those who had not. The Report does not disaggregate these, even though it was possible to do so according to the evidence given.

5.0 COMPARATOR PROFESSIONS

5.1 Institute of Chartered Accountants of Scotland

5.1.1 ICAS has 15,000+ members, who are mainly (80%) employees rather than in private practice. Recently, there has been a significant increase in student members, especially located in England; thought to be due to quality of training and education provided by ICAS.

5.1.2 Not all accountants are members of ICAS; name ‘accountant’ is not legally protected. However, term ‘Chartered Accountant’ is reserved to members of ICAS, founded in 1854 by Royal Charter. ICAS is not ‘generally able to intervene in legal disputes between a client and their CA’ (ICAS, Complaints against Chartered Accountants, 2001:5.14). ICAS requires practising members to take out Professional Indemnity Insurance (5.3). Fee Arbitration Service uses CA arbitrators appointed to act as Auditors of Fees (7.1).

5.1.3 Where complaints cannot be resolved by conciliation, they are referred to the Investigation Committee (9.1), which is made up of CA and lay members. Having lay members began in late 1980s, when ICAS went to Scottish Consumer Council. In a committee of 20, around 7 are lay members. These are ‘people from other walks of life who ensure that the Committee deals fairly and even-handedly with every complaint’ (9.1). Adverts are placed in newspapers; lay members are paid a per diem fee.

Discipline Committee also has a number of lay members, and functions similar to a court or tribunal. ICAS also advertises for lay members of Council; council members cannot sit on Investigations Committee or Discipline Committee.

5.1.4 Lay members mainly come from law and related professions (e.g. former police officers). ICAS looks for qualified lay members according to matrix of skills required e.g. of small businesses or whatever.

5.1.5 ICAS Response to Professional Oversight Board for Accountancy (POBA) report entitled ‘Complaints and Discipline Procedures Review’.

1. For 20 years, ICAS has had an arbitration scheme (Auditor of Fees); not independent, being administered by ICAS and featuring only ICAS members as arbiters; deals only with fee-related complaints.

2. The paper takes a robust attitude to ‘growing regulatory burden’, and its response to POBA recommendation is ‘underscored by the belief that the reparation or compensation culture (an important subsidiary of the ‘Complaints Industry’) that has

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4 This document is due to be updated soon.
rapidly permeated society militates against enterprise and has tipped the balance unfairly against professional of every kind.’

3. ICAS proposes three stages to Alternative Dispute Resolution (ADR): in-house conciliation; external mediation; and external arbitration (note that arbitration only follows mediation). It does not believe that ICAS has responsibility to resolve disputes where internal conciliation fails. It supports independent administration of mediation, away from ICAS, and at no cost to it. Arbiters therefore should not be given powers to compensate, and calculation of consequential loss should not fall within arbitration scheme; ‘There is no substitute for the Courts in this respect’.

4. ‘ … any complaint that cannot be settled by secretariat conciliation in the first instance, must not be remitted to a mechanism that begins to erode the private law position of the member against the client. For that reason alone, members should not be compelled to remit disputes involving clients to arbitration. The mediation mechanism that ICAS proposes is the optimum from the point of view of keeping private law positions of member and client as equal as possible.’ (p.6)

5. ICAS is also concerned that POBA would prefer a single scheme in which all accountancy bodies are participants, and which would almost certainly be run from London. ‘ICAS does not believe a dissatisfied client in Scotland would willingly cede authority for the conduct of his case by someone at so far a geographical remove … In any event, contracts between clients and members which are performed in Scotland are therefore governed by Scots Law.’ (p.6)

5.1.6 General Observations:

1. in 2005, failure of proposed amalgamation of ICAEW and CIPFA, and opposition to ICAEW name-change to ICA (Jack McConnell also voiced opposition, as did Australian body)

2. ICAS: complaints about individual members (E & W complaints against firms; also has schedule of penalties; ICAS doesn’t); ICAS does not have powers to compel witnesses to give evidence.

3. POBA gave ICAS a clean bill of health. Powers to suspend members are being beefed up at moment.

4. ICAS has no equivalent of Guarantee Fund.

5. ICAS does not have tribunals established by statute; it is inspected by DTI and Insolvency Service.

6. Decreasing number of complaints in recent years: from 239 in 1998 to 56 in 2005; thought largely to tightening up of professional standards.

7. New rules being negotiated via Privy Council (governed by Royal Charter slows things down); ‘polluter pays’ scheme being introduced. There will be an additional levy to pay for this. New joint disciplinary scheme with ICAEW.

8. Setting up of Accountancy Investigation and Disciplinary Board (AIDB), POBA successor to Review Board.

9. ICAS seems based on model of private professions who are largely self-regulating, but with lay members on committees; no suggestion of state regulation; autonomous and independent body from ICAEW (competitive?); jealous of independence; seems quick on its feet. It has managed to reduce significantly number of complaints against its members over the years, and to expedite these.
5.2 GENERAL TEACHING COUNCIL

5.2.1 An advisory NDPB, and statutory organisation; example of public sector professional body with registration and regulatory functions. Self-funding (subscriptions from registered teachers), and accepts government funds to carry out specific reviews by negotiation. It is a more powerful, and older (set up under Teaching Council (Scotland) Act 1965), body than its English equivalent. It confers registration on teachers; and gives advice to Scottish Ministers. It is deemed by itself and outside observers as an influential body with regard to government policy. It claims to have good relations with civil servants and through them, with ministers. The Act does give ministers the power to overrule, but this has not happened. It also helps that SE does not employ teachers directly, which is done via Local Authorities and CoSLA – a useful buffer.

5.2.2 The formation of the General Teaching Council for Scotland in 1965 resulted from widespread concern that entry standards to the Scottish teaching profession had been lowered by government action since the time of the Second World War. In particular, the employment in schools of unqualified teachers in response to teacher shortage.

5.2.3 The Council's main functions are:
1. To maintain a register of those entitled to teach in public sector schools and colleges in Scotland;
2. To determine whether, in any particular case under its registration and disciplinary powers, registration is to be refused or withdrawn on grounds of professional conduct;
3. To keep under review the standards of education, training and fitness to teach of persons entering the teaching profession in Scotland and to make recommendations to Scottish Ministers on this matter;
4. To make recommendations to Scottish Ministers on the supply of teachers;
5. To oversee the management of the probationary period for teachers;
6. To accredit all Chartered Teacher programmes and modules and award the Standard for Chartered Teacher;
7. To accredit all programmes and modules leading to the award of the Standard for Headship;
8. To make recommendations to Scottish Ministers on the continuing professional development and staff development review of teachers;
9. To keep itself informed of the education and professional preparation of teachers in teacher education institutions and to review the content and arrangement of teacher education courses.

5.2.4 The Council's powers are to be extended (at a date to be announced) to enable it to determine whether registration is to be refused or withdrawn in cases relating to ill-health and competence. An extended range of disciplinary options short of withdrawal of registration will also become available to the Council at that time.

5.2.5 GTCS has around 76,000 members, each paying £20 p.a.; budget of c£1.5m (roughly doubled since 1998).

GTC has virtual 100% coverage in Scotland in public sector, and around 70% in independent schools, mainly bigger and old merchant company schools. In England, registration is not compulsory, reflected in weakness of GTCE. Nevertheless, GTCS operates 'five nations' arrangements with counterparts in E, W, NI and RoI.

GTC Council has 50 members; 26 elected by the membership, 18 appointed (including 3 Faculty Deans – used to be under elected members), and 6 nominated by Scottish Ministers (used to be Sec of State for Scotland). Nominations to Council are solicited via the press as set out in 1965 Act. Appointments use OCPAS route. GTC moved to present HQ in 1998, and now employs 57 staff (compared with 28 pre-1998).

5.2.6 Impact of ECHR, notably on equality and disability legislation, and on handling complaints – fair trial, etc. Usually, GTC lets law take its course, before deciding on discontinuing registration. On questions of proven illegality: issue is how relevant it is to professional activity. 2000 Act gives wider repertoire of powers. GTCS resists direct role in dismissal on grounds of competence before or unless teacher’s employer has taken decision to dismiss.

Where GTC is unable to satisfy complainant, cases can be referred on to Scottish Public Services Ombudsman. To date, only 2 (same person) have done so.

In 1999, Scottish Office instigated review of GTC, carried out by Deloitte and Touche. Another review is about to be announced. In their 1999 review, D & T used benchmarking with comparator bodies, e.g. LSS, GTCE, UKCC, General Dental Council, and two teachers boards, one in Canada and one in Australia. D&T decided on this, not GTC. The benchmarking data are available in the 1999 report, and
while dated, might be of some relevance. Relevant comparative dimensions included: aims, functions, election methodology, membership, funding, role of competence, discipline, future changes.

5.2.7 Observations
Plainly, GTCS is a dealing with public sector professionals, and there is a longstanding separation from representative functions. It is interesting nonetheless that GTCS seems to have ear of senior politicians and administrators, and has managed to circumvent controversy at a time where considerable public and press interest in matters of care of children, and a few high-profile controversies. This is not to suggest GTCS is untouchable, but that it has Intelligence to know what is going on, especially re matters of professional regulation and risk management.

5.3 GENERAL MEDICAL COUNCIL

5.3.1 Role of the GMC (from their website: http://www.gmc-uk.org/).
The purpose of the General Medical Council (GMC) is to protect, promote and maintain the health and safety of the public by ensuring proper standards in the practice of medicine.
The law gives four main functions under the Medical Act 1983:
- keeping up-to-date registers of qualified doctors
- fostering good medical practice
- promoting high standards of medical education
- dealing firmly and fairly with doctors whose fitness to practise is in doubt.

5.3.2 Protecting the public
“We have strong and effective legal powers designed to maintain the standards the public have a right to expect of doctors. We are not here to protect the medical profession - their interests are protected by others. Our job is to protect patients.
Where any doctor fails to meet those standards, we act to protect patients from harm - if necessary, by removing the doctor from the register and removing their right to practise medicine.
The GMC is an independent body and represents a partnership between the public and the profession. This concept of ‘professionally-led regulation in partnership with the public’ enables the GMC to set a framework of standards and ethics that is owned by the profession while reflecting the views and expectations of the public. The values are embodied in the publication Good Medical Practice, which underpins all the GMC’s work.”

5.3.3 Legal status
The General Medical Council (GMC) was established under the Medical Act of 1858. also a registered charity (registration number 1089278).
The governing body, the Council, has 35 members:
- 19 doctors elected by the doctors on the register
- 14 members of the public appointed by the NHS Appointments Commission
- 2 academics appointed by educational bodies - the universities and medical royal college.

5.3.4 Developing Medical Regulation: a vision for the future (April 2005)
This was GMC’s submission to the Donaldson Enquiry – which was due for publication in Dec. 05 – still not published.
Key issues aimed at improving effectiveness of regulation over next 5 to 10 years:
1. more effective connections between different elements in regulatory environment.
2. Need for regulation. to develop more creative approach to engaging with patients and public.
3. Make register of medical practitioners more accessible and relevant to users
4. Risk-based approach to regulation: the need for regulation to be targeted towards areas of perceived risk. “We need to be fully conscious of the burden of regulation and ensure that it does not get in the way of good health care … we want to regulate with a light touch where the regulatory risk is low and with a greater scrutiny where it is higher.” (intro)
5. Making sense of complaints and fitness to practise: need to make clear distinction between dealing with questions of fitness to practise (which is for the regulator to do) and resolving complaints (which is for others).

Para. 15, p.6: models of professional regulation.
At one end: system based on deterrence, focused on wrong-doing and punishment: prescriptive, rule-bound, reactive, mistrust of those regulated.

“It is the regulator as policeman whose task is to catch miscreants.” (p.7)

at other end: model based on compliance, where underlying assumption is integrity and competence of majority of regulated professionals; emphasis on being proactive and encouraging improvement through guidance rather than detailed and prescriptive regulations.

Para. 69: p.13: a ‘risk-based’ approach to regulation. GMC is committed to the principles of Better Regulation Task Force – proportionality, accountability, consistency, transparency and targeting. ‘Proportionality requires that policy solutions be proportionate to the perceived problem or risk.’ (p.13)

Para. 86, p.15: avoid the ‘complaints maze’ by creating a portal for complaints about health care in UK (in context of NHS, GMC etc) – presumption should be of local handling of complaint in first instance and only passed to GMC if that becomes justified by further, additional evidence.

Para. 159 ff. p.24: July 2003; number of members of Council (i.e. governing body of GMC) reduced from 104 to 35.

Current policy of GMC is that majority should be elected medical members. Para. 165 comments: ‘Other professions are also reviewing the manner of their regulation, most notably the legal professions.’ [context of Clement?] – but ‘the environments of within which medical and legal practice operates are very different.’ (para. 174: p.25)

Para.164: in light of Dame Janet Smith’s fifth report on Shipman case (http://www.the-shipman-inquiry.org.uk/fifthreport.asp);

query whether elected members have a conflict between interests of their electorate and the public interest (‘doctors regulating doctors’). ‘We accept that the election by doctors of a majority may give rise to the perception of a representative body and that in turn might have an impact upon public confidence.’ (para. 174: ‘adjudication could be completely separated from the GMC, as Dame Janet Smith recommended.’)

Para. 165: ‘Other professions are also reviewing the manner of their regulation, most notably the legal professions. It is also a matter being considered by the Better Regulation Task Force [now, Commission] and, most recently, the Independent Commission for Good Governance in Public Services.’

Para. 172: for 2004, percentage of successful appeals constituted 0.7%

Para. 178: regulation is a ‘reserved’ matter to Westminster, and thus accountability should be to WMP. Nevertheless, differing clinical governance exists in different parts of UK, thus office established in Edinburgh in 2004, and one in Cardiff in 2005.

Annex C: p.31; Report also cites Independent Commission for Good Governance in Public Service (by Langlands, 2005) http://www.opm.co.uk/ICGGPS/.

5.3.5 Issues re LSS:

1. high profile cases e.g. Bristol; Shipman – GMC under even more pressure re medical issues than perhaps lawyers are.

2. Issue of ‘doctors regulating doctors’ even where election to council; ‘just a cosy club’? (Professionally-led regulation in healthcare – just a cosy club?”, Social Market Foundation, Nov. 2004). Graeme Catto (President of GMC) comments: ‘I do not believe at all in self-regulating professions but I do believe very strongly in professionally-led regulation.’

3. Problem of external regulation seen as giving rise to ‘a rising mass of codified petty regulation, swollen by the need for rules to enforce rules and to counter their avoidance’ (by Fred Hirsch; quoted by Catto on p.16)

4. ‘You could have a lay body that had professional advice and ask it to regulate the profession, but it is likely to alienate those you most wish to regulate.’ (Catto, p.17)

5. Issues of ‘fit for purpose’ and ‘proportionality’; development of risk-based regulation (see Better Regulation Commission). GMC sees opportunities in a multi-tiered regulatory model (inculcating ‘individual consciousness’ and best practice for each doctor = self-regulation; through team-based regulation (‘the practice’); work-based regulation (e.g. hospital); up to national regulator e.g. GMC. GMC should not see all complaints (‘croutons in soup’ case – whereby a doctor was prosecuted for taking croutons ‘without paying for them’ in hospital canteen.) Also work with Royal Colleges to develop shared regulatory instruments.
6. Finance? While doctors pay a registration fee, they can set it against tax, so in that respect it becomes 'public money'. Nothing wrong with doctors paying a license fee, like a taxi driver, thereby public get reassurance. Problem is costing of regulation set against proportionality; need for this to be accurately done, otherwise it becomes open-ended costs on practitioners.

7. Scottish/English differences? While some 15% of doctors have a Scottish registered address, about 8% of the UK medical workforce actually work in Scotland, but only 4% of complaints relate to doctors working in Scotland. This calculation can be made because the GMC is a UK-wide body, unlike their legal counterparts.

5.4 FINANCIAL OMBUDSMAN SERVICE

5.4.1 Financial Advisors are subject to stringent regulation by FSA, and specifically the Financial Ombudsman Service (FOS) which is responsible for resolving complaints about financial services quickly and with minimum formality. Under the Act, FOS comprises two jurisdictions: the compulsory jurisdiction covering firms which are required to participate in the FOS in respect of complaints about activities specified by FSA; and the voluntary jurisdiction covering financial services activities not included in the compulsory jurisdiction.

5.4.2 FSA has extensive handbooks, including regulatory processes and dispute resolution (http://fashandbook.info/FSA/html/handbook). The role of FOS is to settle disputes, as an alternative to the courts; it is not a regulator or a trade body or a consumer champion. Its main aim is to help settle individual disputes between consumers and financial firms. It covers a wide range of financial matters, from insurance and mortgages to savings and investments. FOS is independent; complainants who are not satisfied are free to go to court instead, but if they accept the ombudsman’s decision, it is deemed binding on both complainant and the form. It aims to resolve cases within 6 months, except in complex cases such as those concerning mortgage endowments which represent some 250 complaints per day. FOS does not publish the names of firms or consumers whose cases it handles.

5.4.3 FOS is answerable to FSA which in turn is answerable to the UK parliament, via The Treasury. All directors are appointed by FSA, and the case of the Chairman, with the approval of Treasury. ‘In the appointment of Directors, the FSA will have regard to the need to achieve and maintain an appropriate balance in the composition of the Board and will take account of the views of the Chairman of FOS.’ (Memorandum of Understanding between DSA and FOS; para. 29) The board members of FOS are non-executive with no involvement in individual complaints. Their job is to ensure that FOS is properly resourced and is able to carry out its role effectively and independently.

5.4.4 According to Handbook Guide FISA 11 (Complaints), FOS collects complaints data to assist in the monitoring of firms and their regulatory compliance. Firms are required to report twice a year, six months pre- and post its accounting reference date.

5.4.5 FSA issued a consultation paper (no.30) in October 1999 on the regulation of professional forms. Chapter 12 set out its thinking on ‘financial’ versus ‘professional’ service complaints, as follows: ‘Complaints that relate purely to a form’s professional services with no element of activity captured by the compulsory jurisdiction of the FSO scheme will remain the responsibility of the relevant professional body.’ (para.12.5)

FSA recognises, however, that many complaints will be hybrid, relating in part to financial services and to professional ones, and resolved to pass details of complaints concerning non-financial service activities of a firm to the relevant professional body. In particular, it gives examples of non-mainstream investment business activities carried on by professional firms including: a solicitor acting for executors arranging the sale of shares on instruction of executors and trustees; a solicitor doing matrimonial work who obtains IFA advice on unit trusts, pension and endowments in joint names; a solicitor acting for an estate or trust who holds unit trusts and share certificates; a lawyer performing residential conveyancing who makes arrangements for transfer of shares in a management company; and see appendix B.

6.0 GENERAL OBSERVATIONS

6.1 The proliferation of regulatory bodies in recent years is causing general concern. Such bodies often take on a life of their own, and in Fred Hirsch’s words, result in ‘a rising mass of codified petty regulation, swollen by the need for rules to enforce rules and to counter their avoidance.’ (quoted by Graeme Catto, President of the GMC). The scale and complexity of what ICAS refers to as ‘the Complaints Industry’ is here to stay. We hear little these days about the need for a ‘bonfire’ of quangos, of non-departmental public bodies (NDPBs) being dismantled. There is now a regulatory industry with a relatively self-contained career structure such that individuals can move from one to the other, gathering up expertise,
and applying it to a cognate area of regulation. This proliferation is recognised by the UK Better Regulation Commission (BTC) with its insistence upon the ‘one in, one out’ principle, although one might be sceptical that such a principle will ever apply.

6.2 As regards the legal profession in Scotland, the impact of the Clementi Report is very obvious. This seems to be a well-argued and astute document, and Clementi even took the precaution of having the system of regulation in England and Wales professionally costed. One might, however, be sceptical that these will remain within the bounds set by Ernst and Young for Clementi. There is also the powerful input of the Department of Constitutional Affairs which is a relatively new player in this regulatory game, and one, no doubt, keen to establish its presence.

6.3 This raises the issue as to whether or not Scotland should be doing things differently. On the one hand, the system is smaller and less complex, but on the other hand, it is not difficult to see the influence of Clementi in the proposals in the bill, and undoubtedly civil servants at least found it a useful benchmark. There is, however, a serious issue as to how these matters play in Scotland. If nothing else, there is a point to be made as the legislation goes through parliamentary committee that the political system should be very careful of landing the profession and their clients with an over-elaborate and costly system, something of a ‘hammer to crack a nut’. There may well be scope to set the number and type of legal complaints in context: have they increased or decreased over the years? Changed in type and impact? Are they proportionately more of less than south of the border (the GMC have made this point to show that Scotland is less subject to complaints).

6.4 There is little doubt that the analysis of the consultation exercise left a lot to be desired. It certainly conforms to the usual kind of Scottish Executive exercise in being quick and dirty, but it should not be allowed to become conventional wisdom. It contains some elementary howlers, and there might be scope in committee to raise this (one can hear some MSPs lazily reaching for it as incontrovertible evidence of public discontent). Some counter-analysis of the submissions would have probably helped to spike some guns, but possibly that moment has gone, and probably would now be seen as special pleading. It does not seem sensible, however, to let politicians get away with lazy nostrums based on half-baked evidence.

6.5 As regards comparator professions, lawyers are at some disadvantage. Plainly, the separation of representative and regulatory functions has been impacting on all professions for some time. Comparison with ICAS, for example, provides a good example of a robust defence of essentially a private sector organisation, although it has the advantage that it does not carry a Guarantee Fund, nor deal with ‘service’ complaints. The GTC is patently a public sector professional body which has, over 40 years, developed its professional and political standing, such that it does not weaken its independence by dealing with government, even when pre-1997 that government was frequently ideologically hostile to public sector professionals. The GMC has had to deal with some very public controversies (Bristol, Shipman etc) and in the course of these has had to take on the accusation that it is a ‘cosy club for doctors regulating doctors’. Its president Graeme Catto had a nice line: ‘I do not believe at all in self-regulating professions but I do believe very strongly in professionally-led regulation’. The Law Society may not, thankfully, have to deal quite so often in matters of life and death, but there is much to be learned from the way the GMC has gone about its business, seemingly one step ahead of the critics, or at least well able to respond. Finally, the financial industry itself has developed far-reaching mechanisms for regulation and complaints-management. There is mileage in pointing out that while it distinguishes financial and professional matters, it recognises that this is not always a clear-cut distinction, and one imagines the legal profession agree with that. FSA/FOS regulation is well-developed and fit for purpose.

6.6 My own reading of relevant documents is that the Law Society has two major grounds for concern. Firstly, membership of the proposed regulatory body seems too closely in the gift of government and politicians, even where this is managed via OCPAS rules ensuring due process. It is proposed that a majority of SLCC will be lay persons appointed by Scottish Ministers, unlike the comparator professions examined where professionals are in the majority. While one can trust OCPAS to ensure that due process is observed, there is a prior issue as to how lay members emerge in the first place, newspaper advertisements seeming to be the usual method. The task is one of encouraging a wide and diverse range of people who do not have particular axes to grind. Secondly, and possibly more dangerously, there seems to be a serious lack of articulation between the system of regulating the legal profession in Scotland, and how it is paid for. In other words, it seems that the profession will pay for a system (minimally employing 50 to 60 people, and one imagines, a lot more than that; how was that figure calculated?) but the regulatory system does not directly to raise its own revenue. This is not to argue that the system
should be publicly funded – this has its own downsides, but that there are no obvious cost constraints. In short, costs may inflate as the regulator finds more things to do. The Better Regulation Commission is a strong advocate of two related principles: of proportionality and fit-for-purpose. There must at least be a risk that the new regulatory system for the legal profession in Scotland fails to meet those principles.

APPENDIX 3

SOCIETY’S SUMMARY OF LORD LESTER’S OPINION ON COMPATIBILITY WITH ECHR

The Law Society of Scotland sought the opinion of Lord Lester on the Bill’s compatibility with the European Convention on Human Rights (ECHR). Lord Lester of Herne Hill is one of the UK’s pre-eminent experts on human rights law and, as a member of the English Bar, is not affected by the Bill’s proposals. Key points identified by the Society include:

- The Bill does not comply with ECHR and is therefore “flawed…and wrong in law”. This was because the Scottish Legal Complaints Commission (SLCC) could not be considered an “independent and impartial tribunal” as required under Article 6 of ECHR because it would consider negligence – a civil law matter – as part of service complaints yet there would be right of appeal to a judicial body against its decisions.
- The SLCC, and its proposed internal appeals committee, cannot be considered independent because Scottish Ministers would appoint members and could direct the Commission in other ways.
- Yet the Commission will have the power to impose serious sanctions on a solicitor, with compensation payments of up to £20,000, and also by harming the reputation of a solicitor by publishing its findings about their alleged negligence.
- Lord Lester also issues a reminder that the introduction of both a general levy on the legal profession and case levies for each complaint investigated are also subject to, and must comply with, ECHR.

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

OPINION

Introductory

1. I have been instructed by the Law Society of Scotland to advise whether the Legal Profession and Legal Aid Scotland Bill (“the Bill”), introduced in the Scottish Parliament on 1 March 2006, is compatible with Article 6 of the European Convention on Human Rights (“the ECHR”). For the purpose of my advice, I have been provided with the Bill, a Policy Memorandum, and Explanatory Notes.

2. I am not expert in Scots law, nor am I familiar with the existing schemes operated by the professional bodies and regulating complaints against lawyers in Scotland. I assume for present purposes that those schemes are fully compatible with the ‘right to a court’ guaranteed by Article 6 of the ECHR.

3. For the reasons set out below, in my view, the scheme proposed in the Bill is not fully compatible with Article 6 (1) of the ECHR, because:

   (i) the proposed Scottish Legal Complaints Commission (“the Commission”) would not be an independent and impartial tribunal in determining service complaints against practitioners;
   (ii) the lack of an external appeal from a determination by the Commission to uphold a services complaint would not be compliant with Article 6 (1);

4. Contrary to the Scottish Executive’s view, the obligation to pay an annual general levy and a complaints levy engages Article 1 of Protocol No. 1 to, and Article 6 (1) of the ECHR. Although the power to secure the payment of such levies is very wide, it is not unlimited but is subject to
the requirement of proportionality. However, the provisions for levies are not in themselves incompatible with the ECHR rights.

5. In my view, if the Bill were enacted in its present form, the Act would, by virtue of Section 29 (1) of the Scotland Act 1998, be outside the legislative competence of the Scottish Parliament to the extent of the incompatibility identified in my advice.

6. I shall summarise relevant features of the scheme proposed in the Bill, and will set out the reasons given by the Executive for considering the Bill to be compatible with the ECHR rights. I shall then explain my reasons for disagreeing with the reasons given by the Executive in the Policy Memorandum for regarding the scheme in its present form as compatible with the ECHR.

**Relevant Elements in the Proposed Scheme**

7. The Policy Memorandum explains that the Bill is designed, inter alia, to improve the system for the handling of complaints against lawyers. The Executive seeks to establish a statutory body, the Commission, independent of the legal professional bodies, to handle complaints about the service provided by practitioners, including solicitors, firms of solicitors and advocates. Appointments to the Commission’s Board would be made by Scottish Ministers and subject to the public appointments procedures and the scrutiny of the Scottish Commissioner for Public Appointments (under the Public Appointments and Public Bodies etc (Scotland) Act 2003). Each member would be appointed for a term not exceeding 5 years (Schedule 1, paragraph 3(1)). The Scottish Ministers would be empowered to remove a member from office if satisfied, inter alia, that the member was “unfit to discharge the functions of a member or … unsuitable to continue as a member” (Schedule 1, paragraph 5(1)).

8. The Scottish Ministers would have to approve the appointment of the chief executive, and would be empowered to give directions to the Commission as regards the appointment of employees, including the terms and conditions of their employment. The Scottish Ministers would also have to approve pay or arrangements for pay. (Schedule 1, paragraph 8).

9. Section 31 would empower the Scottish Minister by regulations to amend the Commission’s duties and powers.

10. Paragraph 17 (1) of Schedule 1 would empower the Scottish Ministers to give the Commission directions of a general character as to the exercise of the Commission’s functions.

11. The Commission would take over from the bodies which currently deal with complaints about inadequate professional services and would be independent from the legal professional bodies (the Law Society of Scotland and the Faculty of Advocates), and the Scottish Solicitors Discipline Tribunal.

12. The Bill deals separately with “conduct” complaints and “services” complaints.

13. A conduct complaint is one suggesting professional misconduct or unsatisfactory professional conduct (Section 2 (1)). Unsatisfactory professional conduct is defined in Section 34 to mean, as respects a practitioner, professional conduct which is not of the standard which could be expected of a competent and reputable practitioner; but which does not amount to professional misconduct and which does not comprise “merely inadequate professional services”.

14. A services complaint is one suggesting that professional services provided by a practitioner in connection with any matter in which the practitioner has been instructed by a client were inadequate. Inadequate professional services are defined in Section 34 to include professional services which are in any respect not of the quality which could reasonably be required of a competent advocate, solicitor or firm of solicitors, and includes any element of negligence.

15. The legal professional bodies and their discipline tribunals would retain responsibility for professional discipline. I assume for the purposes of my advice that the existing disciplinary arrangements made by those bodies and their disciplinary tribunals are fully compatible with Article 6 of the ECHR. I note, for example, that a right of appeal is available for a practitioner against a determination or direction by the Council to the Scottish Solicitors’ Discipline Tribunal.

16. The Commission would refer conduct complaints to the relevant professional bodies to deal with (Section 5), but would have powers to oversee the way in which conduct complaints are handled.
I assume that this would not involve oversight of the way in which the Scottish Solicitors’ Discipline Tribunal determines complaints of professional misconduct, since that would create obvious incompatibility with Article 6.

17. Services complaints would be investigated by the Commission itself. Where the Commission made a determination upholding a services complaint, it would be empowered to take such of the steps mentioned in Section 8 (2) of the Bill as it considered fair and reasonable in the circumstances. These steps would include (a) determining the amount of the fees and outlays to which the practitioner is entitled for the services provided to the client; (b) directing the practitioner to secure the rectification at the practitioner’s own expense of any error, omission or other deficiency; (c) directing the practitioner to take, at the practitioner’s own expense, such other action in the client’s interests as the Commission might specify; and (d) directing the practitioner to pay compensation of such amount, not exceeding £20,000, as the Commission might specify to the client (including an amount for loss suffered or inconvenience or distress caused to the client as a result of the inadequate professional services). The Commission would be empowered to monitor compliance with directions (Section 12 (1)).

18. Section 10 (1) provides that neither the making of a determination under Section 7 upholding a services complaint, nor the taking of any steps under Section 8 (2), may be founded upon in any proceedings. However, Section 10 (2) provides that a direction under Section 8 (2) (d) to a practitioner to pay compensation to a client does not prejudice any right of the client to take proceedings against the practitioner for damages in respect of any loss which the client claims to have suffered; and any amount directed to be paid to the client under that Section may be taken into account in the computation of any award of damages made to the client in any such proceedings. When the Commission upheld a services complaint and directed a practitioner to provide redress for the client by way of remission of fees, payment of compensation or otherwise under Section 8 (2), Section 14 provides that it would be able to enforce such a direction through standard court procedure. I am not familiar with the relevant procedure for the enforcement of an extract registered decree arbitral in favour bearing a warrant for execution issued by the sheriff court, but I assume that it would not enable the practitioner to have a rehearing of the merits of the complaint by the court.

19. Although the professional bodies would retain responsibility for conduct complaints, the Commission would take over the role of the Scottish Legal Services Ombudsman in overseeing the way in which the professional bodies handle complaints and would have the power to enforce its recommendations. The Scottish Legal Services Ombudsman would be abolished.

20. The Commission would be led by a board which would have a non-lawyer majority and a non-lawyer Chair. Commission decisions would be subject to internal review by the Commission appeals team. The proposed new complaints handling arrangements are intended to provide quicker outcomes for both complainants and practitioners. Any further appeal would be by way of judicial review.

21. Funds for the Commission would be obtained by two levies: (i) an annual general levy on all practitioners; and (ii) a complaints levy payable by practitioners in relation to eligible complaints. The complaints levy would in effect be a charge for the Commission’s dispute resolution service. It would be for the Commission to decide the proportion of funding that each type of levy would contribute, and then to set the amount of each levy in each financial year. It would be for the professional bodies to collect the general levy from their members and pass it to the Commission. The Commission would be able to make rules in respect of arrangements concerning the levies.

22. In most cases the Commission would have rule-making powers in relation to its practices and procedures for the handling of complaints (Section 23 and Schedule 3). It would be required to consult Scottish Ministers, the legal professional bodies and relevant consumer bodies before creating or varying such rules. The rules would include provisions regulating the making of complaints to the Commission, the handling of complaints by the Commission, the nature of evidence which may be required, the fixing of time limits, and arrangements for the review by the Commission of its own decisions and determinations. The rules would also enable the Commission to make different provisions for different categories of complaint. It would be for the Commission to make final decisions about its regulatory procedures.

23. The Policy Memorandum states (paragraph 74) that the core structure of the Commission’s complaints handling machinery is set out in the Bill, but that most of the machinery will be set out in the rules made by the Commission itself. As a public body the Commission “will be under an
obligation to make the machinery ECHR compatible." Paragraph 1 (c) of Schedule 3 would require the Commission to “have regard to the Convention rights", in deciding whether –

(i) to hold a hearing in relation to a complaint" under Part 1;
(ii) such a hearing should be in public or private.

24. The Commission would be obliged by paragraph 11 (1) of Schedule 1 to establish an appeals committee in accordance with rules made under Section 23 (1) for the purposes mentioned in the rules. The Commission’s practice and procedure rules would have, under paragraph 1 (d) of Schedule 3, to require the appeals committee to “have regard to the Convention rights” in deciding whether –

(i) to hold a hearing in relation to an appeal made to it;
(ii) such a hearing should be in public or private.

25. The appeals committee would have at least 3 members, of which the majority would be non-lawyer members of the Commission, and would not include persons involved in making the determination, direction, decision or recommendation appealed against (Schedule 3, paragraph 1 (f)).

The Scottish Executive’s Reasons for Considering the Bill to be Compatible with the ECHR Rights

26. The Policy Memorandum helpfully explains the reasons why the Executive considers the Bill to be compatible with the relevant ECHR rights. In my view, the reasons given are flawed and the views expressed are wrong in law.

27. The Policy Memorandum notes (paragraph 69) that the ECHR is engaged in several areas of the Bill, including the Commission and the annual general levy/complaints levy. It states (paragraph 70) that Article 6 of the ECHR in general terms requires that any mechanism involving the determination of “civil rights and obligations” must provide a right to a fair trial, and lays down specific requirements. It recognises that the Commission would constitute an administrative body acting in a judicial or quasi-judicial capacity, and states that “we consider that Article 6 will be engaged.”

28. The second reason given for thinking that Article 6 will be engaged is that (paragraph 71) “in terms of section 10 (2) of the Bill the submission of a complainer to the Commission’s jurisdiction does not preclude access to a court to determine a dispute. However, in the case of a practitioner as defined by section 34 of the Bill, the practitioner effectively loses his civil right of access to a court for most purposes and as regards his possessions, and accordingly Article 6 of the ECHR is engaged [citing Luordo v Italy 41 EHRR 25 at 83].”

29. The Policy Memorandum states that “72 Given that Article 6 is engaged, there must be an independent and impartial judge to determine civil rights. The members of the Commission, who will be the main arbiters in the Commission, are to be appointed by the Scottish Ministers and will be a mix a [sic] laymen and lawyers. In terms of paragraph 4 of Schedule 1 to the Bill, the Scottish Ministers are under an obligation to appoint members with relevant experience. Secondly, the appointment system has to be subject to the public appointments legislation (see paragraph 5 of Schedule 4). This ensures that the appointees will be appointed on merit and impartially, so that the Scottish Ministers are really nominal appointers. We think that this will ensure the independence and impartiality of the Commission.

“73. There is no stipulation in the constitution of the Commission as set out [sic] schedule 1 to the Bill, as to any determinate length of service of a member of the Commission. The only provision is that a member may not be appointed for a period exceeding five years at a time. We think that the question of security of tenure of the job of being a member of the Commission is not the same as the considerations that apply to temporary judges. Being a member of the Commission is not a stepping stone to becoming a full time member of the Commission, because the job by its nature is a part time job.”

30. The Policy Memorandum refers (paragraph 74) to the fact that the Commission will be under an obligation to make the machinery ECHR compatible. It also notes (paragraph 76) that the Commission must have regard to the ECHR rights in deciding whether to hold a hearing and if so whether the hearing should be in public or private. It notes too (paragraph 77) that the Commission must set up an appeals committee to hear appeals against determinations in relation to complaints and the steps to be taken following the upholding of a complaint and in relations to other important decisions. And it observes (paragraph 78) that reasons have to be given for
various categories of its determinations, directions, decisions or recommendations, but that that is at the Commission’s discretion to be set out in its rules.

31. Note 8 to paragraph 78 of the Policy Memorandum indicates a misunderstanding of what is required by Article 6. It provides as follows:

“In relation to the structure and powers of the Commission in key regards the model of the Financial Ombudsman Service as set up in term of section 225 and schedule 17 to the Financial Services and Markets Act 2000, has been followed. The rules of the Financial Ombudsman Service were subject to careful scrutiny and, in order to make the ECHR compatible, it was considered important that, if there was no external appeal from decisions of that Ombudsman, there would have to be an internal appeal mechanism. Accordingly the mandatory rules provide for an internal appeal mechanism. Secondly, again following the Financial Ombudsman Service approach, it will be necessary for ECHR purposes that, where appropriate, the Commission would have to hold hearings. This would not be required on every occasion, but there would be occasions where for Article 6 purposes, this would be appropriate. Hence the mandatory rule to the effect that the Commission must provide in its rules that, in deciding whether to have a hearing in a particular case, regard must be had to ECHR considerations.”

32. The Policy Memorandum contains an important passage which needs to be set out in full because, again it indicates a misreading of the relevant legal principles. It provides as follows:

“79. The Executive has described above the reasons why it thinks that the constitution and practices and procedures of the Commission are likely to be Article 6 compatible. However, if that were not the case, the ECHR jurisprudence is that even if there is some lack of impartiality or other flaw in the way a decision-making body operates, this is not to be treated as a fundamental flaw as far as compatibility with Article 6 (1) is concerned, provided there is an adequate judicial control by a Tribunal to correct any flaw in the operation of the decision-making. In other words when the administrative machinery is taken with the judicial control the machinery as a whole operates in an ECHR compatible way. (See the main UK case which lays down this important point is R (Alconbury) v The Secretary of State, followed in Scotland by County Properties v The Scottish Ministers.

“80. For these reasons we think that the appeal/judici al review mechanisms in place in the Bill in relation to complaints to the Commission are ECHR compatible.”

33. As regards the annual general levy and complaints levy, the Policy Memorandum explains (paragraph 81) that “The Executive considers that these levies which the practitioners (as defined in the Bill) must pay in terms of section 18 (1) are best characterised as charges or taxes. They therefore would not engage Article 1 of Protocol 1.”

The Bill’s Incompatibility with the ECHR Rights

34. To understand the relevance of the ECHR rights, it is first necessary to identify which civil rights and obligations would be determined by the Commission. The Policy Memorandum correctly identifies the right to property (protected by Article 1 of Protocol No. 1 to the ECHR), the right of access to courts for the determination of civil rights and obligations (protected by Article 6 (1) of the ECHR), and the right to a fair hearing by an independent and impartial tribunal (also protected by Article 6 (1) of the ECHR).

35. The professional bodies rather than the Commission would retain the responsibility for determining conduct complaints and imposing sanctions, including removing a practitioner from the right to practise; and, as already mentioned, I assume that their arrangements provide for independent and impartial tribunals to determine the civil rights and obligations of practitioners, and of allegations of professional misconduct some of which may in substance be criminal in nature.

36. However, in determining services complaints and in reporting on the handling of conduct complaints, the Commission would effectively determine not only the civil and private right to property but also the civil and private right to a good reputation of individual practitioners and firms of solicitors, protected by Article 8 of the ECHR. This is because its findings would be communicated to the complainer and to the relevant professional body, with no protection against wider public disclosure. A finding of inadequate professional services could include a finding of professional negligence, adversely affecting the professional reputation of the individual or his or her firm. It would be less detrimental than a finding of professional misconduct, but it would involve a finding of professional negligence against which there would be no right of appeal to an
independent and impartial tribunal. Adverse findings could result in the award of substantial compensation of up to £20,000, interfering with the right to property. By virtue of Section 32, the Commission’s reports would be privileged, for the purposes of the law of defamation, unless the publication was proved to have been made with malice. The Commission’s decision would be as decisive of the civil rights and obligations (as regards the professional reputation and property of practitioners and their firms as is a judgment by a civil court in negligence proceedings, or a finding by a professional disciplinary tribunal of professional misconduct in dealing with a conduct complaint. 

37. The Commission is accurately described by the Policy Memorandum as “an administrative body acting in a judicial or quasi-judicial capacity”. The Policy Memorandum is also correct in recognising that, “in the case of a practitioner as defined by section 34 of the Bill, the practitioner effectively loses his civil right of access to a court for most purposes”. 

38. As a public authority, the Commission would have a duty, imposed by Section 6 of the Human Rights Act 1998, to act in a way that was compatible with the ECHR rights. That duty is attenuated in the Bill by the references in Schedule 3 merely to the need to “have regard to” the ECHR rights in deciding whether to hold a hearing or to hold the hearing in private or in public. In fact the duty is not merely to have regard to the ECHR rights but to act compatibly with those rights. The duty applies not only in those contexts identified in the Bill but in relation to the discharge of all of the Commission’s public functions and the appeals committee’s public functions, It is not strictly necessary to refer to the duty in the Bill since it is prescribed in Section 6 of the Human Rights Act. However, if reference is to be made to the ECHR rights in the Bill, the duties imposed on the Commission and its appeals committee should be correctly stated. 

39. Although the Commission would in effect be exercising judicial functions, it would not be an independent and impartial tribunal, as required by Article 6. The Commission would not be clothed with the independence and impartiality required of a judicial body. Indeed, the Policy Memorandum itself recognises (paragraph 71) that, in the case of a practitioner as defined by Section 34, he “effectively loses his civil right of access to a court for most purposes and as regards his possession”. 

40. The fact that the Scottish Ministers would be under an obligation to appoint members with relevant experience, and that appointments would be subject to the public appointments legislation are important safeguards to ensure that merit, rather than political considerations, would be the relevant criteria for appointment and membership. The fact that the Commission would be under a duty, under section 6 of the HRA, to act in a way that is compatible with the Convention rights is also an important safeguard. However, these safeguards would not be sufficient to characterise the Commission as a “tribunal”, within the meaning of Article 6; and the heading “Independent and impartial judge” introducing paragraphs 72-73 of the Policy Memorandum, does not accurately describe the Commission’s legal nature. It is not a court or tribunal within the meaning of Article 6 (1). Similar considerations apply to the appeals committee to be established by the Commission. Plainly, it would not constitute an independent and impartial tribunal so as to satisfy the requirements of Article 6 (1), applying the criteria identified in Clancy v Caird[2000] SLT 567 CS and Starrs v Ruxton[2000] EC 208 CS, including the manner of appointment of members of the Commission, the terms of their office, the existence of guarantees against outside pressures, and whether the Commission would present an appearance of independence. 

41. The Policy Memorandum recognises that there is no stipulation in the Commission’s constitution as to any determinate length of service of members of the Commission. The only provision is that a member may not be appointed for a period exceeding five years at a time. The Policy Memorandum explains that the Executive does not think that the question of security of tenure of the job of being a member of the Commission is the same as the considerations that apply to a temporary judge. That statement indicates that the Executive does not regard the Commission as an independent and impartial tribunal in the sense required by Article 6 (1), since there is no security of tenure. Indeed, Scottish Ministers would be empowered to remove a member from office if they considered him or her to be unfit to discharge the functions of a member unsuitable to continue as a member; and the Scottish Ministers would be empowered to give directions to a general character to the Commission — powers inconsistent with judicial independence. 

42. Where, as in the present case, decisions determinative of an individual’s civil rights and obligation would be taken by an adjudicatory body not complying with Article 6 (1), that Article requires, in accordance with the right of access to a court, that the State provide a right to challenge the
decision before a judicial body with full jurisdiction providing the guarantees of Article 6 (1): Albert and Le Compte v Belgium (1983) 5 EHRR 533, paragraph 29. In Kaplan v United Kingdom (1980) 4 EHRR 64, the European Commission of Human Rights explained that to provide a full right of appeal on the merits of every administrative decision affecting private rights would lead to a result which was inconsistent with the long-standing position in many of the Contracting States. Bryan v United Kingdom (1993) 21 EHRR 342 indicates how the question of full jurisdiction should be approached. In his concurring opinion, Judge Sir Nicolas Bratza stated that: “the requirement that a court or tribunal should have ‘full jurisdiction’ cannot be mechanically applied with the result that, in all circumstances and whatever the subject matter of the dispute, the court or tribunal must have full power to substitute its own findings of fact, and its own inferences from those facts, for that of the administrative authority concerned. Whether the power of judicial review is sufficiently wide to satisfy the requirements of Article 6 must in my view depend on a number of considerations, including the subject matter of the dispute, the nature of the decision of the administrative authorities which is in question, the procedure, if any, which exists for review of the decision by a person or body acting independently of the authority concerned and the scope of that power of review.”

43. In reliance on this passage, in R (on the application of Alconbury Developments Ltd) v Secretary of States for the Environment, Transport and the Regions [2003] 2 AC 295, 1416, paragraph 87, Lord Hoffmann interpreted ‘full jurisdiction’ to mean full jurisdiction to deal with the case as the nature of the decision requires. The House of Lords held that where the decision in question involved administrative policy, it was not necessary for the reviewing body to have full power to re-determine the merits, any such review in cases where the Minister was answerable to Parliament and ultimately to the electorate would be profoundly undemocratic (see, in particular, paragraphs 60, 74 and 189).

44. In Ruma Begum v Tower Hamlets London Borough Council [2003] 2 AC 430, the main issue was whether a decision taken by a local authority re-housing manager deciding whether the authority had discharged its duty to Ruma Begum to secure that accommodation was available to her, complied with the requirements of Article 6 (1). Lord Hoffmann reviewed his judgment in Alconbury. He noted (paragraph 46) that the question in Alconbury was “whether the appellate tribunal had to be able to review the Secretary of State’s decision based on policy,” Lord Hoffmann drew a distinction (paragraphs 43-44) between (i) a finding of fact made in the context of decisions taken “by central and local government officials in the course of carrying out regulatory functions (such as licensing or granting planning permission) or administering schemes of social welfare”, where “efficient administration and the sovereignty of Parliament are very relevant”, and (ii) decisions involving “findings of breaches of the criminal law and adjudications as to private rights” where “the rule of law rightly requires that … [they] should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators.”

45. The Strasbourg Court has recognised that in specialised areas of law, such as planning law, it may be expedient for an administrative body to make findings of fact and to exercise discretionary judgment in relation to policy matters, and that in such cases Article 6 (1) may be satisfied by an appeal on a point of law to a judicial body with limited jurisdiction as to matters of fact, rather than requiring a full judicial rehearing of all matters of fact and discretion: e.g., Bryan v United Kingdom (1993) 23 EHRR 343. This is particularly so where the facts have already been established by a quasi-judicial procedure governed by many of the safeguards required by Article 6.

46. By contrast, in cases not involving specialised decisions of this kind, the Strasbourg Court has found violations of Article 6 (1) on the basis of a lack of an appeal on the merits (rather than merely on a point of law) from an administrative decision determinative of civil rights and obligations which did not comply with Article 6 (1). Such violations were found, for example, in Albert and Le Compte v Belgium (1983) 5 EHRR 333 (disciplinary decisions relating to doctors taken by professional bodies not complying with Article 6 (1), appeal to the Belgian Court of Cassation only on as point of law).

47. Strasbourg case law recognises that this does not mean that the decision-maker itself must be fully Article 6 (1) compliant provided there is subsequent access to a court or tribunal that does satisfy the requirements of Article 6 (1) in which all relevant aspects of the decision can be challenged on factual as well as legal matters.
48. Decisions by the Commission in determining services complaints do not involve issues about democracy, Parliamentary sovereignty and policy of the kind referred to in *Alconbury and County Properties v Scottish Ministers*. They involve adjudications on private rights. It follows that, in my view, it the Policy Memorandum is in error in treating such decisions as akin to what Lord Hoffmann termed “regulatory functions (such as licensing or granting planning permission) or administering schemes of social welfare”.

49. The Policy Memorandum treats the Financial Ombudsman Service, established under the Financial Services and Markets Act 2000, in key respects as the model for the structure and powers of the Commission. The object of the scheme for that Service is to resolve disputes between authorised firms and their customers quickly and with the minimum of formality. The detailed operation of that scheme is determined largely by rules made by the Financial Services Authority. Firms authorised by the Authority must submit to the jurisdiction of the scheme. There is also a voluntary jurisdiction. If a complaint under the compulsory jurisdiction is determined in favour of the complainant, the respondent may be ordered to pay compensation up to a maximum limit which may be set by the Authority. There is also a power to award costs. The respondent may also be ordered to take steps to rectify the matter complained of, and this can be enforced through the courts by the complainant if necessary. A money award may be registered in accordance with scheme rules and is enforceable by the county court in England and Wales and in Scotland by the sheriff.

50. However, the scheme proposed by the Bill differs from the Financial Ombudsman Service scheme significantly. For example, under the Bill a determination by the Commission of a services complaint may involve findings of professional negligence and the award of compensation for such negligence. The findings are sent to the complainant and, in certain circumstances, to the relevant professional organisation. Accordingly, the Commission’s decision to uphold a services complaint may directly determine the practitioner’s right to a good professional reputation; and in the absence of proof of malice the practitioner would be unable to vindicate his or her reputation. That is not the case under the Financial Ombudsman Service scheme. Another significant difference is that the Financial Ombudsman Service is not designed to exercise disciplinary functions. By using the Financial Ombudsman Service as a model, the Scottish Executive may have lost sight of these importance differences. The Commission, unlike the Financial Services Ombudsman, would make decisions decisive of the private rights and obligations of the parties.

51. Since there would be no right of appeal against the decisions of the Commission and its appeals committee, (unlike the position regarding conduct complaints) recourse to an independent court or tribunal would be possible only by means judicial review. That is recognised by implication in paragraph 79 of the Policy Memorandum, headed “Judicial review”. That raises the key question as to the scope of judicial review in such cases, The Policy Memorandum refers to “adequate judicial control by a Tribunal to correct any flaw in the operation of the decision-making.” But it does not explain whether the judicial review court have “full jurisdiction” to deal with disputed issues of fact (for example, relevant to a complaint of alleged professional negligence).

52. In *Begum* (paragraph 50), Lord Hoffmann, who gave one of the leading speeches, said “I do not propose to say anything about whether a review of fact going beyond conventional principles of judicial review would be either permissible or appropriate” [in a context other than the *Bryan v United Kingdom* type of case], Lord Bingham, who gave the other leading speech, stated (paragraph 8) that the county court judge could not, under the statutory scheme there in issue, “make fresh findings of fact and must accept apparently tenable conclusions on credibility made on behalf of the authority.” He held (paragraph 11) that this limitation on the county court judge’s role did not deprive him of the jurisdiction necessary to satisfy the requirement of Article 6 (1) in the context of that case.

53. However, in cases where an administrative body determines civil rights and obligations in a dispute between private parties, it is well established that there must be an independent and impartial court or tribunal with full jurisdiction to decide factual as well as legal issues. In *Holder v Kaw Society* [2005] EWHC 2023, the English Administrative Court held that the Solicitors Disciplinary Tribunal was an independent and impartial tribunal that complied with Article 6 (1), given that appointments were made by the Master of the Rolls through an open selection process and the Law Society had had no hand in the appointments, applying *Pine v Law Society* (2002) UKHRR 81. The Tribunal heard the evidence itself. In *Michael Shrimpton v General Council of the Bar*, [2005] EWHC 844, decided by Lindsay J. for the Visitors of Lincoln’s Inn, it was held that, where there was a defect in the composition of a barrister’s disciplinary tribunal leading to
potential bias, anything less than a full, careful and independent review of the evidence by the appellate tribunal, leading to its own findings of fact, suggested a continuance of the breach of natural justice, and necessitated the selection of a fresh tribunal fully compliant with Article 6 (1) of the ECHR.

54. *Tehrani v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2001] SC 581, involved a petition for review of a decision by the preliminary proceedings committee (“PPC”) of the respondent Council to refer a charge of misconduct against the petitioner, a registered nurse, for hearing before the Council’s professional misconduct committee (“the conduct committee”), on the ground that that decision was incompatible with Article 6 (1). The conduct committee could remove the practitioner’s name from the register if misconduct was proved. A practitioner who was struck off by either the PPC or the conduct committee had an automatic right of appeal to the Court of Session. Lord Mackay of Drumadoon stated (paragraph 52) that

“Under the Strasbourg jurisprudence, the position in relation to tribunals charged with responsibility for disciplinary or administrative matters is quite clear. Where the decision of such a tribunal involves the determination of a dispute over civil rights and obligations, no violation of the Convention can be found in the proceedings before the tribunal, if the tribunal’s decision is subject to subsequent control by a court that has full jurisdiction and does provide the guarantees required by Article 6 (1)”.

He held that the proposed disciplinary proceedings before the conduct committee could lead to a determination of the petitioner’s civil rights and obligations, because an order striking her name from the register would exclude her from certain nursing posts. The conduct committee was not required to meet all the requirements of an independent and impartial tribunal, within the meaning of Article 6 (1), because of the existence of the right of appeal to the Court of Session.

55. Lord Mackay noted (paragraph 63) that there was no right of appeal against the issuing of a caution by the PPC against future conduct. He also noted (paragraph 64) that the parties were agreed that there should be no discussion as to the extent of the court’s powers, by way of judicial review proceedings, to review a decision to impose a caution. However, he observed that the answers lodged on behalf of the Secretary of State for Health contained averments that in such proceedings the court “must endeavour to ensure compliance with Article 6”, and that “the court will require to consider issues of fact and proportionality to a greater extent than previously. That being so, judicial review provides the Court of Session with full jurisdiction in relation to a challenge to a caution imposed by the Professional Conduct Committee.” In light of the agreement between the parties, Lord Mackay stated (paragraph 65) that he reserved his opinion “on all issues relating to the scope for judicial review of a decision by the PPC to make a finding of professional misconduct against a practitioner and to issue a caution as to future conduct.”

56. These cases make it clear that where an administrative body lacking the requirements of an independent and impartial tribunal determines the civil rights and obligations of a practitioner, there must be a right of access to a tribunal which does satisfy those requirements. Article 6 (1) would be satisfied if the Bill provided for a unqualified right of appeal to the Court of Session (as was the case in *Tehrani*). However, the courts have not so far decided whether the availability of judicial review would be sufficient on the basis of an extension of the scope of review to include a re-hearing of the factual dispute.

57. The reliance by the Executive upon the availability of judicial review would therefore leave the relevant law in a state of complete uncertainty. If the Bill were enacted in its present form, it is likely, in my view, that the courts would annul the legislation as beyond the legislative competence of the Scottish Parliament under Section 29 of the Scotland Act 1998 rather than extend the scope of judicial review so that it became virtually indistinguishable from a right of appeal involving a re-hearing of the facts and merits of the case.

58. As regards the annual general levy and complaints levy, the Executive characterises them as charges or taxes and concludes that they therefore would not engage Article 1 of Protocol No. 1. In my view, this is incorrect. The powers of public authorities to secure the payment of taxes, charges or other contributions is particularly wide but it is not unlimited. A taxing measure is subject to the principle of proportionality: see e.g., *Gasus Dosier und Förderotechnik v Netherlands* (1995) 20 ECHR 403, paragraph 403; *National Provincial Building Society v United Kingdom* (1998) 25 ECHR 127, paragraph 80. However, there is no incompatibility between the provisions of the Bill and Article 1 of Protocol No. 1 in this respect, since it is possible to read and give effect to those provisions in a way that is compatible; and, in the event of a breach of the principle of
proportionality, it would be open to a victim to bring a claim against the Commission for breach of the duty imposed by Section 6 of the HRA.

Conclusion

59. To make the Bill’s provisions fully compatible with Article 6 (1) and so to bring it within the legislative competence of the Scottish Parliament, it is necessary, in my view, to create a right of appeal against Commission decisions upholding services complaint to the Court of Session or some other appropriate independent and impartial tribunal endowed with full jurisdiction to adjudicate upon the relevant issues of fact and law. If reference is to be made in the Bill to ECHR rights, this should be done in a way that accurately reflects the obligations imposed on the Commission and the appeals committee by Section 6 of the HRA to act compatibly with ECHR rights in performing their public functions, rather than having regard to them in performing only some of their public functions.

60. If any aspect of my advice requires further amplification or clarification, I would be glad to advise further.

LORD LESTER OF HERNE HILL QC

APPENDIX 6(a)

Unpaid cost of running the Guarantee Fund Committee - £213,900

Who gives their time free of charge?

The Guarantee Fund Committee consists of eleven members in total, a convener, vice convener and nine further members.

The nature and volume of matters under consideration and the potential outcome of all decisions made requires a high calibre of committee member with a broad and deep level of knowledge and experience.

How much time do they give?

The minimum preparation time and attendance at the Guarantee Fund Committee meetings, interviews and Council meetings, excluding any travel time, all of which are essential to the orderly and efficient operation of the Committee, is calculated at 128 hours per month and 1536 per annum.

Who is paid and how much?

The only member of the committee to be remunerated is the convener, at the current rate of £10,500 per annum. This payment is nominal and is provided to defray some of the costs or lost income incurred by the convener’s firm as a result of the work undertaken for the Guarantee Fund Committee.

What would be the cost of paying for that time?

The unpaid cost associated to the average number of hours given by the Committee can only be calculated in terms of lost earnings to their respective firms.

The Cost of Time Survey for 2005 provides a median, zero income hourly expense rate for profit sharing partners of £62.96. This is the rate at which profit sharing partners have to generate income to cover the overheads of the firm and provide interest on capital but without providing themselves with any remuneration.

The same report provides a median profit per partner of £83,146, based on 1000 chargeable hours.

Based on these figures and after deduction of the £10,500 payment to the convener:
The minimum cost of the time required to operate the Guarantee Fund Committee which is given without charge is calculated at £213,900 per annum.

The actual time given by the solicitors and their firms, and therefore the cost, is much higher when travelling time is taken into account.

Appendix 6(b)

Extract: Section 43- Guarantee Fund

Solicitors (Scotland) Act 1980

Protection of clients

Guarantee Fund

43. (1) There shall be a fund to be called “The Scottish Solicitors Guarantee Fund” (in this Act referred to as “the Guarantee Fund”), which shall be vested in the Society and shall be under the control and management of the Council.

(2) Subject to the provisions of this section and of Schedule 3 the Guarantee Fund shall be held by the Society for the purpose of making grants in order to compensate persons who in the opinion of the Council suffer pecuniary loss by reason of dishonesty on the part of

(a) any solicitor or registered European lawyer in practice in the United Kingdom, or any employee of such solicitor or registered European lawyer in connection with the practice of the solicitor or registered European lawyer, whether or not he had a practising certificate in force when the act of dishonesty was committed, and notwithstanding that subsequent to the commission of that act he may have died or had his name removed from or struck off the roll or may have ceased to practise or been suspended from practice; or

(b) (b) any incorporated practice or any director, manager, secretary or other employee of an incorporated practice, notwithstanding that subsequent to the commission of that act it may have ceased to be recognised under section 34(1A) or have been wound up.

(3) No grant may be made under this section-

(a) in respect of a loss made good otherwise;

(b) in respect of a loss which in the opinion of the Council has arisen while the solicitor was suspended from practice;

(c) to a solicitor or his representatives in respect of a loss suffered by him or them in connection with his practice as a solicitor by reason of dishonesty on the part of a partner or an employee of his;

(cc) to an incorporated practice or any director or member thereof in respect of a loss suffered by it or him by reason of dishonesty on the part of any director, manager, secretary or other employee of the incorporated practice in connection with the practice;

(d) unless an application for a grant is made to the Society in such manner, and within such period after the date on which the loss first came to the knowledge of the applicant, as may be prescribed by rules made under Schedule 3; or

(e) in respect of any default of a registered European lawyer, or any of his employees or partners, where such act or default takes place outside Scotland, unless the Council is satisfied that the act or default is closely connection with the registered European lawyers practice in Scotland;

(f) in respect of any act or default of a registered foreign lawyer, or any of his employees or partners, where such act or default takes place outside Scotland, unless the Council is satisfied that the act or default is closely connected with the registered foreign lawyers practice, or any of his partners practice, in Scotland; or

(g) in respect of any act or default of any member, director, manager, secretary or other employee of an incorporated practice which is a multinational practice where such act or default takes place outside
Scotland, unless the Council is satisfied that the act or default is closely connected with the incorporated practices practice in Scotland.

(4) The decision of the Council with respect to any application for a grant shall be final.

(5) The Council may refuse to make a grant, or may make a grant only to a limited extent, if they are of opinion that there has been negligence on the part of the applicant or of any person for whom he is responsible which has contributed to the loss in question.

(6) The Council or any committee appointed by them may administer oaths for the purpose of inquiry into any matters which affect the making or refusal of a grant from the Guarantee Fund.

(7) Part I of Schedule 3 shall have effect with respect to the Guarantee Fund, including the making of contributions thereto by solicitors and the administration and management of the Fund by the Council; but nothing in that Schedule shall apply to or in the case of a solicitor-

(a) who is not in practice as a solicitor; or

(b) who is suspended from practice as a solicitor during suspension; or

who is in any such employment as is specified in section 35(4) or in the employment of an incorporated practice;

but where any solicitor in any such employment as is mentioned in paragraph (c) engages in private practice as a solicitor, the said Schedule and the other provisions of this Act relating to the Guarantee Fund shall apply to him and in his case so far as regards such private practice.

APPENDIX 6(c)

MEMORANDUM OF COMMENTS
BY
THE COUNCIL OF THE LAW SOCIETY OF SCOTLAND
ON THE
SCOTTISH EXECUTIVE CONSULTATION PAPER ENTITLED
"REFORMING COMPLAINTS HANDLING, BUILDING CONSUMER CONFIDENCE:
REGULATION OF THE LEGAL PROFESSION IN SCOTLAND"
(AUGUST 2005)

Chapter 10 – The Guarantee Fund and the Master Policy

Question 28 – Do you agree that the oversight role envisaged for the Scottish Legal Services Ombudsman would be a good way to address concerns about the operation of the Law Society of Scotland’s Guarantee Fund and Master Policy?

The Council does not accept that there are valid concerns about the operation of the Guarantee Fund and Master Policy. These twin consumer protections are unrivalled in scope and depth and provide the clients of Scottish solicitors with better protection than any other Scottish profession.

The Council does not agree that the Scottish Legal Services Ombudsman should have oversight of the Guarantee Fund and Master Policy.

With effect from 14th January 2005 the Financial Services Authority (FSA) has responsibility within the whole of the United Kingdom for the oversight of all insurance business, including the oversight of the brokers to the Master Policy (Marsh Ltd.) and the lead insurer and co-insurers of the Master Policy – as all of these companies have to be directly regulated by the FSA.

The Society, as a co-regulator with the FSA in terms of its status as a Designated Professional Body has to have its insurance arrangements approved by the FSA.

There is, therefore, no role for the Scottish Legal Services Ombudsman in overseeing the Master Policy as that role is already undertaken by the Financial Services Authority.
The Council is proposing, in the contract with the brokers (Marsh Ltd.) for the next five year term from 1st November 2005, to have a clause in the contract which provides that Marsh Ltd. use their best endeavours in their dealings/relationships with the lead insurer and co-insurers so that claims are settled within a 12 month timescale.

The Master Policy was investigated in 2004/2005 by the Office of Fair Trading (OFT). The OFT examined every aspect of the Master Policy’s operation and concluded that it should close its investigation under the Competition Act 1998. Indeed, the OFT concluded that the collective bargaining arrangements carried out by the Council which underpin the Master Policy are of benefit to the Law Society of Scotland, its members and their clients in securing uniform and affordable professional indemnity insurance for Scottish solicitors.

The OFT made no adverse remarks regarding the Master Policy.

Many solicitors already give advice on negligence claims against other solicitors. From figures provided by the Master Policy Brokers, Marsh Ltd., in the current insurance year there have been 95 claims on the Master Policy where the identity of the claimant’s agents is readily identifiable as a firm of solicitors. There have been 68 action raised by firms of solicitors from locations all over Scotland. A Pursuers’ Panel has been established to ensure that clients can get advice on negligence actions against their former solicitors. The panel has been in operation since October 2002 and during 2004 dealt with 160 enquiries with over 60 cases being pursued. The value of this scheme has been recognised by the Scottish Legal Services Ombudsman who states in her Annual Report for 2004/2005: “The Law Society has provided useful information to dispel the myth that it is impossible to find a solicitor who will take a professional negligence action against another solicitor.”

The Guarantee Fund is an unrivalled public protection established under the Solicitors (Scotland) Act 1980. The Guarantee Fund has been studied by several overseas jurisdictions and has a high international reputation in client protection circles. The Council calls on the Scottish Executive to provide details of any “concerns” which allegedly exist regarding the Guarantee Fund.

APPENDIX 6(d)

Issues Covered by the Accounts Rules

The Accounts Rules have been created in terms of s.35 of The Act. The rules apply to all solicitors who handle clients’ money. The current Rules in operation are The Solicitors (Scotland) Accounts etc Rules 2001. (Appendix 6). The Accounts Rules have been developed over the years to ensure that proper records are kept which show the true financial position of a firm at any time, in relation to both client monies and firm finances.

The rules cover a number of issues, including the following:

- At all times the solicitor must hold sufficient funds in client account to meet the sums held for all clients, without taking any account of sums due to the solicitor by other clients.

- Individual records must be maintained for each client of sums received, paid and held for them.

- Regular checks must be made and evidenced in respect of the actual sums of money held in client bank or building society accounts, the accounting balance held for each client and the adequacy of the funds to cover those balances in total.

- Client funds being held by the solicitor for any length of time require to be invested in such a way as to earn an appropriate amount of interest for the client. (Rule 11)

- Strict rules are in place governing bridging loans arranged for clients, borrowing from clients and acting for a lender where the loan is to the solicitor or a connected person. (Rule 20-22)

- Powers of Attorney held by a solicitor are regulated through the rules. (Rules 8,11 and 23)

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5 Scottish Legal Services Ombudsman Annual Report 2005/2005 page 21
Solicitors are obliged in terms of the rules to adhere to the provisions of the Money Laundering Regulations and part seven of the Proceeds of Crime Act 2002. (Rule 24) (Appendix 10)

The rules also set out solicitors’ obligation to contribute to the Guarantee Fund. (Rule 26)

All firms require to appoint a Designated Cashroom Partner who is responsible for ensuring that the staff and systems of the firm are compliant with the Accounts Rules. (Rule 12(2))

Solicitors are obliged to deliver an Accounts certificate every six months setting out the firm’s financial position. (Rules 14-18)

The rules allow for inspections and investigations to be taken on behalf of the Council and that in certain circumstances the solicitor should be responsible for the costs of these inspections. (Rule 19)

The Accounts Rules (Appendix 6) include an index of matters covered on the final pages. The Guide to the Accounts Rules (Appendix 7) explain what is required to comply with the Rules and are issued to guide and assist solicitors and their staff to fully comply with the requirements of the Rules.

APPENDIX 6(e)

TRAINING

The Society places a high emphasis on training. All solicitors who become a principal (usually a partner) of a firm are required to attend the Society’s Practice Management Course. A substantial proportion of this relates to the operation of the Accounts Rules. The Society also offers additional training for solicitors to assist them in familiarising themselves with the Accounts Rules. The Society runs courses for sole practitioners, designated cashroom partners and cashroom staff and operates a frequently run programme of ‘road shows’ for the profession as a whole. The Society also plays an active part in courses run by the Society of Law Accountants in Scotland (SOLAS).

This emphasis on training, taken together with the operation of the inspection programme, has resulted in the establishment of generally high standards of book-keeping throughout the profession.

This high standard has led to two things:

- firstly, only a small number of firms failing to meet the required standard, and
- secondly, the more ready discovery of those firms.

APPENDIX 6(f)

Solicitors (Scotland) Act 1980

Extract: Section 40 – Powers where failure to comply with accounts rules, etc.

Powers where failure to comply with accounts rules, etc.

40. (1) Where the Council are satisfied, in the case of any solicitor or incorporated practice, after enquiry and after giving the solicitor or, as the case may be, incorporated practice an opportunity of being heard, that the solicitor or, as the case may be, incorporated practice has failed or is failing to comply with any provisions of—

(a) section 35 or the accounts rules made under that section, or

(b) section 37 or the accountant’s certificate rules or other rules made under that section, so far as applicable in his or, as the case may be, its case (in this section referred to as “the applicable provisions”), the Council may, subject to the provisions of this section,

(a) withdraw the practising certificate held by the solicitor; or as the case may be—
(b) withdraw the practising certificate or certificates of any or all of the solicitors who are directors of the incorporated practice, and a certificate so withdrawn shall thereupon cease to have effect and the solicitor shall be suspended from practice as a solicitor.

(2) On being satisfied by the solicitor that he or, as the case may be, by the incorporated practice that it is able and willing to comply with the applicable provisions, the Council, unless they are of the opinion that the solicitor or, as the case may be, the incorporated practice is liable to disciplinary proceedings under Part IV, shall terminate the suspension from practice of the solicitor or solicitors concerned and shall restore to him or them any practising certificate or certificates held by him or them for the practice year then current.

(3) Within 21 days after receiving written notice of a decision of the Council under this section to withdraw his practising certificate, or to refuse to terminate his suspension from practice, a solicitor may appeal to the court against the decision; and on any such appeal the court may give such directions in the matter, including directions as to the expenses of the proceedings before the court, as it may think fit; and the order of the court shall be final.

(4) Any withdrawal of a solicitor’s practising certificate by the Council in exercise of the power conferred by subsection (1) shall be without prejudice to the operation of section 35(3) or section 37(8).

Appendix 6(g)

EXTRACT FROM SECTION 41; JUDICIAL FACTOR

Solicitors (Scotland) Act 1980

Extract: Section 41 - Appointment of judicial factor

Appointment of judicial factor

41. Where the Council, in exercise of any power conferred on them by the accounts rules, have caused an investigation to be made of the books, accounts and other documents of a solicitor or an incorporated practice, and, on consideration of the report of the investigation, the Council are satisfied—

(a) that the solicitor or, as the case may be the incorporated practice has failed to comply with the provisions of those rules, and

(b) that, in the case of a solicitor, in connection with his practice as such either—

(i) his liabilities exceed his assets in the business, or

(ii) his books, accounts and other documents are in such a condition that it is not reasonable, practicable to ascertain definitely whether his liabilities exceed his assets, or

(iii) there is reasonable ground for apprehending that a claim on the Guarantee Fund may arise; or

(c) that, in the case of an incorporated practice, either-

(i) its liabilities exceed its assets, or

(ii) its books, accounts and other documents are in such a condition that it is not reasonable practicable to ascertain definitely whether its liabilities exceed its assets, or

(iii) there is reasonable ground for apprehending that a claim on the guarantee fund may arise,

the Council may apply to the Court for the appointment of a judicial factor on the estate of the solicitor or, as the case may be, of the incorporated practice; and the court, on consideration of
the said report and after giving the solicitor or as the case may be, the incorporated practice an opportunity of being heard, may appoint a judicial factor on such estate, or do otherwise as seems proper to it.

APPENDIX 6(h)

<table>
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<tr>
<th>Year</th>
<th>Number of firms</th>
<th>Claims Paid</th>
<th>Average per firm £</th>
<th>Number of firms</th>
<th>Claims Paid</th>
<th>Average per firm £</th>
<th>% of LSEW</th>
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<td>16.3Millions</td>
<td>1962</td>
<td>1245</td>
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<td>1841</td>
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<td>1464</td>
<td>1250</td>
<td>214,000</td>
<td>171</td>
<td>12%</td>
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NOTE: LSEW Grants are limited to £1million per claim
LSS Guarantee Fund is uncapped

The number of firms is seen as the appropriate comparison, rather than the number of practitioners in private practise as inspections, reporting, systems and controls and claims all relate to practice units.

The claims experience reflects the loss to clients as a result of dishonesty.
The Scottish experience is significantly better and reflects the enhanced protection to the public interest afforded by the proactive on site inspection regime in place in Scotland.
The number of inspections carried out in Scotland averages around 500, approximately 40% of all firms, and will cover all firms in sequence as well as those where problems are known or suspected on a more frequent basis.

The Scottish system ensures firms are visited and compliance with the rules in place to safeguard client funds is tested routinely whether there is knowledge or suspicion of a problem or not.

On the other hand the English system only involves visits to firms where problems are known or suspected. The level of such inspections runs at about 400 per annum, being approximately 4% of all firms but with many firms never receiving an inspection visit.

APPENDIX 6(i)

International Appreciation of the Scottish Model

EXTRACT FROM ARTICLE IN SOUTH AFRICAN LAW SOCIETY JOURNAL OF SEPTEMBER 2005 – DIRK VERCUIL.


Other Jurisdictions consulted – New Zealand and Upper Canada

The position in Scotland

At its annual meeting on 27th March 2001 the Fund’s Board of Control (BoC) considered a detailed memorandum of the Chairman and Executive Director in relation to the New Zealand and the Scottish
systems. It resolved to appoint a task team in order, among other things, to investigate a means of improving the present audit system, and at the same time to consider the possible implementation of an alternative system.

A delegation of the Fund saw first hand in August 2001 that the self-certification system in Scotland (which has developed since 1985) had been an unqualified success, although the number and value of claims against the Society’s Guarantee Fund rose dramatically in the first few years after the system had become operative because the first series of inspections uncovered irregularities which had been undetected for some time.

In Scotland

- Seminars are conducted for special groups:
- Each firm is required to appoint someone who is personally responsible for overseeing the accounting work within the firm; and
- The inspectorate visits every firm, irrespective of size or reputation, every two years.

One to three-person firms accounted for 75% of the profession, which consisted of 3,700 solicitors at 1,250 firms in 2002. Claims admitted in the early 1990’s had bottomed out at the time and ran at around only £250,000 (R3,101,450) in 2002.

The Law Society of Scotland (LSS) introduced new measures because the profession in Scotland had shared a common experience of accountants having failed it.

The Fund delegation reported that the Scottish system had not had the effect of completely stopping the theft of trust moneys. The greatest advantage of the system, however, was to be found in the fact that it has substantially shortened the time taken in detecting thefts. The delegation believed there would be much merit in establishing a pilot scheme to be conducted in South Africa.

**EXTRACT FROM LETTER OF SEPTEMBER 2004 TO LAW SOCIETY OF UPPER CANADA SEEKING INFORMATION ON THEIR NEW DEVELOPMENTS.**

Our provincial Law Society commenced with a two year pilot project at the instance of the Attorneys Fidelity Fund (AFF) on 1 March 2004. 66 firms volunteered by 31st July 2004 to subject themselves to inspections by an own inspectorate team instead of the usual annual audit report to be done by the firms’ Chartered Accountants (CA’s) (as a prerequisite for the issuing of Attorneys Fidelity Fund Certificates to sole practitioners, partners or directors).

Our inspectorate (staff etc) had been set up since 1 August 2004 in view of the ‘first’ six monthly accounts certificates falling due at the end of September (for the period 1 March to 31 August 2004).

Our pilot project is essentially based on the Scottish system. A task team of the AFF visited Scotland in August 2001. Les Cumming has assisted us from time to time and we consulted with him and others in October 2002 in Durban.