



FACULTY OF ADVOCATES

15 March 2016

Neil Stevenson
Chief Executive
Scottish Legal Complaints Commission
The Stamp Office
10-14 Waterloo Place
Edinburgh EH1 3EG

Response by the Faculty of Advocates to SLCC Draft Four Year Strategy

I am pleased on behalf of Faculty to provide a detailed response to the SLCC's draft four year strategy as below, and look forward to discussing this further in early course.

Background

1. The Faculty of Advocates is Scotland's independent referral bar. Its membership comprises some 460 practising advocates, each a sole practitioner. The Faculty exercises regulatory responsibility for the profession, under powers delegated to it by the Court of Session under the Legal Services (Scotland) Act 2010 and is subject, in that regard, to the supervision of the Lord President. It is a relevant professional organisation for the purposes of the Legal Profession and Legal Aid (Scotland) Act 2007.

THE DEAN OF FACULTY

Telephone +44 (0)131 260 5622 Facsimile +44 (0)131 225 5341

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www.advocates.org.uk

2. An advocate holds a public office to which the advocate is admitted by the Court. That public office carries with it privileges – notably a right of audience in all Scotland’s courts – and responsibilities – in particular, the cab-rank rule, enshrined in the 1532 legislation establishing the College of Justice in Scotland, which means that an advocate may not, without good reason, decline to accept instructions where a reasonable fee is tendered.
3. Advocates provide specialist advocacy and advice services. Unlike solicitors, advocates do not have the right to conduct litigation in the Scottish courts, but have rights of audience in those courts. Advocates accordingly, ordinarily, work on a referral basis, receiving instructions from solicitors and, under the Faculty’s Direct Access Rules, from other designated persons and bodies. Advocates practice as sole practitioners.
4. The Faculty’s work is directed specifically to the practice of advocacy in Scotland. The Faculty’s training programme is widely recognised within and outside Scotland as one of the best of its kind. The requirement on advocates to seek advice, ultimately from the Dean or Vice-dean, on matters of professional conduct, supports good standards of professional conduct. As the Scottish Legal Complaints Commission is aware, the Faculty has committed itself to a quality assurance programme for practising advocates, including peer review assessments of advocacy skills. I am pleased that the Faculty is, in this regard, leading the way within the Scottish legal profession.
5. The Commission receives few complaints about advocates. In the year 2014-15, the Commission received 18 complaints against advocates. It accepted three of those as eligible. In the previous year it received 19 complaints against advocates and accepted four as eligible. However, each complaint is significant both to the complainer and to the practitioner concerned and must be properly and effectively dealt with.

6. The Faculty values the working relationship which it has with the Commission. Together, the two organisations published last year guidance for advocates on complaints handling. I accordingly welcome the opportunity to comment on the Commission's strategy for 2016-20. I would encourage the Commission to focus on its statutory remit; and to concentrate over the next four years on fulfilling that remit effectively. I would suggest that the Commission should revise its strategy with this in mind; and exclude from that strategy activities which would be of questionable *vires* and which would distract from the fulfillment of its statutory quasi-judicial responsibilities.

7. There are two general points which I would make by way of preliminary to my specific comments on the Commission's draft strategy.
 - 7.1. The draft strategy claims that the Commission has "expertise greater than any other organisation" in relation to the practical application of standards of service by lawyers in practical circumstances. I do not believe that this claim is well-founded, at least as regards advocates. The information available to the Commission is based on complaints, which represent those cases in which something has gone sufficiently badly wrong to result in a complaint which reaches the Commission. Complaints represent a tiny fraction of the total volume of transactions or matters dealt with by lawyers on behalf of clients in Scotland. I do not have data on the number of instructions accepted by advocates in those years to make a direct comparison with the number of complaints against advocates dealt with by the Commission, but in the calendar year 2015 over 34,000 fees were issued by advocates who subscribe to Faculty Services Limited. On any view, the Commission's information in relation to the work of advocates is very limited indeed.

7.2. Section 1 of the Legal Services (Scotland) Act 2010 sets out the regulatory objectives which apply in the context of regulation of the legal profession. These are: (a) supporting (i) the constitutional principle of the rule of law and (ii) the interests of the justice, (b) protecting and promoting (i) the interests of consumers, and (ii) the public interest generally, (c) promoting (i) access to justice and (ii) competition in the provision of legal services, (d) promoting an independent, strong, varied and effective legal profession, (e) encouraging equal opportunities within the legal profession, and (f) promoting and maintaining adherence to the professional principles. Protecting and promoting the interests of consumers is one of those objectives, but is only one of the relevant objectives. Much of my own work, under the Faculty's Guide to Conduct, in giving advice and direction to individual advocates, is concerned with the conflict which can sometimes arise between the wishes of the client and adherence to the professional principles – and is, thereby, directed to supporting the constitutional principle of the rule of law and the interests of justice.

The Commission's statutory functions

8. The Commission has specific statutory functions, namely those set out in the Legal Profession and Legal Aid (Scotland) Act 2007. Those functions are as follows:-

- (a) to receive complaints (s. 2) and to deal with those complaints in accordance with the Act (ss. 2-22);
- (b) to investigate any complaint in relation to the handling of a conduct complaint by a relevant professional organisation (ss. 23-25);

(c) to provide advice as respects the process of making a service complaint or a handling complaint (s. 34);

(d) to monitor practice and identify any trends in practice as respects the way in which practitioners have dealt with matters that result in services and conduct complaints and the way in which the relevant professional organisations have dealt with conduct complaints (ss. 35-36);

(e) to give guidance and make recommendations to the relevant professional organisations about the specific matters referred to in section 36(3);

(f) to monitor the effectiveness of the Guarantee Fund and other similar arrangements (s. 39);

(g) to issue guidance to the relevant professional organisations or to practitioners as respects how practitioners deal with complaints (s. 40).

9. The principal statutory responsibility of the Commission under the Legal Profession and Legal Aid (Scotland) Act 2007 is its work in dealing with individual complaints. I invite the Commission to focus on that task. I welcome, in that regard, the acknowledgment in the draft strategy document that the Commission needs to improve its resolution times. I also welcome the hope that the Commission's determinations "will give closure to parties, and will minimise the need for appeals". Achievement of that aim will require the Commission to concentrate on the quality of its investigation and decisionmaking processes.

10. The Commission rightly stresses in its strategy document the need for it to be, and to be perceived to be, independent, fair and impartial. As the Inner House of the Court of Session observed in *Bartos v. SLCC* 2015 SC 690, paras. 88-89, this is essential if the Commission is to command the confidence of all those involved. As the Court pointed out in that case, the Commission “has a statutory quasi-judicial function. It adjudicates upon disputes, some of which would previously have been directed to the court in order to resolve issues of alleged professional negligence.” That is one of the reasons why the Commission’s role is defined as it is by statute.

11. In *Bartos*, the Court concluded that the conduct of the advocate in question was “not open to reasonable criticism”: para. 84. The Court criticized the quality of the reasoning in the Commission’s decision: para. 59. The Court found that the Commission had made at least one fundamental error, which “goes straight to the heart of the reason given for upholding the complaint”: para. 81. The same error had been made both by the investigator and the determination committee. This case invites a concern – reflected in the Court’s opinion at para. 90 – as to whether the Commission has available to it the expertise and knowledge to adjudicate fairly and effectively on cases involving advocates – and, perhaps, other lawyers engaged in advocacy. I recognize that the very low volume of complaints against advocates presents challenges in that regard. The Court specifically enjoined the Commission to “bear in mind the need to ensure that the professionals involved [in its decisionmaking processes] have the appropriate background and standing”: para. 90. I hope that the Commission will consider seriously how it addresses this issue.

Comments on specific features of the strategy document

12. Against this background, I have the following specific comments on the strategy document.

12.1. The statement in Part 1 that the Commission intends to “move to influencing standards of service for Scotland’s diverse clients” should be omitted. The promotion of good standards is a matter, in the first instance, for individual practitioners and firms, and for the profession at large. I have described above the Faculty’s commitment to promoting and maintaining high standards, and some of the steps which the Faculty takes in that regard. I question whether the Commission should see itself as having a role in influencing standards other than in relation to complaints handling. Such a role would not, it seems to me, reflect the Commission’s statutory functions; nor would it sit well with the Commission’s quasi-judicial role.

12.2. The statement in Part 1 that “regulation and complaints handling should be consumer focused ...” should be amended. As I have explained above, regulation, in the context of the legal profession, in particular as regards court proceedings, is directed to protecting the public interest in the administration of justice, and a variety of other objectives, as well as the consumer interest. The interests of consumers is an important regulatory objective, but is only one of a number of regulatory objectives which requires to be secured in this context. In any event, the Commission has no responsibility for regulation of the legal profession except as regards complaints. I would accordingly suggest that this sentence be amended to omit the words “regulation and”. In relation to complaints, the Commission might wish to explain what it means by being “consumer focused”: as the Court in *Bartos* observed, the Commission has a quasi-judicial role, which it must maintain.

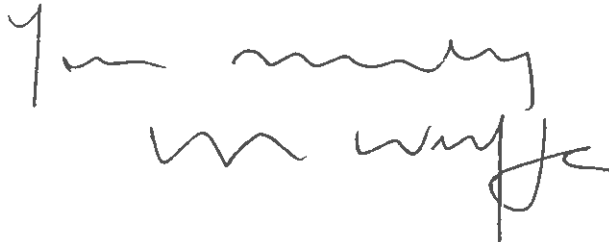
- 12.3. I also invite the Commission to consider whether it would be better to refer to “clients” rather than “consumers”. I recognise that the term “consumer” may be used in a sense which does not limit it to matters of consumer law, but clients are various – including public bodies and multinational corporations – and consult lawyers in many situations which are remote from consumer disputes in the narrow sense, including in relation to criminal charges, access to children and commercial disputes. The broader term “clients” would avoid the risk of misunderstanding.
- 12.4. The statement in Part 1 that the Commission will seek to influence change at a national level “on the handling of complaints and regulation” should omit the words “and regulation”. The Commission’s statutory functions are concerned with complaints and not with regulation more generally.
- 12.5. Under the heading “Consumers and customers ...” there is an elision between a welcome focus on improving the Commission’s own work using “key drivers of customer service” and an expressed desire to “improve the sector’s work” in that regard – which does not appear to be restricted to complaints handling. As I have observed above, improvements in the services provided by the sector generally will and should be driven from within the profession itself. I question whether the Commission has the *vires* or the resources to promote this aim.
- 12.6. Under the heading “1. Build Trust as a highly visible, independent, fair and respected body in Scotland” the fifth bullet point should be omitted. As I have observed above, the Commission has a very limited insight – based on those complaints which reach the Commission – into the consumer experience of lawyers. In the case of advocates at

least, the Commission deals with only a handful of cases each year, and most of those are found to be ineligible. If it implies that the Commission intends to embark on some other exercise of information gathering, I question its *vires*; and, in any event, whether it is an appropriate exercise for the Commission to undertake given its statutory remit and limited staff.

- 12.7. Under the heading “2. Promote strong relationships between consumers and their lawyers” the second bullet point implies that the Commission intends to access and audit data on all complaints raised direct with lawyers. I am not clear that the Commission has power to do this. Its powers under sections 35 and 36 of the Act are concerned with the way in which practitioners have dealt with matters that result in services complaints being dealt with by the Commission under sections 8 to 12 and conduct complaints being remitted to the relevant professional bodies under sections 6(2)(a) or 15(5)(a), not with complaints which never require to be dealt with by the Commission or the relevant professional body. But even if the Commission has such powers, I question whether such an exercise would be a good use of the Commission’s resources.
- 12.8. Under the heading “4. Drive improvement through a learning culture, education and our influence in the sector”, the first, second and fourth bullet points should be omitted. It seems to me that these go beyond the statutory remit of the Commission. The reference to “lobbying” is, I would suggest, particularly unfortunate given the Commission’s quasi-judicial functions.

Concluding observations

13. As I stated at the outset of this letter, I value the relationship which the Faculty has with the Commission. I would invite the Commission to reflect, in its strategy, that it has important, but limited, statutory functions. I would suggest that the Commission should concentrate over the next four years on fulfilling those functions as effectively as it can. It would, I would suggest, be unhelpful and undesirable for the Commission to commit itself to ambitions and tasks which are of questionable *vires* and which may distract from the effective fulfillment of its important public responsibility. I would be glad to discuss these issues further with the Commission.

A handwritten signature in black ink, appearing to read 'James Wolffe', written in a cursive style.

James Wolffe QC