Submission from Scott H Miller for the Legal Profession and Legal Aid (Scotland) Bill

I am writing about the call by Justice 2 Committee for evidence in relation to the Legal Profession and Legal Aid (Scotland) Bill.

I am a 58 year old solicitor in private practice concerned mainly with litigation. I have been a Council Member of the Law Society of Scotland since 1999 and a Reporter on Complaints for the Law Society as well as a member of one of the Law Society’s Complaints Committees. I qualified as a solicitor in 1971 and before going to University I worked in the Sheriff Clerk’s Office for a while from 1965 so I have long experience of dealing with the public over legal difficulties and disputes. I am not a fat cat and have spent most of my career providing services to ordinary people.

I am, like many professional people of my generation, partly concerned about the move away from vocational professional ideals towards the treatment of the legal profession as simply a service industry. I see the complaints part of the Bill as driven by consumer interests but there are other interests at stake in the operation of an effective range of legal services so far as the public, the business community and the established order is concerned. The thrust of the Bill will, I think, move us further down the road away from the element of kindness and concern which was part of the vocational outlook, towards offering set piece defined services in limited circumstances. It seems similar to the pressure to move away from G.P. health services where the family circumstances were well known, towards industrial scale hospital processes where knowledge of personal circumstances, which are not thought to be of a strictly medical history nature, is disregarded. Solicitors offering predefined set piece work to avoid complaints and make a reasonable profit with tight charges, (particularly for civil legal aid work where the charges have not been properly increased for two decades and there is a drive by the Scottish Executive to pre-define what everything is going to be about,) are trends likely to create a fair amount of public dissatisfaction. I believe that the complaints structure and the plans for dealing with complaints in the Bill will aggravate these difficulties.
I would not maintain that the Law Society’s handling of complaints was ideal. Many solicitors thought that it was far from ideal. There was a bureaucratic, paper based, and impersonal element in it. However, a lot of individual attention was given to each complaint through a great deal of volunteer help from the panel of Reporters and by members of committees, particularly a large number of interested and capable lay people. The difficulty for the Law Society was in dealing firmly at an early stage with the rejection of irrational, unspecific, wild, and almost incoherent complaints driven by anger rather than any sensible expression of dissatisfaction with what a solicitor was meant to be doing – particularly where expectations by the clients ran high and they were generally aggrieved with a range of problems surrounding the issue placed with the solicitor. The Law Society found it difficult to reject large amounts of nonsense without incurring criticism of protecting its own; so much effort went into helping complainers define the issues, and much was investigated unnecessarily to err on the safe side. Public perception was distorted by the media and consumer lobby aided by the Ombudsman, particularly Mrs Costello-Baker, the recent holder of that Office, who was nit picking and bureaucratic in the extreme. She carped continuously as though this was purely a matter of perfection in administrative organisation and a numbers game but without carrying any significant responsibility herself. The Law Society took a pragmatic course and avoided quarrelling with her about individual matters although trying to hold to points of principle. I am sure that contributed to what has been called the public perception of the complaints system being unsatisfactory. The system was by no means an unsatisfactory as some members (and the numbers seem relatively small) of the public may have perceived it to be, and that has to be borne in mind when planning to dismantle it, and seeking to produce an entirely different alternative which may not operate nearly as effectively or economically.

Lawyers who are complained about form part of the legal system, which is one of the three pillars, as it were, of the establishment along with the legislature and the executive. They do a vast amount of work to keep the executive administration right, in circumstances where public administration lacks the personnel with the skills to accommodate individual details (as opposed to preconceived categorisation and form filling) to provide an effective direct interface with the public. They also support the role of the Judiciary in upholding an independent rule of law within this country, free from arbitrary state power, which, apart from making it a good country to live in, also enhances its attractiveness to inward investors and others as a predictable and reliable environment in which to do business. There is more to the overall implications of undermining any component in that system than simply pandering to public expectations stoked up by selfish interests in advertising, the media, and political considerations. The undermining of the Judiciary and the Rule of Law in Scotland would have deep consequences for its economy, and retention of its more able population much of which emigrates.
My first impression on looking at the Bill is that it simply sets up another quango where there will be jobs available for those close to the political and Scottish Executive processes. It will be expensive. It will not have the good will built by the Law Society, which has involved much free or cheap voluntary help. It will be out of touch with what is actually happening in the legal market place. It will not employ, certainly at Board level, and probably not at administrative level either, many people who have day to day experience of dealing, in the context of applying the law, directly with members of the public (particularly the underprivileged ones) and the enormous range of difficulties they encounter in everyday life in Scotland. In many areas public administration is failing them and there is little that lawyers can do to effectively exercise rights for them. There is a direct political interest to cover up these failings – and for the Executive to pretend that legal remedies are available when, in practice, they are not and also to influence the operations of the Complaints Commission to uphold that myth. The Bill, as presently drafted, does not create an independent complaints body. The Commission will be a further dangerous intrusion into access by the public to legal services by the Executive and the political area. The scope for manipulation is considerable.

The funding of the Commission is also a cause for concern. It is not to be responsible for producing any particular efficiency or outcomes so as to create anything like market results. It will be accountable to the Scottish Parliament for perceived performance (and no doubt will develop expertise in self justification and statistics) and will present the bill for its costs elsewhere - to the professional bodies representing the legal profession. The general levy is effectively a class of taxation put on to a particular professional group. The Commission will decide, after consultation with the Executive in particular and probably token consultation with the professional bodies, what this taxation is to be to suit the expenditure level they wish to operate at. The complaints levy on the other hand is, in effect, a penalty. In addition, this body will have the right to impose fines of up to £20,000 on lawyers and £5,000 on professional organisations to be paid to consumers and it will interfere in the independent handling by the Law Society of conduct complaints and also in matters with which the independently constituted Scottish Solicitors Discipline Tribunal is concerned. It is also planned that the Commission should have some unnecessary role overseeing the Guarantee Fund and Master Policy both of which are already effectively operated and attract international compliments. This body will be an administrative creature, controlled by the Executive and there are to be no rights of appeal. This sounds like totalitarianism and is in clear breach of a number of articles of the European Contravention on Human Rights. It will just not work as presently constituted. It also raises the question whether Scotland is prepared to be seen in the world as a country where its limited devolved government is seeking to manipulate and restrict the independence of the legal profession - if other institutions to which there is recourse approve which seems unlikely.
This Bill loads the dice against solicitors. It takes a one-dimensional consumerist viewpoint. It overlooks that in many reactive litigation and dispute matters there are not black and white, right or wrong outcomes. Solicitors are caught in the middle of disputes trying to assist in arriving at something, which is just. Outcomes can often be regarded to some extent as unfair on both sides. Justice is often a form of compromise – and not the stereotyped vindication of right preached by the media. Legal work in other proactive areas – for example – contract/corporate work/inheritance, and many other areas – is also finely balanced in individual circumstances, with an unpredictable element at the outset. The management of expectations cannot reasonably be expected to go as far as psychological therapy, offering happy and constructively perceived outcomes to everyone. The legal system addresses many varied grievances and provides a buffer absorbing public anger about disappointments in life but some people are not assuaged and continue. This system will attract them. Solicitors will lose any inclination to treat unfortunate people kindly and will become quite regimented about turning away all sorts of awkward and difficult problems and narrowing down the trading conditions to make it absolutely clear that they are not taking on any extras by way of personal attention – so as to avoid complaints administration and disproportionate compensation bills. However, many clients who initially present as difficult to deal with, turn out later in the process to be prepared to focus, and can achieve justifiable remedial outcomes. It has to be borne in mind that personal attention is something the administration is particularly bad at providing for. We have a history of Poll Tax, CSA, Police and Prison Service, Planning, and all sorts of other Government bodies behaving in an impersonal, shallow and unimaginative way towards the public and causing immense anger. Much of that flows towards the solicitors’ profession, or towards the medical profession if they become ill – and sometimes creditors or social work professionals, MSPs, and even families and employees. This Bill will be a warning to the solicitors’ profession not to be caught absorbing that sort of anger.

The political ambitions behind the Bill and the desire to do too much, really, are the basic problem. A properly independent commission outwith executive control, funded at least in part by the taxpayer, and involving or with recourse to, a completely independent judicial process is what is required. If there is a desire to provide that sort of system for the public there should be a corresponding willingness to finance it and to make it robust, independent and clear in its objectives. At the outset it should be concerned only with quality of service. The additional concerns in relation to conduct and the Discipline Tribunal are going to be very difficult to operate in practice. They will give rise to much confusion and expense. The concept of the Tribunal awarding compensation for professional misconduct will undermine the role of the Tribunal as an upholder of professional standards. It will become another body distracted by consumer demands. The offence in professional misconduct is an offence against the profession and its standards. The fines go to the Crown Treasury so as to keep a proper distance between the Law Society, as prosecutor, and the Tribunal. If the Law Society is not to have a
financial stake in these matters there is no reason why consumers should have a financial stake in matters of solicitors' conduct. It is quite different where the conduct also involves inadequate service to the consumer which can be compensated but misconduct in itself should not be compensated – the victim is the profession and its reputation not the consumer.

I think the Bill is also too long and betrays a tendency to write administrative rules (claiming credit for many which are already in effect or use as good practice) as though they were new law, and a lack of moral courage and administrative leadership in the setting of clear criteria, giving adequate funding, and autonomy. In my experience much of the best legislation, in this country was produced in short Bills, which drew on existing, specialised knowledge. The Law Society wants to help the Executive and Parliament get this right and should be accepted as a sensible guide in a difficult area – not a challenger.

Yours sincerely,