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

I must first of all declare an interest in that I am a practising solicitor and, accordingly, have followed the debate as to whether disciplinary matters are to be dealt with in-house as, for example, doctors or be placed with an independent body.

By now many submissions will no doubt have been made regarding the incompatibility of the Scottish Legal Complaints Commission as proposed with the European Convention on Human Rights and therefore the inability of the Scottish Parliament to pass the bill without radical amendment. In particular you will no doubt have received the opinion obtained by the Law Society. I shall therefore focus on a number of areas which concern me in particular.

These are, broadly, threefold: the complaint levy, the lack of accountability of the quango to be created and the confusion of disciplinary functions with compensation.

Complaints Levy
While it is not unusual to have a general levy as proposed, it does seem grossly unfair to make a second levy on the party who is the subject of a complaint whether or not they are successful in defending the allegation. While allegations which are "frivolous or vexatious" will be dismissed out of hand, the term still represents an easy hurdle to clear as many cases are almost certain to fail yet have a 5 or 10% chance of success.

Clearly for sophisticated clients or serial complainants this will be a useful tool to extract a settlement from practitioners conscious of the cost of defending a claim. It would appear that seldom will the matter be settled at mediation if the levy is to be imposed whether or not a commercial view is taken by the practitioner.

The General Levy
Solicitors are in general content to pay a levy to the Law Society in respect of their disciplinary functions at present (and this is likely repeated in the other bodies affected) as they have a measure of control over the level of expenditure. Clearly as the Commission will be funded by those it oversees but will be appointed by others as another quango, there appears to be a lack of accountability for those costs and therefore a risk that the costs will escalate. Ultimately, they will require to be passed on to clients in higher fees.

Disciplinary function
It also appears that there is a blurring of the distinction between professional disciplinary procedures and compensatory awards. Clearly society has always expected high standards from its legal profession. Indeed, this is verified by the very fact that the Scottish Parliament considers it necessary to create a new quango to administer certain complaints independent of the legal profession unlike others, for example doctors or accountants.

However, that is an entirely different purpose from that of compensating clients, a function which is still best performed by the courts, or in respect of solicitors the Scottish Solicitors Complaints Tribunal, who have the advantage of listening to all the evidence and argument presented to the best of the parties' abilities in a fair and ECHR compliant way. This is especially important given the sizeable leap in the limit for compensatory awards and the effect this will have on complainants who will seldom raise actions for negligence. Instead, they will gain an unfair advantage by complaining of inadequate professional service thus subverting normal rules on the funding of cases and requiring one party to fund both the defence and the prosecution.

Further, it is essential that no penal element of "damages" is introduced into the compensation award of the Commission as that would subvert the whole essence of monetary awards which is to put the complainer in the position they would have been had the act or omission complained of not occurred.

I trust that you will take my views into account when considering what is admittedly a complex and testing area.