Submission from David Preston for the Legal Profession and Legal Aid (Scotland) Bill

1. My name is David Preston. I am a solicitor, now practising part time in Oban. I was a principal in the firm of Hosack & Sutherland from 1975 to 2005, when I passed my practice to MacPhee & Partners, Fort William, for whom I am now a consultant on a part time basis. I am employed part time by Registers of Scotland in connection with the introduction of the Automated Title to Land project and I am a Convenor of a Mental Health Tribunal. I have been a member of the Council of the Law Society of Scotland (LSS) since 1990 and served as its President for the year 2002/03. I have therefore developed a keen sense of the responsibilities of LSS in terms of the governing legislation.

2. LSS was established by the Solicitors (Scotland) Act 1949, which has been amended by legislation over the years, with the amendments being consolidated by the Solicitors (Scotland) Act 1980 in terms of which the object of LSS includes the promotion of (a) the interests of the solicitors’ profession in Scotland and (b) the interests of the public in relation to that profession (section 1). The current legislation empowers and obliges the Council of LSS (the Council) to regulate the profession in the context of section 1. In addition, the legislation requires LSS to maintain a Guarantee Fund for the purpose of compensating clients for loss arising through the dishonesty of a solicitor, and a Professional Indemnity scheme (the Master Policy) for the purpose of providing compensation for loss as a result of negligence on the part of their solicitor. The Council has fulfilled these functions since 1949 in relation to matters of professional conduct and, since the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, also in relation to Inadequate Professional Services (IPS). The Guarantee Fund has been administered and the Master Policy has been maintained by LSS. Apart from procuring the necessary level of cover under the Master Policy, through its brokers, and ensuring that each relevant practice unit maintains the necessary cover, LSS has no influence the policy in particular in relation to the handling of individual claims.

3. It is regrettable that the Executive has found legislative time to promote the Bill in its present terms, whilst ignoring the representations made by LSS over a period of years for amendment to the existing legislation in a number of constructive ways. For example, the power to suspend membership of the Society in certain circumstances, such as in the case of Julian Danskin, where LSS was subject to criticism for failing to act in circumstances where action was not possible under the governing legislation until he had been convicted and sentenced and where the sentence was for imprisonment for a period of less than 2 years, which even then prevented automatic referral to the Scottish Solicitors Discipline Tribunal.

I am aware of a number of similar situations for which amendments have been proposed by LSS in recent years, the legislative opportunity for which has not been available until the present Bill, and the opportunity for which has not been taken.

4. In terms of the Bill as drafted, there are a number of concerns, which relate to potential interference with the independence of the legal profession as well as the public interest. It is accepted that there is a groundswell of opinion which considers that “self-regulation” is no longer appropriate, particularly in relation to service issues. As a consequence, LSS has confirmed its willingness to co-operate with the transfer of IPS handling to a truly independent and impartial body, provided it is properly constituted, represents a true improvement in the system of handling service complaints and recognises the ECHR considerations. The proposals in the Bill fall short of that in a number of respects.

5. The issue has to be taken in context. When one considers the number of transactions or bits of legal business and advice given in any year, the number of complaints arising is comparatively very small. It is considered that complaints arise in less than 1% of the business transacted and advice given by solicitors. That is not to diminish the importance of the subject of any complaint to the individual complainer, which has to be respected throughout the process. However, to introduce a system which may well have the consequence of making it uneconomic for efficient and diligent solicitors to remain in
practice or which causes solicitors to restrict their areas of practice should be a matter of grave concern.

6. In particular, I have the following specific points to raise in relation to the terms of the Bill:

- I am aware of the representations by LSS in relation to the composition of the Commission and the procedures as outlined in Schedule I in relation to compliance with ECHR and I adopt and endorse those representations in full.

- The preliminary steps proposed by section 2 will introduce additional steps in the process, which will result in delays to the process of determining complaints. LSS has spent considerable time, effort and energy over the past three years to reduce the average time taken to determine complaints to less than a year. The proposed measure will immediately result in a diminution of the benefits of that effort and energy, which cannot be in the interests of the public. Such delays are inevitable as a result of the introduction of the concept of the ‘single gateway’. What time will be required for the Commission to fulfil its initial function?

- The definition of “any person having an interest” is too vague and unspecific. It appears to be left to the total discretion of the Commission, without affording an opportunity for representations by the solicitor. Such representations are necessary in view of the nature of legal work and the ‘wide range’ of circumstances which might give rise to a complaint about conduct.

- Further delays will arise as a result of the requirement under section 4 to determine the nature of the complaint and re-direct it, or elements of it to the professional bodies.

- Section 7 refers to “an” opportunity for representations to be made before determination of the complaint. Taken literally, this could seriously fetter the ability of the Commission to properly determine a complaint in terms of ECHR. The nature of legal services is such that the complexity could require a detailed consideration of the circumstances that would not be possible if the ability to make representations were to be limited in this way.

- The consequences of the provisions in section 8 relating to the level of compensation could be far reaching and could greatly diminish the effectiveness of attempts to resolve issues at source or by mediation. If complainers are given an expectation of compensation at the level proposed, and standing the fact that the process will not involve them in cost, complainers will have nothing to lose by pursuing the complaint to a determination by the Commission in the hope and expectation of receiving compensation at, or towards the upper level.

The level of compensation for IPS was introduced in 1990 at a level of £1000, and increased in 2004 to a level of £5000. It is noteworthy that the only basis for the proposed level is the equivalent proposal for England & Wales. There is no evidence that such a figure is relevant to Scotland, and in fact the evidence suggests that this figure is grossly excessive as outlined below. The compensation for IPS was designed to be for the inconvenience and upset caused by the need for the complaint to be made. Any recovery of loss arising from negligence was properly to be dealt with through the Master Policy and therefore through the normal court process as with any such claim. As part of such a claim arising from negligence, the element of ‘solatium’ that might have previously been determined in relation to IPS was to be taken into account by the court. Therefore the issue of claims arising from negligence were kept separate from issues of IPS, as the two are distinct from each other, although, as is recognised in the legislation, there is an element of overlap. However the method of determination requires to be handled in different ways. The Bill proposes a procedure for claims for recovery of loss of up to £20,000 arising partly or wholly from negligence as well as from the provision of IPS. This is inappropriate and is
considered to be contrary to a solicitor’s right to have claims arising from his or her negligence to be determined by the Court.

As mentioned above, the proposed level of compensation is grossly excessive based on the available evidence. The current average settlement of professional negligence claims against the Master policy is under £10,000. The vast majority of settlements are reached by agreement with the claimant ie in 96 – 98% of cases, with only 2 – 4% of claims being litigated in any year. There is accordingly no basis for the proposed increase in the level or nature of compensation for IPS. The Master Policy is in place to cover claims against solicitors arising from negligence and does not cover awards of compensation for IPS. Therefore in view of the proposed level and nature of compensation, cover will not be available to the solicitor, resulting in the solicitor personally bearing the award in its entirety. This will have a number of potential consequences all of which are contrary to the public interest:

- Solicitors will consider the areas of practice which are most likely to result in such claims and will cease to practice in those areas. It is suggested that such areas tend to be in the most socially sensitive areas of practice which will result in a denial of access to justice to many of the most deserving. Such areas will include legally aided family and matrimonial matters.

- Where this effect occurs in rural areas, many citizens will be denied any access to justice locally, resulting in additional hardship through the need to travel potentially great distances for assistance.

- If solicitors are required to meet the potential additional outlays on such awards of compensation, they will need to pass the burden on to their clients by way of increased fees. This will deny access to justice to many who miss the legal aid thresholds and require to self finance, but who may be unable to afford the increased costs.

- In extreme cases, solicitors may conclude that the potential risk of such a level of award is too great and close altogether with similar consequences as outlined above.

- The imposition of a Complaints Levy as set out in sections 18 – 19 of the Bill will further discourage complainers from settling complaints at an early stage in the process. The complainer will have nothing to lose in pursuing the complaint to determination by the Commission. It is suggested that this effect would be reduced if a complainer were to be required to contribute to the expenses where they had rejected an offer of settlement at a level which is the same as or more than a determination by the Commission, or to have rejected the offer of a mediation. This would be similar to the effect of a ‘judicial tender’ in the court context.

- There has been no evidence of any concern regarding the Guarantee Fund and it is therefore considered unreasonable and unnecessary for the Commission to interfere with its operation. So far as the Master Policy is concerned, LSS merely facilitates the existence of the policy and the level of premium through the brokers. A tendering process is operated relative to the appointment of the brokers. LSS has no involvement in the handling of claims. It is considered inappropriate to seek to interfere with the operation of commercial insurance arrangements, which is a matter for the relevant insurers. Any such interference may result in terms of the insurance being imposed by the insurers that will adversely affect the cover, whether by way of increased premium for that reason or otherwise. This would be a matter for the insurers. Such interference by the Commission which is so closely linked with the Executive in view of the proposed arrangements for appointment of members is a matter of extreme concern.

7. As outlined above, the general effect of the Bill as drafted will lead to serious implications for access to justice, particularly in rural areas. The potential additional costs to solicitors
of funding the Commission and the complaints process, coupled with the potential level of compensation for IPS, are likely to cause solicitors, particularly in small firms to carefully consider the economics of remaining in private practice, or at least providing services in specific areas of high risk. This is likely to impact further on the provision of Legal Aid services. It will be uneconomic for a firm to carry out routine work under legal aid, attracting a fee of less than £200, where that work could give rise to a complaint of IPS the cost of which will be payable by the solicitor, to a considerably higher level than the fee, and also potentially leading to a level of compensation of up to £20,000. in addition, many clients involved in matrimonial and family matters can require particular skill and attention on the part of the solicitor in view of what is often a limited ability to appreciate the consequences of actions or the nature of advice. Such risks for the solicitor are likely to result in withdrawal from that sector of practice.

The loss of high street law firms, particularly in rural areas of Scotland will have a serious impact on the social landscape of such communities. Not only will clients require travelling great distances and incurring considerable expense in so doing, but the pro bono services provided by solicitors to the community will be lost. Solicitors very frequently provide services to local churches, charities, sports, community and social clubs, associations and organisations in the voluntary sector. If high street practices are diminished or lost, the social consequences in this regard will be serious.

Further, the loss of such offices and the attendant employment will be significant. It is estimated that solicitors firms in Scotland employ around 20,000 people and a sizeable proportion of these jobs will be in rural areas, many of which are economically fragile as things presently stand.