Submission from Colin Harley for the Legal Profession and Legal Aid (Scotland) Bill

I wish to make certain comments on the Legal Profession and Legal Aid (Scotland) Bill for which I understand the deadline for submissions is 21 April.

I am happy to disclose for purposes of transparency that I am a Scottish qualified solicitor currently working in London. Therefore although much of the Bill's remit will not affect me directly, I do not feel that is any less reason to comment on what seems a flawed piece of proposed legislation.

Whilst I do not share all of the Law Society of Scotland's well publicised concerns over the Bill, my concerns can be broken down into four areas:

1. Independence of the Complaints Commission
2. Liability for costs of complaints
3. Negligence
4. Rights of appeal

Independence - it is unacceptable that the Scottish Legal Complaints Commission should not be entirely independent from both the executive and the Law Society of Scotland. The proposal for an executive appointed body with no legally qualified members is actually worse than the existing position. The existing position of the Law Society acting as complaints body and "trade union" is clearly untenable but so is a situation where the complaints handling body is politically appointed and therefore open to an attitude of having to be seen to respond to (often ill-informed) media pressure to be hard on solicitors' errors. If the analogy of an employment tribunal is taken, there is always a balance between the interests of workers and interests of employers with a chairman to act as the honest broker having no vested interest. Why can the same principle not be applied in these circumstances?

Additionally, I do not believe the serverance of the Law Society's role in acting as a complaints body is sufficiently final. The Society should not retain any remit whatsoever in the complaints process including review of professional conduct. This would better achieve public confidence that the complaint process is not loaded against the complainant. The overseer role of the Commission in conduct cases is not enough to ensure full independence.

Liability for costs - a solicitor should not be liable for costs in a situation where the complaint is not upheld. This would rarely be the case in litigation and it ought to act as a deterrent from frivolous or vexatious claims that the claimant may end up paying both sides' costs. Solicitors will already be funding the complaints process to a great extent through their annual fees and should not be asked to suffer a double jeopardy simply because they are the subject of a complaint. Clearly if the complaint is upheld, the situation is reversed as is only fair and proper.

Negligence - all professional negligence claims (regardless of value) should remain strictly within the jurisdiction of the courts. With respect to the eventual members of the Commission, a complaints commission with no legally qualified members (if that must be the case) is not qualified to preside over the issues involved in negligence cases. There does not seem to be any good reason why the legal profession in Scotland should be treated any differently in this respect from the other
Rights of appeal - the removal of a direct right of appeal to the courts from a decision of the Complaints Commission is an illiberal measure. To require a solicitor to seek a judicial review is a costly method of ensuring proper review of the Commission's actions. Will the non-legally qualified Commission get it right in all cases, particularly when the body is in its infancy? The obvious answer (as can be seen from successfully appealed decisions of lower courts) is no. To remove the right to appeal may in fact create an extremely high handed attitude in the Commission as the members will know that a review of their decisions is unlikely given the costs of a judicial review. It cannot be said that lower court judges can afford (or have) the same attitude when the possibility of being made to look foolish by a successful appeal is just round the corner.