Submission from SSC Society for the Legal Profession and Legal Aid (Scotland) Bill

The SSC Society, incorporated by Royal Charter in 1784, represents a large body of solicitors practising before the Supreme Courts (including the High Court of Justiciary) and the Sheriff Court in Edinburgh. The Society seeks to promote the highest standards of scholarship and professional ethics amongst its members. The advent of Solicitor-Advocates has increased demand for membership as we provide Library and other practical facilities within Parliament House itself. The President has prepared this response after consultation with and contribution by members.

We welcome the opportunity to submit evidence to the members of the Justice 2 Committee. The Society participated fully in the consultation process leading to the promulgation of the Bill and remains committed to the establishment of an independent consumer redress system which inspires public confidence but at the same time strengthens and supports a functional, free and independent legal profession. The need for independence within the Justice system has been recognised by the Scottish Executive in their major consultation in February 2006 – Strengthening Judicial Independence in a Modern Scotland.

The Society has specific areas of concern which relate to:

1. Human Rights issues in the independence of the proposed Commission;
2. Human Rights issues in the lack of an independent appeal structure;
3. The definition of Inadequate Professional Services to include “negligence”;
4. The initial upper level of compensation of £20,000.00;
6. Cost of Regulation

1. The Independence of the Commission.

The provisions envisaged by the Bill will create a “Quango”. Modern open and transparent administration demands that a body of this importance be seen to be free from undue political influence. The appointment of Commissioners should be wholly independent (perhaps by the Judicial Appointments Board) of the Executive. The same protections must be applied to removal of Commissioners. Security of tenure has been recognised as a cornerstone of independence as in the challenge to temporary Sheriffs successfully made in Starrs v Ruxton. Scottish Ministers also control the purse strings and can amend powers, financial limits on compensation and the like. These are fundamental Human Rights issues. Moreover in Schedule I (para 17) the Scottish Ministers are empowered to give general directions to the Commission on the exercise of its functions. This must raise very clear issues of independence. The policy briefing document refers to the Executive as merely “nominal” appointers but this is not borne out by the terms of the Bill.

2. The Appeal Structure.

The lack of an independent appeal (as exists now) to a body such as the Scottish Solicitors Discipline Tribunal is not only likely to fail to comply with Article 6 of the European Convention of Human Rights (ECHR) but is also disporportionate in its effect on the balance between the interests of clients and solicitors and other regulated professionals. Judicial review was not (and it is submitted that there are sound policy reasons why it should not) intended to be an appeal or re-hearing of the merits of a case. We urge the Committee to accept that the determination that a solicitor has provided an inadequate professional service or yet worse that he been negligent, is a serious matter of his or her civil rights. A client can “appeal” a decision against them (where negligence is alleged) by suing the solicitor in the local sheriff court. Where is the equality of arms if regulated professionals must go to the Court of Session? This aspect is expanded upon in para. 3 of this submission. The Society has also had the benefit of studying the Opinion of the Rt.Hon. Lord Lester of Hernehill QC dated 30th March 2006 which has been copied to Scottish Ministers. This concludes that the present Bill is not ECHR compliant owing to the lack of an independent appeal. The Society respectfully
concur with Lord Lester’s Opinion and we adopt his detailed arguments by reference for the sake of brevity.

3. The definition of IPS

“inadequate professional services”-

(a) means, as respects a practitioner who is a solicitor, professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor;

(b) includes any element of negligence in respect of or in connection with the services,”

The Society is firmly of the view that the current definition of “Inadequate Professional Services” (IPS) is not fair or proportionate in that it includes reference to negligence. A proposed upper limit of £20,000.00 on compensation awards under this head could lead to the wholesale decline of many small practices and, at the least, a severe restriction on the type of cases court practitioners are willing to undertake. The impact will be most severely felt in rural and depressed urban communities. This is contrary to the interests of the justice system and the people of Scotland.

The Courts remain in our view the proper forum to determine important legal rights and to define the standards which the law of negligence responds to from time to time. The decisions of courts are public and subject to rigorous appeal: thus people are able to know what obligations and liabilities attach to their activities. This enables them to gauge how they undertake those activities or obtain adequate insurance etc. It must be borne in mind that issues of “professional negligence” will have read over into many other non regulated activities and if a new jurisprudence based on Commission decisions is to be developed this will affect other advice giving agencies such as Womens Aid and Shelter who must indemnify their staff against claims. We are also concerned at possible prejudice to the client making such claims without access to proper advice and other issues such as “process fatigue” which we address more fully in paragraph 4.

There is no definition of “negligence” in the Bill and therefore it must be intended that the Commission will apply the whole jurisprudence of the law of delict. This is a vast and highly important area of the law with some very difficult concepts: title to sue, liability, contributory negligence, remoteness of damage and remedies. There will be difficult issues where non-solicitors and solicitors share liability. The bill is silent on the extent to which the court-based remedies are excluded, or how they will apply in complex cases involving non-solicitor defenders. The consultation proceeded on a false premise, the responses to the consultation were not conclusive. The reference to “negligence” in section 34 should be deleted.

In the event that negligence is not excluded then this emphasises the need for an independent appeal structure. The client can effectively “appeal” a refusal by the commission to award compensation for alleged negligence (or a decision that their award should be reduced by reason of contributory negligence) by simply raising an action for reparation in the courts and having a second bite at the cherry. This can be done in the local Sheriff Court. The solicitor can only raise an action of Judicial Review in the Court of Session. Aside from the cost implications and basic equality of arms the Society does not accept that Judicial Review is an appeal fully determinative of the merits of the dispute and is not, therefore, Article 6 compliant. It is difficult to conceive of a judge in judicial review becoming embroiled in factual issues such as contributory negligence. This was not the purpose of Judicial Review.

4. The Upper Limit of Compensation

The Society can see no justification in the Scottish economy for this limit at this time. It is grossly disproportionate and appears to be an attempt to
“harmonise” the position between Scotland and England? This must be seen against the fact that the Scottish Small Claim limit is £750.00: the English counterpart is £5000.00. The Scottish Executive has steadfastly refused to increase the Small Claim limit citing various reasons all rooted in the unique interconnection of issues in Scotland. The legislation places the main burden of cost on the solicitor to provide this “dispute resolution” process. On what basis can it be seen to be fair to the people of Scotland to put upon them (either through professional fees or direct taxation) a free system to bring negligence actions against solicitors (or any other regulated person) for any client (irrespective of their means) up to the value of £20,000.00 when the general public cannot pursue an accountant, optician, a business, or a local authority for their neglect for more than £750.00 without means tested legal aid or other funding. The Society also believes that clients will be ill served by pursuing negligence claims (and it is difficult to conceive of a “non negligence” claim having values in excess of say £5000.00 as at present) of any magnitude without professional input. The crafting of such claims requires knowledge and experience: the ordinary client cannot know how to do this. This borne out daily when solicitors advise clients on “offers” made directly from insurers which are said to be fair but on examination are woefully inadequate. Where does the client obtain funding for such advice? It cannot come from the Commission or they would be guilty of bias. It will not be covered by Legal Aid and “no win no fee” negligence claims depend on recovery of interest and costs: this cannot apply to the present scheme. The unprepared client is, therefore, asked to disclose his or her case to the opponent (or more likely the indemnity insurers) in the complaints procedure which may well provide months of advance notice to prepare an eventual defence in court. There is also the issue of “procedure fatigue”. Will clients just run out of steam having battled through the Commission procedure before they go to court. An apparently free system may encourage clients to follow this path but in the ground breaking research of Professors Genn and Paterson Paths to Justice it is clear that some claimants find the whole dispute process so stressful that sustaining impetus through different elements of procedure becomes increasingly difficult to achieve.

5. Oversight of the Guarantee Fund and Solicitors Indemnity Insurance arrangements

The Society cannot see any public interest in the Commissions oversight of either the Guarantee Fund or Indemnity Insurance. These are long standing protections for the public but do not relate to consumer concerns. The OFT in 2005 concluded that there was no case for investigation in relation the Master Policy which operated in the public’s interest. These are private contractual relationships by firms and any “oversight” could lead to issues of confidentiality. The collapse of the Master Policy would increase costs to the public and put the provision of services in rural and depressed urban areas at risk.

6. Costs

The concept of “polluter pays” should not be a one way street. Regulated professionals will have no control over the costs of the Commission. There is no reason why complainers should not pay costs (even the Small Claim Courts are not free of charge) or the Executive should part fund the scheme if it is desirable that complainers contribute via general taxation.