Submission from J L Gordon for the Legal Profession and Legal Aid (Scotland) Bill

I would be obliged by you placing some comments on the above Bill before the Committee as part of its consideration. The comments are confined to the regulatory and complaints handling sections of the proposed legislation.

I make these comments as a non-solicitor reporter and a member of a complaints committee for the last seven years. I feel strongly that there are issues that Ministers need to consider every carefully before enacting any legislation, particularly in its present form, as it would be detrimental not only to the profession but also to the users of legal services across the country.

The first point I should make is that no legislation should be enacted as an over hasty reaction to adverse press comment. Since Justice 1 looked at regulation of the profession, complaints handling has undergone a radical overhaul resulting in significant improvements to the system. This has not been adequately canvassed. Whatever the public perception, Ministers need to be aware that the present system is functioning well. There is equal solicitor/non solicitor membership of committees, but it is my experience that this of itself has not impacted on the decision making process. It is not my view that when decisions are made the committee splits along professional/non professional lines. There is therefore no need in my view to consider a greater non solicitor input, and I say this as a non solicitor. There are always going to be complaints that cannot be sustained no matter what the constitution of the body handling them. Perception again seems to be that unless a complaint is upheld, then justice has not been done. A complaint must stand or fall on its merits.

Certain of the proposals in relation to sanctions for inadequate professional service are out of proportion to the “gravity” of any shortcoming.

The matter of abatement of fees has always been an option but there is a suggestion that “before abatement the fees may be submitted for taxation”. When the fee itself is not the subject of complaint-and of course the Law Society at present has no powers to investigate a complaint about fees-what purpose is to be served? I would suggest that the Auditor of Court has quite enough of a workload without adding to it with what to this observer seems a pointless exercise.

Ministers will have the means of setting an upper limit of compensation at £20,000. I was directly involved in looking at the situation when the level was raised in 2005, from £1,000 to £5,000 and in setting the intermediate bandings. Accepting for the present that some increase was necessary, the amount of cases attracting the maximum compensation are a very small minority. It is too early to gauge the effect of the new level of £5,000 (with intermediate bands) as cases are only now beginning to come through, but if experience is translated across then there will be very few. The object of compensation is to offer some redress for vouched costs and for “stress, hassle, and inconvenience”, that is after abatement of fees for the inadequacy of the service and ordering any rectification that is appropriate. It is important to distinguish this from negligence which is properly a matter for the courts to decide. It is my opinion that any payment of £5,000 suggests an inadequate professional service bordering on negligence. It is hard to conceive of any service which could be so deficient as to attract anything approaching £20,000 without there being a possible action for negligence. The proposals must not be seen as a cost free route to obtain reparation. I would re-emphasise that it is important to draw a distinct line between inadequate service and negligence. To contemplate setting a maximum figure of compensation at £20,000 is, I feel, blurring that line. Negligence is not properly a function for the proposed Complaints Commission but for the courts.

Allied to this is an economic issue. Many small practices across Scotland generate their income in the areas of Trust and Executry and Conveyancing, areas which tend to generate the majority of complaints. Faced with the compensation proposals and the complaints levy, many of these firms will face a choice of whether to continue to carry out work in those areas. This leaves the general public exposed to the possibility of not being able to access services. The other alternative is for the practice to purchase additional indemnity cover and pass this cost on to the consumer who will be the ultimate loser. This is not an issue that will affect
large specialist firms or firms where the client base is mainly corporate business. In the latter case the client does not tend to want to become embroiled in a complaints process, rather he moves his business elsewhere. The individual client who may only require assistance in house purchase does not have that option. The proposals therefore, possibly not intentionally, are detrimental to the smaller firms and indirectly to the consumer who may be denied access to legal services.

It is appropriate also to set out some thoughts on conduct issues, where at present misconduct is primarily the province of the Scottish Solicitors Discipline Tribunal, and unsatisfactory conduct that of the Society. The new proposals would seem to undermine the position of the Tribunal.

It appears to the writer perverse that the Complaints Commission can order the Society to action certain conduct issues. Not only that but the Society must impose a censure with provision for a fine of up to £2,000 and also provision for an award of compensation of up to £5,000, subject to appeal to the Tribunal. The Tribunal is also to be able to award compensation of up to £5,000 for distress, inconvenience and loss.

Again it is important not to confuse issues, in this case conduct and service. In a great number of cases the matter that is the subject of a conduct complaint will have service consequences or the matter will be classed as both “service and conduct” with identical wording for both complaints. There needs to be a safeguard against ‘double jeopardy’ so that the solicitor is not required to pay compensation under both headings.

If I may conclude with an observation on the complaints levy which I understand will be imposed on solicitors who are the subject of complaint. Obviously some firms have more complaints than others, some have none at all, in which case presumably they will escape the additional levy, but there are those who have complaints made against them that are subsequently judged to be without foundation. It would seem to be manifestly unfair if they were to suffer a penalty for what may have been a frivolous or vexatious complaint. I trust that Ministers will look at this particular point.

I have confined my comments to areas in which I have direct experience, and I trust they will be of interest to the Committee.