Submission from Neil Ross for the Legal Profession and Legal Aid (Scotland) Bill

I am a partner in a seven partner practice situated just off the High Street in Elgin the largest town (population 27,000) of a rural area. In addition to the partners there are six qualified solicitors, one consultant and eight paralegals with various qualifications including one registered qualified conveyancer and executry practitioner.

I have also been a Reporter for the Law Society of Scotland Client Relations Department for a number of years.

I have serious concerns about a number of implications contained in the Bill.

My experience as a Reporter leads me to believe that complaints will frequently have both service and a conduct element to them albeit perhaps only the service or conduct matter might be upheld. To split the handling of the complaints cannot possibly be an improvement on the present procedure where one case is considered by one Reporter. Invariably there are two sometimes even three or four files. It simply does not make sense to have two separate organisations looking at different aspects of one case. If complaints are split into service and conduct complaints with one aspect being considered before the other then delays will undoubtedly occur. This cannot be for the benefit of the consumer who is complaining.

I also have serious concerns about the possible affect of Section 8 which provides for compensation up to an amount not exceeding £20,000. My concern is that the complainers will find it easier to make a complaint free of charge to the Commission rather than risk taking a Court action against the solicitor if the complainer thinks there has been some form of negligence or inadequate service. It is not to difficult to imagine a scenario where a client may have lost a considerable amount of money perhaps say £100,000 but not be able to prove negligence in a court of law but on the other hand might well be able to show that one part of the service has been inadequate. The adequacy of that service may not have directly resulted in the loss experienced by the complainer but the solicitor will run the risk that the Commission will consider £20,000 is only a small proportion of the loss suffered by the complainer and make an award. It is only fair that if awards as high as £20,000 can be made that a full right to be heard by the Commission is granted to the solicitor complained against (and to the complainer). Failure to allow a hearing is probably non EHCR complaint and is going to usurp the Courts position which at present deals with actions relating to negligence.

Whereas at present, solicitors PI cover has (in our case) a self insured amount of £20,000 which itself can be insured and just now we have a limited number of “self assured amounts” that we have to bear in one year, if this Bill is enacted, there will be no restriction on the number of claims that a firm could receive in one year which might arise from service provided in earlier years. There would also be no possibility of insuring that risk.

The scenario could also emerge that a complainer could make a complaint to the Commission, receive £20,000 of compensation then proceed with a Court action against the solicitor which would be covered by the solicitors insurance but given the self insured amounts the solicitor would again have another possibly £20,000 self insured amount to pay before the insurance company would step in. This is quite clearly a case of double jeopardy for a solicitor and there cannot be many small High street or rural firms in Scotland that could suffer more than one of two claims of that sort in one year. The inevitable consequence if that happened would be closure of the firm of solicitors.

I also have concerns regarding the provisions in Section 8(6). Up till now only conduct matters have applied directly to individual solicitors and IPS has related to the firm quite properly on the basis that the solicitor is a client of the firm and not of any one individual solicitor. If however, the situation exists where an individual solicitor is going to be responsible for any finding made against him, then there will be instances where that employed solicitor has left the firm’s employment and is now with another firm or in public service work or possibly even set up on his own account. In those instances the former employing firm may well feel that it should the former employee that should be made to pay
entirely. If that practice arises then very few newly qualified solicitors will be encouraged to work for small – 1-2 man firms.

There have also been instances in the past where the principals of these small firms have been sequestrated and in those instances Section 8(6) would leave the award of compensation registered against the employed solicitor. That employed solicitor would probably have been earning in the region £20,000 - £30,000 per annum and most likely will not be in a position to pay compensation and may well also be sequestrated as a result.

While it may not concern some complainers at present that solicitors that may go out of business or become sequestrated, the knock on effect must surely be obvious.

My firm and I suspect many others will start concentrating on areas of work that do not pose such an obvious risk of complaints.

We have already taken steps and now do not provide Legal Aid for anything other than reparation cases. We will not provide matrimonial Legal Aid because in the past it has proven to be one of the most difficult areas to handle clients expectations satisfactorily. If these provisions are enacted we will look seriously at whether we continue providing matrimonial work and will look very closely at the types of domestic conveyancing that we will undertake. Areas such as purchasing plots of ground, and Deeds of Servitude which generally are never straight forward will be avoided. Members of the public will be denied choice and access to Justice will start to become a real issue. Like the majority of firms in this area we no longer act for clients who require Legal Advice and Assistance.

There is also the strong likelihood that firms of claims handlers will treat claims against solicitors as a new area to develop when they realise that they could get as much as £5000 for a successful claim against a solicitor. The Claims handling business has grown in recent years on the back of “endowment claims” and this can hardly be said to have been of benefit for the consumer. To encourage the growth of this unregulated area is not in the interests of either the client or the public at large. It will not enhance the provision of legal services one bit.

I also believe the way the Bill is drafted is unfair requiring the solicitor to pay for the mediation costs even where the complaint is not upheld against the solicitor. That is clearly in my view unfair. If I instruct a plumber, electrician or other tradesman providing a service – which after all is how the public as most solicitors as some one providing a service – then if I am not happy with the standard of work provided by that tradesman I can either refuse to pay him and deal with the matter in Court or not instruct him again. I do not expect compensation from the tradesman and certainly not from his employee. The suggestion that an employee should be responsible is totally misguided.

I also believe the Financial Memorandum published with the Bill will bear no resemblance to the actual true start up of the running costs of the Commission. It seems totally unfair that the legal profession should bear more costs than is presently borne by the legal profession. As the Executive believe there is a public demand (as evidenced by a couple of hundred responses) for a change in the system then I think that it is only right that the public should bear the cost of that change in its entirety. What is clear is that the Executive are not taking on board the fact that a great number of complaints determined by the Law Society have been determined satisfactorily so far as the public has concerned.

Section 23 of the proposed Bill provides for rules as to practice and procedure to be published. However it is clear from this that there is no proper truly independent right of appeal against any decision of the Commission which is contrary to natural justice and probably not compliant with the European Convention on Human Rights. At present solicitors have the right appeal in IPS cases to the Tribunal with further right of appeal to the Court of Session. Those rights should not be removed. If anything the appeal procedure needs to strengthened to ensure justice for the both the public and solicitors and to be made less onerous for all.
I cannot understand why there is any reference to the Guarantee Fund or the master policy within the terms of the Bill. Personally, I would do away with the Guarantee Fund. I can think of no other profession or trade where the other principals in that trade all fund the wrong doing of one of their fellow workers. However despite my personal views I cannot understand why the Guarantee Fund which is operated satisfactorily by the Law Society cannot remain in the control of the Law Society. My views that this is a step towards controlling the Guarantee Fund and directing payments out of that fund which will result in another burden on solicitors.

There is also provision in Section 26 of the proposed Bill to allow the Commission to identify trends in relations to complaints. This will lead undoubtedly to the Commission publishing league tables of solicitors showing the numbers of complaints lodged against them whether successful or not. Is the Scottish Executive going to consider introducing the same for supermarkets, plumbers, electricians and everyone else in society?

Over the last two and a half years I have been a member of the Research Working Group on the Legal Services Market in Scotland which was set up by the Scottish Executive. I cannot think of one item of legislation that we looked at over the period of two years which will have as much impact on the market – and to the detriment of the consumer – as this piece of legislation. It will undoubtedly restrict access to justice. It will remove at a stroke access to justice in certain areas of law in which solicitors will decide not to practice in order to avoid the risk of complaints and claims. Those most in need of justice and those relying on Legal Aid will suffer more and in some areas where margins are tight and where even an experienced qualified solicitor is earning in the region of £25,000 per annum (the equivalent of a newly qualified teacher) the public face the real serious possibility of losing the service of a solicitor either through natural wastage or bankruptcy.

Please do not be in any doubt that the real consequences of this Bill will be reduced access to justice and increased legal costs neither of which is in the consumers interest.

I strongly urge you to reconsider the Bill in its entirety. I would be willing to give evidence if requested.