1. Turcan Connell welcomes the proposal to create a new statutory body to deal with services complaints.

2. We support retention by The Law Society of Scotland (“The Law Society”) of conduct complaints for the time being. However, on the basis that the new statutory body will prove itself competent at fairly dealing with service complaints, consideration should be given to it also take over conduct cases after an initial settling down period. Such cases need not be dealt with in exactly the same way as service complaints and there may be merit in having a different ratio of lawyers to lay people, however one body should ultimately deal with both types of complaint. During the interim period there should be a single gatekeeper for receiving complaints, namely the Commission.

In any event having one body dealing with complaints will be easier for the public to understand and will avoid unnecessary duplication.

3. We are encouraged by provisions in the Bill relating to rejection as premature any complaint which has not previously been communicated to the practitioner’s firm and where the practitioner’s firm have not had a reasonable opportunity to deal with it.

However, we believe that rejection by the Commission should be mandatory unless it is satisfied that the complainer has properly intimated the complaint and the practitioner’s firm has been given a reasonable opportunity to investigate. The firm’s internal complaints procedure should be fully exhausted before the Commission should be given jurisdiction.

This position reflects the general policy of the Scottish Executive “that complaints from clients should be dealt with wherever possible by the law firm, lawyer or other practitioner who provided the service in question”. (Paragraph 4 of the Policy Memorandum.)

This would also reflect the successful model of the Financial Services Ombudsman (“FSO”). The FSO has jurisdiction once the firm has sent its final response or alternatively has had at least 8 weeks and has not sent its final response.

It also means that the client would be required to act reasonably in minimising their own loss but yet still have an ultimate recourse by way of complaint to the Commission.

4. The imposition of a specific levy every time a complaint is accepted is grossly unfair in circumstances (a) where the legal firm has not had a reasonable opportunity to deal with the complaint and (b) where the firm has dealt with the complaint effectively but the complainer unreasonably rejects the outcome. In circumstances where the complainer rejects the outcome and then achieves the same or a lesser outcome from the Commission the levy should be reimbursed. Alternatively there should be no levy unless a finding of Inadequate Professional Services is made.

The Policy Objective will more fully be achieved by insisting that the Complainer states their reasons for rejecting the outcome of the firm’s own complaints handling procedure and the imposition of a test that the Complainer is acting reasonably in making the complaint.

The proposition that solicitor’s firms who (a) have well developed complaints handling procedures and skills and (b) have acted reasonably in trying to resolve the matter should incur a specific levy regardless of the ultimate outcome of the Commission’s investigations and the reasonableness of the complaint is both wrong and a disincentive towards the achievement of the Policy Objective.
In summary, emphasis should be placed on the promotion of better quality services and better quality complaints handling services by firms themselves if the Policy Objective is to be met.

The quid pro quo of (a) insisting that Complainers allow the legal firm reasonable opportunity to address complaints and (b) ensuring that it is reasonable on the part of the Complainers to reject the firm’s outcome, will be that firms as a matter of professional practice should be required to set out their complaints process in writing upon receipt of a written complaint.

5. Until such time as the Commission takes over conduct complaints there should be adequate statutory safeguards to ensure that, where a complaint is treated as both a services complaint and a conduct complaint, the solicitor is not required to deal with two organisations which might be out of step with each other in the progress of their enquiries. In referring conduct cases to The Law Society the Commission should specify what the conduct complained of is and in what way it considers that this might amount to either misconduct or unsatisfactory conduct.

6. The inclusion in the definition of Inadequate Professional Services at Section 34 of “negligence” has the effect of altering the nature of the complaints system such that it becomes a compensation system. Two points emerge – (a) A considerable element of any award will in many cases not be covered by insurance and may therefore have a direct bearing on the financial viability of the practice concerned. For this reason it is all the more important (i) to ensure that firms are allowed and empowered to resolve the matter themselves through their own complaints processes as mentioned above and (ii) that adequate consideration is given to actual fee value in assessing compensation and (b) there will require to be adequate safeguards as to how the Commission will assess loss. This should be included in the Bill. It is submitted that loss should be assessed in accordance with the approach taken by the Courts and any compensation for injury to feelings should be in line with awards currently made by the Legal Services Ombudsman in complaints against The Law Society.

7. Section 6 (5) enables the Commission to enter into mediation with consent of both the complainant and the practitioner. Particularly where the firm has carried out a proper enquiry it is appropriate that the Commission set out as a matter of fair notice precisely what the conduct complained of is and in what respect that is said by the complainant to amount to Inadequate Professional Services. This is a fundamental aspect of investigating a complaint against someone. In that it is the Commission which ultimately will determine the outcome of the complaint its role of mediator conflicts with its role as adjudicator.

8. The policy behind the Bill as outlined in the financial memorandum is that the costs “will largely fall on practising members of the legal profession”.

The Policy Memorandum states that the Commission should be “independent of the legal professional bodies”. There is a concern over the lack of financial accountability by the Commission to its funders and a lack of control over the escalation of running costs. Adequate statutory safeguards are required. Such safeguards should include proper financial safeguards to prevent a proliferation of the Commission.

We recommend that an independent body should be appointed with a statutory remit to audit the Commission to ensure value for money and cost effectiveness.

9. The word “complaint” should be properly defined. This is fundamental because it determines the jurisdiction of the Commission. Defining a complaint to include “any expression of dissatisfaction” is far too broad. There ought to be a de minimis exclusion. There ought to be a requirement that the expression of dissatisfaction
relate to (a) the service given by the practitioner or firm and (b) relates to the fault of the practitioner.

The firm recommends the definition used by the FSA which is “an allegation that the complainant has suffered, or may suffer, financial loss, material distress or material inconvenience.”

10. The dangers, risks and unfairness of allowing people who were not clients to bring complaints of Inadequate Professional Service have not been properly addressed in the draft legislation. Solicitors in many fields but in contentious areas especially are particularly at risk. Further, duties to uphold client confidentiality impact upon a solicitor’s ability to respond to a complaint. This requires to be properly considered.