Dear Sirs,

THE LEGAL PROFESSION & LEGAL AID (SCOTLAND) BILL

We wish to submit our comments in the form of written evidence in advance of the relevant deadline of Friday 21st April 2006. By way of background, we are a firm of solicitors and estate agents based in Aberdeen and with branch offices in Stonehaven, Ellon, Inverurie and Banchory. Our firm is comprised of 24 partners in addition to which we employ some 10 qualified solicitors and a total staff of approximately 130.

Our firm’s principal concerns/comments in relation to the Bill are as follows:-

The Scottish Legal Complaints Commission

Whilst accepting the probable inevitability of complaints handling passing from the Law Society of Scotland to an external body and to an extent welcoming this as a means of reassuring the public, albeit that the existing system has always been fair and reasonable, there are a number of concerns arising from the proposed constitution of the Scottish Legal Complaints Commission, namely:-

➢ As we understand it, the Commission will be empowered to deal with complaints “from any person having an interest”. Whilst generally speaking these will be from our clients, this wording suggests that practitioners will be faced with responding to complaints from non-client “interested parties” to whom they owe no duty of care, whether contractual or otherwise. This represents a significant departure from existing Scots Law and imposes on the profession a further considerable commitment of time to often spurious complaints.

➢ It is proposed that the Commission will have power to direct a practitioner to pay compensation of up to £20,000, a four fold increase on the current upper limit for inadequate professional services of £5,000. For many single practitioners and smaller firms this represents a wholly unrealistic burden and will inevitably lead to firms reviewing whether they are willing to provide legal services in areas where complaints are common, e.g. matrimonial work, civil court work and conveyancing. Additionally, in our view the suggested figure of £20,000 is so far out of line with any realistically anticipated loss it is entirely inequitable.

➢ The /-
The Commission is to be funded by a general levy on legal practitioners and a levy on complaints on an individual basis. Whilst larger firms such as ourselves will no doubt be able to fund the general levy, this will be a considerable additional burden on single practitioner and smaller firms. The legal profession already maintains the Scottish Solicitors Guarantee Fund ensuring that any client is fully recompensed for any loss sustained as a result of fraud or theft by their practitioner. Is there any other profession which funds such a scheme and in addition to which is then asked to pay for its own regulation by an external body?

The specific levy on complaints falls to be met by the practitioner notwithstanding the eventual outcome, i.e. whether any fault is established on the part of the practitioner or otherwise. This simply invites a “complainant’s charter” as the complainant has nothing to lose by pursuing a complaint whether substantive or frivolous. Whilst assurances will no doubt be given that frivolous complaints will not be pursued, one would refer the Committee to the analogous situation in respect of endowment complaints where effectively these have been pursued by the FOS whether justifiable or not. Experience has shown that even where it was patently obvious that a complaint was unjustified and unsustainable, these have been pursued vigorously resulting in costs to the firm complained against which are irrecoverable in any way, despite there being no fault on their part. We note that the suggested cost to the profession will be approximately £300 to £400 per complaint whether such complaint is justified or not. It is therefore clear that complainers will have an interest to do so since this is likely to lead to some offer of financial compensation, for example, by way of a reduction in fees charged, merely to avoid the even more costly complaints procedure. It seems wholly contrary to the principles of natural justice for such fees to be paid even where a practitioner is exonerated and indeed such a system may well contravene the European Convention on Human Rights.

As drafted, the Bill does not allow the practitioner any right of appeal against the Commission’s decision and again this would seem to contravene the European Convention on Human Rights.

Independence

If, as proposed, appointments to the Commission are to be made by Scottish Ministers then the Commission cannot be considered “independent” and again we would suggest that there is the possibility of a contravention of the European Convention on Human Rights.

Cost

There appears to have been no proper costing or cost benefit analysis of the proposed new Commission. It is inevitable, however, that this will cost considerably more than the Law Society’s existing Client Relations Office since many of the services required are presently provided free of charge by the profession and as indicated these additional costs fall to be met by the profession. No doubt there will be considerable resistance from the Scottish Ministers and other bodies as well as the public at large should the profession attempt to pass on these charges (quite reasonably) by way of increased fees for legal services.

Whilst the legal profession might expect little sympathy from the public at large, influenced by a largely hostile Press, it surely is entitled to expect more from the Scottish Executive as it has made and continues to make a significant contribution not only to the Scottish Economy but also to the whole structure of Scottish Society. It provides essential services to the public at large /-
large in a largely efficient and cost effective manner. The turnover of the profession approaches £1 Billion per annum with solicitors’ businesses employing around 20,000 people in Scotland, yet the profession is more than 99% complaint free (per Law Society statistics). When the Executive was created we were promised Scottish solutions for Scottish issues whereas in practice English solutions continue to be imposed upon Scotland with the Scottish Ministers seemingly failing to recognise or value the independence and uniqueness of the Scottish Legal System.

In summary, we consider that the Bill as drafted would have, amongst others, the following adverse implications, not only for the profession but the public at large:-

- Given the Executive’s stated intention to provide "Access to Justice" the Bill as drafted will undoubtedly cause problems for Legal Aid practitioners as their marginal profit levels as presently existing will not be able to absorb increased costs. Secondly, risk management considerations will lead firms to consider whether they should provide certain legal services involving potentially a compensation claim of up to £20,000. This could lead to a number of smaller and rural firms either ceasing to trade or deciding not to offer particular services to the public and with consequent loss of employment. In our own case we will no longer be providing legal aid services to other than existing clients and even this will require to be reviewed. The small return from legal aid does not justify the additional risk imposed by this Bill. A £300 to £400 “penalty” on a complaint being made for whatever reason would simply eradicate any profit from the provision of legal aid services, and that disregarding the unrealistic level of compensation which could also be payable.

- It is surely in the interests of the public for the historic independence of the legal profession to be preserved. As indicated, the Commission cannot be considered independent if, as proposed, appointments are made by Scottish Ministers with no guarantee of solicitor representation.

- As indicated, there appear to be a number of potential breaches of the European Convention on Human Rights contained within the Bill.

- In addition to maintaining the Guarantee Fund, the profession also funds a Master Policy for Professional Indemnity Insurance. The Bill gives the Commission power to oversee the running of both of these, notwithstanding that there was no Mandate for this in the Executive’s Consultation. The costs already incurred by solicitors in funding these schemes are considerable. The Executive must, in our view therefore, consider whether it wishes legal services to be provided by an independent “profession” and, if not, where is the justification for solicitors being forced to fund these schemes in addition to the costs of self regulation?

We hope that the foregoing comments will be of interest to the Committee.

Yours faithfully,

Brian Healy, Partner.