Submission from Catherine J. Newton for the Legal Profession and Legal Aid
(Scotland) Bill

I am writing to outline my concerns about the above Bill. I consider that the Bill is flawed in several respects and that it will not improve on the complaints system currently operated by the Law Society of Scotland.

They key issues that arise from the Bill are as follows:-

1. Cost

No detailed cost or cost-benefit analysis has been undertaken in respect of the new Scottish Legal Complaints Commission. However, it will undoubtedly cost more than the Law Society’s existing Client Relations Office, particularly as the work currently carried out on a voluntary basis by committee members and reporters will in the future be conducted by paid employees. These costs are proposed to be met by a general levy on the legal profession in addition to fees charged to solicitors for every case considered, whether upheld or not.

If the government feels that a completely independent complaints system is required by the public, then the public should fund it. As usual, the real costs of the scheme will only reveal themselves once it has been up and running for some time. This will almost invariably be greater than any cost estimates produced at a time when the details of the scheme have not been finalised. In effect, the proposal to pass the burden of the expenses of the scheme on to solicitors will amount to a tax on practicing law in Scotland.

There is no point in having change for the sake of it. Detailed and reliable costings must be obtained in relation to the new Commission. Unless such costings clearly demonstrate the new Commission will be equally or more cost effective than the current Law Society scheme, Part 1 of the bill should not proceed.

2. Levels of Compensation

The proposed increase in the level of compensation for Inadequate Professional Service (“IPS”) from £5000 to £20 000 has no justification and is unacceptable. It is shocking that such sums should be contemplated in circumstances where the service has been poor rather than negligent.

What other trade or profession has to endure such a system? In any other service sector, if a business provides a shoddy service, the customers will simply take their business to a competitor in the future. The market corrects problems with shoddy service.

It seems that the figure of £20 000 has been introduced for no other reason than that is the proposed level in England and Wales. So much for Scottish solutions for Scottish problems! If there is no ground swell of public opinion and evidence of consumers actually needing such a remedy, why is being introduced at all?

Surely there would be more voter demand to introduce IPS claims for e.g. car mechanics, builders, electricians etc. It is in these unregulated sectors that consumers would benefit from such increased rights.

Also, no other regulated professions are being saddled with such a system (as well as the privilege of paying the costs of running it!). Why are doctors, dentists, surveyors and accountants not being subjected to such a burden on their ability to provide professional services?

Solicitors have paid for their “monopoly” on legal services with the guarantee fund and the master policy. Any additional burdens are not justified.
3. No Fault Liability

It is not reasonable to require the solicitor to pay a case handling fee irrespective of whether the complaint is upheld. Such a rule will provide scope for abuse as, from a purely economic perspective, it will be in solicitors’ interest to pay a sum just less than the case fee to clients with unfounded complaints.

The solicitor should not be obliged to contribute where the complaint is not upheld. In addition, there should at the very least be the ability to charge the complainer where it is decided that the complaint was without foundation, or made in bad faith.

4. Conduct Issues

The new commission should not have any power to compel the Law Society to take specific action in any conduct issues. The ability to determine whether a person’s conduct falls short of the required standard is one of the core principles of being a profession.

5. Guarantee Fund/Master Policy

The Bill gives the new Commission the power to oversee the running of both the master policy and the Guarantee Fund. No justification for these powers has been offered and there was no mandate for their introduction in the Scottish Executive’s consultation.

6. Access to Justice

There are certain types of work such as conveyancing and civil litigation, particularly matrimonial matters, which involve advising highly demanding clients who are undertaking a stressful experience. These are more likely to give rise to complaints than other types of work.

If the current scheme were enacted, there is no doubt that high street firms around Scotland will have to increase fees significantly and/or withdraw from some types of work altogether. Either way it is the public who will eventually lose out. Particularly as regards smaller firms in rural areas and as regards legal aid (where there is no prospect of passing costs on to clients) it will become difficult for clients to obtain advice about certain types of matters. This cannot be in the public interest.

In addition to the damaging effect on access to justice, any downturn in the solicitors’ profession could have serious economic impacts, particularly in rural areas.

7. Human Rights

In terms of the Scotland Act, any legislation which is incompatible with EC Law or the ECHR is ultra vires.

Appointments to the new Commission are made by the Scottish Ministers and there is no guarantee of solicitor representation. In addition, there is no right of appeal allowed. This is contrary to Article 6 of the ECHR.

It is one of the fundamental principles of EC law that EU citizens have the freedom to pursue their chosen trade or profession without disproportionate or intolerable interference from the state.

The right to pursue your chosen profession is a “property” right in terms of Article 1 of Protocol 1 of the ECHR.

Article 14 of the ECHR provides that convention rights are to be enjoyed without discrimination. I understand that membership of a particular profession has been recognised as a distinct group which can be discriminated against.
There is no evidence that an increased IPS award is needed. To introduce such a rule simply because it applies south of the border is not a sufficient justification. Likewise, what is the justification for making solicitors bear the cost of the scheme? These measures are therefore unjustified and are not proportionate.

The IPS procedure applies only to solicitors. No other regulated professions are compelled to operate such a scheme. To force solicitors alone to accept such a scheme is discriminatory.

It would therefore appear that the Bill violates Article 6, Article 1 of Protocol 1 and article 14 of the ECHR.

Conclusion

As currently drafted, the Bill is flawed and many of its provisions place an unfair burden on solicitors. It will also have an adverse effect on the public interest generally. I would hope that the foregoing points will be considered carefully by the Parliament and substantial adjustments made as appropriate. In any event, I do not see that the Presiding Officer could safely sign the declaration of convention compliance for the bill for the reasons which I have outlined.

I look forward to hearing from you.