Submission from Clive Franks for the Legal Profession and Legal Aid (Scotland) Bill

The following are my representations in respect of the Bill.

Background, and Credentials

I qualified as a solicitor in the service of the Bank of Scotland in 1980, and remained an employed solicitor within the Bank of Scotland, prior to setting up my own practice in 1985.

I was appointed a Reporter to the Client Relations Office of the Law Society of Scotland in 1998, becoming a Committee Member in 1999. As a Reporter I have completed over 100 Reports for the Law Society. In 2004 I was appointed Convenor of Client Relations Committee A, the first non-council member of the Law Society of Scotland to be appointed to a convenorship.

Until quite recently, neither Reporters nor Committee Members were paid for their work. Nowadays Reporters receive an honorarium of £100 per Report satisfactorily completed, and Committee Members receive a payment of £50 per meeting attended. I have yet to do a Report that took less than 2 hours, and some take a considerable amount of time, usually outwith office hours, i.e. in my spare time.

Committee Meetings usually take 2 hours or more, with as much time again, if not more, being spent in preparation work - reading the Committee papers and familiarising oneself with their contents, so that one is thoroughly briefed by the time of attendance at Committee.

I think it will be seen that, although a small payment is now received, Reporters and Committee Members are hardly well paid, and it might be said that their much dedicated work is a contribution of good will to the Law Society.

Background

It seems that only comparatively recently the Justice 1 Committee published its findings, which indicated that, in fact, the Law Society’s complaints-handling machinery was well conducted, though there was room for change: in point of fact, change that the Law Society itself sought. For example, Counsel’s Opinion had been obtained by the Law Society, which indicated that Committees had no delegated powers: whilst they could make recommendations, the ultimate decision in respect of all complaints had to be made by Council. Legislation was introduced that provided for Committees to make decisions and this happily improved and streamlined the Law Society’s complaints handling process still further.

On some views it might appear surprising that the favourable results of the Justice 1 Committee, and the benevolent legislation that followed it, and the sophisticated complaints handling machinery that is now the result are all going to be overturned by the current Bill such a short while later.

I can understand that there may be a perception that if complaints handling against solicitors is run by the Law Society, the solicitors professional governing body, that there might be a weighting in favour of solicitors. (Perversely, there is a perception within many parts of the legal profession that the Law Society is “out to get” solicitors, and the complaints-handling machinery is weighted in favour of the complainer). If accordingly there were perceptions - in both directions - neither of which were felt to be sustainable by the Justice 1 Committee, I would have thought that it would have been more constructive to try to correct those perceptions, and to educate, rather than throw out a sophisticated and ultimately fair machinery and to replace it with something completely untried and untested, and probably much more expensive.

That having been said, I would be the first to accept that review is seldom a bad thing, and if there is to be change, then this should be seen as a real opportunity, to improve. However, any opportunity is a double-edged sword, in that equally there is an opportunity to mess
things up. There is a risk that if wrong decisions are made or wrong pathways followed that the general public, and the profession, will end up with a complaints-handling system that is significantly inferior to that which currently exists.

Concerns about the Bill, as currently drafted

1. Cost and Burden

As I have noted above, much of the existing complaints handling process is in effect “funded” by the good will of many of those (Committee Members and Reporters) who participate in the machinery, though there remains a real cost to the profession in terms of funding the cost of the Law Society’s own staff (Case Managers, secretarial and admin and support staff). Although certain savings can be made, indeed streamlining achieved, by abandoning the Committee structure in favour of employed case investigators, there will be a hard cost that will require to be borne, which will in my submission increase, in that there will be no “goodwill funding”.

Substantially, that cost will be funded by a levy on the profession, much as is the case now. However, as the Law Society, wearing its hat as representing the profession, has an interest in containing costs - there is a check and balance between providing a blue-chip service on the one hand, and doing so on an economic basis on the other - there are no such constraints on the proposed Commission. Costs could soar in an uncontrolled fashion.

Additionally, it is proposed that there will be a case levy. If a complaint is levied against a solicitor, the solicitor will be obliged to pay the case levy to the Commission whether the complaint is justified or not. A solicitor will have to fund the case levy, even if completely exonerated. This does not seem to me to be in the least just.

(I can accept that a solicitor should be obliged to pay some form of expenses to the Commission, in the event of a complaint being sustained, but equally it seems to me that it would be just for a complainer, whose complaint is completely rejected as being unfounded, should pay expenses, perhaps part to the Commission and part to the solicitor. It might not be inappropriate for complainers to pay a deposit to the Commission, refundable in the event of the complaint being upheld).

There is an added spectre, here, that there might be a positive incentive to stimulate unfounded complaints. If a solicitor carries out a wholly satisfactory piece of work for a given client, the client might nevertheless indicate that he or she is going to complain. If the solicitor is faced with a case levy of, as is proposed, £300, it would make economic sense for the solicitor to try to reach a negotiated settlement with the client at, say, £250. The solicitor might have only charged a fee of that level, or indeed at a lower level, which would mean that the solicitor is actually paying the client to do wholly satisfactory work for the client.

What flows from this is the further spectre that solicitors might radically increase their fees, to compensate themselves for the cost of having to thus “buy off” difficult or less scrupulous clients. If that were to happen, then good and normal clients would be paying higher fees to effectively subsidise bad or less scrupulous clients.

This might particularly affect solicitors’ willingness to continue to offer Legal Aid services, where there would be no opportunity to increase fees. Equally, certain geographical areas may become depopulated of solicitors, perhaps particularly rural or low-means areas. Law Centres might become a thing of the past.

This also applies to certain types of work, which being more sensitive carry a higher risk of complaints being initiated. Solicitors might simply withdraw from offering certain services because of the higher incidence of complaints relating to that type of work and the economic impact that would result.
Taken together these factors could, and in my view, would, result simultaneously in an increased cost of legal services, and the denial of access to justice to many members of the public.

This is perhaps amplified further by the proposed increase in compensation levels from £1,000, at which the statutory maximum rested comparatively recently, through the current £5,000 level, up to £20,000. As an aside, it appears a pity that the English level appears to have been imported wholesale to Scotland, rather than a Scottish solution being applied to a Scottish problem. Other factors apart, the legal profession in Scotland is much more tightly regulated than it is south of the border.

What appears to be contemplated is that complainers may be compensated for solicitors’ negligence, which is properly the function of the Court. I can well see that complainers should be compensated for distress, worry and inconvenience brought about by a solicitor providing an inadequate service, where the Court might not normally provide compensation, but it appears to me inappropriate for the Commission to usurp the Courts function, as appears to be contemplated by the Bill, in respect of issues that are properly the Courts preserve.

In summary thus far:

A. There is a risk that the new system may prove to be much more expensive than the existing one, in that there are no checks and balances, and no visible incentive for the Commissions costs to be contained. The legal profession is being required to provide an open chequebook.

B. Individual case fees are patently unfair, in that solicitors are being expected to pay them even where exonerated.

C. Indeed, individual case fees are a positive incentive for the unscrupulous to present apparently valid but ultimately unjust and unsustainable complaints.

D. That in turn acts as an incentive to solicitors to increase fees, so that they are compensated in respect of a perceived or likely increase between unjustified complaints, where there will be an economic incentive to “buy off” the complainer.

E. Equally, there will be an economic incentive for solicitors to withdraw certain types of services, including legal aid. There will be an adverse impact on access to justice for certain areas at least of the general public.

F. Equally, solicitors might refuse to accept certain types of work, or clients.

In the latter regard, certain clients have unrealistic expectations of the remedies that they feel that the law can, or should, provide, for example in contested executries, matrimonial or employment disputes. If solicitors refuse clients or cases, because of the higher risk of complaints resulting in exposure to cases and high compensation levels, then access to justice may be denied to many, and solicitors willingness to undertake legal aid work may quickly become a thing of the past.

**Conduct Issues**

Whilst I note that the Law Society will remain entasked with dealing with Conduct Issues (as distinct from Service Issues), nevertheless it appears to be contemplated that the Law Society itself will, in effect, be “regulated” by the Commission. In effect, the Commission will be given the power to “twist the arm” of the Law Society, which will then lose its freedom to regulate the profession in an uninterrupted fashion.

Other factors apart, it appears curious that the legal profession should be singled out from all other walks of life in having its ability to regulate itself interfered with. There seems to be no
suggestion that the medical profession, for example, should give up or have taken away from it the ability to self-regulate.

**The Guarantee Fund and the Master Policy**

Both of these are extremely well run at the moment, and form a cornerstone for consumer protection. It is not clear why the drafters of the bill felt the need to transfer these functions to the Commission, and indeed the subject does not appear to have been touched upon at all in the earlier consultative stages, or in any discussion. It is consequently very difficult indeed to see what justification there is for interfering with issues that are currently being conducted harmoniously and well, and of which there is no visible criticism.

**Human Rights Issues**

Of course, there has been significant press comment here of late, with the Law Society having obtained Senior English Counsel’s Opinion which has concluded that the proposed Commission will not be ECHR compliant.

Other factors apart, it does seem curious in the extreme that it is proposed to set the Commission up deliberately excluding any independent appeal machinery.

As I have said at the outset, it does seem strange that there is proposed wholesale change so soon after Justice 1 concluded that the existing system works very well, and indeed produced legislation, that the Law Society itself sought to improve the system still further to the point where it is now fair, sophisticated and cost effective.

If there is to be change, though, this presents a twin opportunity: potentially, an opportunity to produce a system that is better, but equally an opportunity to produce a system that is far worse.

It does seem to me that certain things have not been thought through, and that as currently drafted there are cost implications that give rise to grave concerns, not only for solicitors, but for the general public at large. Further, there are access to justice issues, and human rights issues: indeed, the ripples look to be very far reaching and not to be good.