Submission from Susan Wightman for the Legal Profession and Legal Aid (Scotland) Bill

I refer to the above. As a practising solicitor I am extremely concerned with some of the provisions of the Legal Profession and Legal Aid (Scotland) Bill, particularly with regard to the handling complaints against solicitors.

Independent Complaints Handling Body

The Law Society of Scotland previously backed an independent complaints handling body. However, the Bill goes significantly further in a number of areas where the Society made it clear in its response to the consultation that it did not believe action was required. The Society made it clear when it backed an independent complaints handling body that it must be demonstrably better than the current system, particularly so given the cost and disruption involved. There are a number of areas where the Society, and I, as a member of the Society, believe that the new Scottish Legal Complaints Commission will not fulfil this aim:

Independence – The new Commission has to be independent from Government. The proposals in the Bill suggest that the appointments to the Commission Board should be made by Scottish Ministers. This is not appropriate – they should be made by an independent body which is free from political influence. Also, there is no guarantee of solicitor representation on the nine-member Board, despite the fact Solicitors comprise around 95% of the legal profession in Scotland.

ECHR Compliance – This is related to the issue of independence (see above). The Bill at present does not allow for the right of appeal for the public or the profession about a decision by the Commission on a service complaint. The current system has safeguards – a Reporter makes a recommendation and a Committee, made up of solicitors and non-solicitors, reaches the decision. If solicitors believe that the Society has reached the wrong decision, in a service complaint, they have a right of appeal to the Scottish Solicitors Discipline Tribunal. The complainer is entitled to take the Society’s handling of the matter to the Scottish Legal Services Ombudsman. I understand that the Society has obtained an Opinion from Lord Lester of Herne Hill, Q.C. and he is of the view that the Bill, as it stands is not ECHR compliant.

Cost – There is no proper cost or cost-benefit analysis of the proposed Commission. The cost of running the Society’s existing Client Relations Office is met by the profession from their Practising Certificate subscriptions but it is clear that the new Commission will require considerably more funding, particularly as the work currently carried out by volunteer committee members and Reporters would be conducted by paid employees. The Bill proposes that this will be met by a general levy on the legal profession as well as fees charged to solicitors for every chargeable complaint, i.e. all complaints which have not been resolved at source and which the Commission determines as eligible for consideration.

No-Fault Liability – The charging mechanism for the Commission is said to be based on the principle of “polluter pays”. However it would more accurately be described as one based on the system of “Solicitor Pays”. That raises questions of natural justice in that it is proposed to charge solicitors for the cost an investigation whether or not a case is upheld. In addition, the solicitor would be expected to pay the full costs of mediation through the Commission but the complainer would not be charged any fee. That means the system is cost free and risk free to the complainant and positively induces fraudulent or vexatious complaints which may or may not be weeded out by the Commission. Once the level of the specific levy applicable to a chargeable complaint is known, at present thought to be £300 or £400 there is a risk that, taking an economic view of matters, it may become routine practice for firms to offer settlement of a complaint at a level just under the levy, whether or not the complaint is justified. I understand that the Society would rather that where a complaint is upheld the solicitor would pay a higher case handling fee rather than a flat handling fee applying to all cases and that is a position which I support.

Compensation – This relates to the issue of cost (see above). The increase in compensation for Inadequate Professional Service from £5,000 (a level which was raised from £1,000 just
last year) to £20,000 is excessive and no explanation for such a large rise is given. The English white paper on complaints handling introduced the £20,000 figure – it appears that an English solution is being imported to resolve a perceived Scottish problem, despite the promise of Scottish solutions for Scottish issues.

Firms Ceasing to Trade - There is the prospect that a combination of the cost of the ongoing new system and the possibility of paying compensation of up to £20,000 could lead a number of firms either ceasing to trade or deciding not to do particular types of work which traditionally have brought complaints. This could mean, particularly in rural areas, the number of solicitors decline, meaning an increased level of unemployment for solicitors and support staff. Turnover of the profession approaches £1 billion per annum and solicitors’ businesses employ around 20,000 people. Yet the profession is more than 99% complaint-free.

Advice Deserts - in some areas it might be difficult for clients to get advice about particular types of business, either because firms have ceased to trade or because firms are reluctant to accept instructions with regard to certain types of work. The recent Legal Aid reforms have already seen a significant number of firms in this area opting out of Legal Aid work and that is likely to be compounded by the present proposals. That is clearly not in the public interest.

Negligence – It appears the Commission would take on the functions of the courts in negligence matters where the claim is less than £20,000, even though there is no consultation mandate to do so. Again, this raises issues in relation to ECHR compliance. Negligence should remain a matter for the courts. Every solicitor pays a premium additional to his or her Practising Certificate subscriptions to be covered under the Master Policy for Professional Indemnity Insurance. That already covers claims up to £1.5m for clients if there has been negligence by the solicitor. Many solicitors are prepared to advise and take on cases from the members of the public where there is a concern that a solicitor has been negligent.

Guarantee Fund and Master Policy – The Bill calls for the Commission to have the power to oversee the running of both the Master Policy and the Guarantee Fund. The justification for such powers is not clear. The administration of the Master Policy and claims made under that policy are not decided by the Society. These are unique and robust public protections.

Conduct Issues – The Commission will have the power to force the Society to action certain conduct issues. Losing control of conduct goes right to the heart of what it means to be a profession.

There are other general issues which give cause for concern. A number of the proposals in the Bill follow on directly from questions asked in the consultation, others do not. For instance, whilst there was a clear number of people in favour of an independent body to handle complaints, many of the other questions were not answered by significant numbers in the consultation and a number of the proposals, now in the Bill, for example, oversight of the Guarantee Fund and Master Policy (see above) seem to be predicated on anecdotal rather than fact based evidence. A number of other issues remain unclear from the Bill.

It appears that the Executive accepts that the Society should continue to deal with conduct complaints. On that basis there needs to be a robust and fair system for deciding how complaints involving both service and conduct are to be dealt with. Again, the Bill does not address this issue. If a complaint comprises both service and conduct there will be an inbuilt delay in the early stages of the complaint whilst a consultation takes place about who should deal with which part and in which order.

The Executive envisages the Commission taking over the function of the Scottish Legal Services Ombudsman when it comes to a complainer having a right to make a handling complaint about the way in which a professional body has handled a conduct complaint. The Society believes that the cost of the Ombudsman’s office, currently around £400,000, should be diverted to the Commission to meet some of its running costs. The Commission will be able to recommend compensation of up to £5K for poor handling. The current figure is £1200. There will be no procedure for a complaint against the Commission.
It is understood that the legislative and start-up process is expected to take at least two years. It is worth bearing in mind that a lengthy transition period would mean it was unlikely the high standards set by the Client Relations Office would be maintained during the handover period, with staff retention and morale likely to suffer. However, the Society has advised that it, in general, and the CRO in particular, will continue to work to ensure the public and the legal profession are provided with the best possible system for handling complaints against solicitors. Any new system must be an improvement on the one that exists at present.