Submission from CCW LLP for the Legal Profession and Legal Aid (Scotland) Bill

Legal Profession and Legal Aid (Scotland) Bill
Response to Scottish Executive Consultation, April 2006

Introduction
1. CCW LLP is a firm of solicitors based in Dunfermline and Edinburgh. We are not affiliated with any political party. Our practice focuses on business law.
2. We welcome this opportunity to provide a submission to the consultation on the draft Legal Profession and Legal Aid (Scotland) Bill. CCW LLP broadly supports the reasoning behind the Bill as we believe that strong legislation accompanied by detailed and properly thought-through guidance will provide a positive and clear cut approach to the complaints procedure, resulting in a more effective and streamlined approach. However we do have a number of concerns regarding specific provisions contained within the Bill. In broad terms these matter because of the ease with which Scots solicitors and law graduates can use their qualifications to work outwith Scotland (or regulated by non-Scots bodies) should the legislative burden be disproportionately onerous.
3. Our submission begins with a general overview of our response to the nature of the proposed legislation and then moves into the specific areas of concern identified by the Law Society which we feel require to be reconsidered.

General Comments
4. We are of the opinion that the current system of handling complaints is inherently flawed. For the regulator of the profession to act concurrently as its “trade union” is to create an immediate conflict of interest. We believe that complaints should be handled by a body existing independently from the Law Society, the creation of which, in theory, should help provide a better service for both solicitor and complainant.
5. Although not ourselves practising in the legal aid sector, we further support the proposals made by the Executive to reform the provision of legal aid in Scotland. The Scottish Legal Aid Board (SLAB) should have full responsibility for the granting and terminating of legal aid, a move which can only result in increased transparency. We also agree that certain state funding should be given to non-legally qualified individuals who currently perform the same service as legal aid lawyers and yet are excluded from the legal aid scheme.

Specific Comments
7. The Scottish Legal Complaints Commission
We are in favour of an independent regulator. We suspect however that no rightminded individual could support the proposition that the new Scottish Legal Complaints Commission, which will oversee service complaints in place of the Scottish Legal Services Ombudsman, should be so inextricably bound to the Scottish Ministers. While we understand that there will be certain “safeguards” in place to ensure proper regulation, permitting the Executive to appoint and remove members, determine remuneration and approve the appointment of the chief executive effectively eliminates any notion of independence which such a body should unquestionably retain. We would urge a rethink of this if the word “independent” is to be used with any degree of seriousness.
8. With section 7(b) of Schedule 1 of the Bill granting the Executive power to determine how many solicitors will sit on the Commission, we do not have confidence that the profession will be adequately represented. Furthermore, should the Executive disapprove of decisions made by the Commission, it will in effect have the arbitrary power to pick and choose members it feels will deliver the best results for the Executive, not for the solicitor nor the complaining client. The Schedule further empowers the Executive to amend the duties of the Commission and give the members directions as to the exercise of its functions. We believe this does not uphold the vital constitutional need of every citizen for a strong and independent legal profession. Nor does it properly respect the long tradition of judicial supervision and review by envisaging a role for, and the need for ready access to, our independent judiciary if there are procedural problems or issues of natural justice.
9. In terms of who may make a claim against a solicitor, we do not agree with the
Executive’s proposal to widen the definition of those who have an ‘interest’ to complain to cover ‘anyone who has been directly affected by anything a legal practitioner has said or done.’ We are of the opinion that the wording proposed is excessively broad in its application and potentially covers the most trivial of situations – the investigation of which, bearing in mind the cost implications for solicitors (as discussed below), could result in a massive financial burden for all practitioners. Moreover, as a matter of principle, it seems that hundreds of years of Scots jurisprudence on the circumstances in which obligations to parties who are not parties to a contract can come into force should not be swept aside in this fashion. Accordingly, and almost uniquely, solicitors have less by way of common law rights and protections than any other citizen. Can one for example imagine the medical profession or the NHS or any Scots medical research surviving if a similar test were applied to patients directly affected by anything a medical practitioner had said or done?

10. Compliance with the European Convention of Human Rights
We are concerned as to the extent to which the provisions in the Bill will be ECHR compatible. In light of Scottish Ministers’ involvement in the running of the Commission, as detailed at points 7 and 8 above, the Executive’s assertion that with the application of Article 6 (the right to a fair trial) any body acting in a judicial capacity must be independent and impartial, is somewhat lacking in conviction.

11. As already stated above, we are further concerned that, while the Bill provides for an internal appeal procedure from decisions taken by the Commission, the lack of any external appeal similarly does not comply with Article 6. Given the professional consequences arising from an adverse decision of the Commission, we agree that to prevent solicitors from having any recourse to an external court is, as Lord Lester of Herne Hill succinctly stated in his legal opinion, to effectively deny a ‘civil right of access to a court.’ We further believe that the appeal process should be two-way and that complainants should also have the right to externally appeal the Commission’s decision.

12. Costs
We agree that the complaints procedure should be easily accessible for those who have suffered loss because of poor service and that there should be no insurmountable financial barrier. We further agree that solicitors against whom a claim is brought should pay a specific levy over and above that paid by all members of the profession. However we are of the opinion that the requirement for a practitioner to pay all the costs of bringing a case to the Commission, whether a complaint is successfully upheld or not, is highly objectionable and creates a system open to abuse by vexatious claimants.

13. Apart from being grossly unfair and disproportionate to expect one party to bear the entire cost of the complaints procedure, we see here the destruction, at a stroke, of the inherent and vital notion of ‘innocent until proven guilty.’ We also see a genuine risk, when added to the catalogue of bad news about Scots law and procedures down the last few years (for example, the “temporary sheriffs” fiasco, the McKie case etc), of Scots law and procedure becoming a laughing stock. This would inevitably lead to law graduates leaving the country and those outside Scotland portraying our system as being “Third World” or undemocratic in nature.

14. There should be some mechanism in place whereby complaints are independently and sensibly sifted with those lodged maliciously or vexatiously being removed from the process at a very early stage. We believe this would help ease an already overburdened system by allowing more time for genuine complaints to be considered. Moreover, should a malicious complaint be identified, we are of the opinion that some form of compensation should be paid to the solicitor in question (albeit with a high test such as that governing the award of expenses against an applicant in Employment Tribunals).

14. Compensation
Although we are in agreement as to a rise in the level of compensation payable, we believe that the increase of the threshold for Inadequate Professional Services from £5,000 to £20,000 is grossly excessive with no explanation given by the Executive for such a rise. We are particularly concerned that this figure appears to have been
taken from the White Paper on ‘The Future of Legal Services: Putting The Consumer First’, published by the Government in the wake of Sir David Clementi’s report into the reform of legal services in England and Wales. We are in agreement with the Law Society that the conclusions reached by the Clementi report are based on a careful factual analysis of the much larger and more highly remunerated English system. There is no reference here to Scotland and that the importation of an English solution, and with no empirical evidence about the Scottish Profession’s earnings and ability to pay, this seems is wholly inappropriate. As an aside we note that, the maximum level of compensation which can be awarded by the Scottish Solicitor’s Discipline Tribunal for findings of professional misconduct remains at £5,000. We do not see why there should be such a large discrepancy between the two – particularly when professional misconduct is so much more serious. We would have thought caps of £15,000 for the more serious offence and £5,000 for the lesser offence – both index linked – would be much fairer to all concerned.

15. Access to Justice
We believe that high levels of compensation will undoubtedly have a detrimental effect on small firms and those in rural areas. While the threat of spiralling costs aiding the removal of those firms whose work is either negligent or of poor quality is understood, we see no merit or advantage to the profession or, more importantly, the public, in forcing honest firms out of the marketplace purely as a result of arbitrary financial penalties.

16. The effect on those living in rural areas should also be closely considered. If small practices in rural areas are concerned about the potential threat of expensive claims being made against them, and are already experiencing problems in recruiting young trainees and newly qualified solicitors, they may cease to offer those services which are most necessary, and yet prone to generating the most complaints. While we recognise that there are clear advantages to be gained by other firms in the reduction of the overall number of legal practices, there are distinct disadvantages for the public interest and for rurally-based clients, who may be left with significant barriers to the obtaining of local and cost effective legal advice. We believe that such consequences would benefit no-one.

17. Conclusion
The need for an independent complaints system has long been – in our view – unarguable. The trouble with the present proposals is they would replace one fundamentally flawed system with another. The veneer of independence would swiftly disappear once the necessary and inevitable judicial and ECHR challenges expose the substantive problems set out above.

Solicitors are charged with protecting their clients’ interest under a system based on centuries of the rule of law and the prevention of arbitrary injustice. The Bill proposes what would appear to be a state-supported kangaroo court which proceeds on a presumption of guilt not innocence. For a 21st Century Scotland, such an outcome would be regrettable when (a) the basic thrust behind the reform is well founded; and (b) proper attention to the consequences of the presently ill-thought out detail could yet give Scotland a fine model for a modern supervisory complaints system.

CCW LLP