Submission from Alison Arbuthnot for the Legal Profession and Legal Aid (Scotland) Bill

As a solicitor working within private partnership in Scotland I wish to bring the following concerns to the Committee as regards what will be considered to be the negative impact both on consumers and the legal profession itself from the enactment of the Legal Profession and Legal Aid (Scotland) Bill as it presently stands.

Compensation

The Legal Services Complaints Commission will have power to direct a practitioner to pay compensation of up to £20,000.00 to a complaining client. In the last two years the upper limit of such compensation following upon a finding of inadequate professional service increased from £2,000.00 to £5,000.00 but the Commission has quadrupled that sum for loss suffered or inconvenience or distress caused to the client as result of the IPS. Clearly it is a punitive measure against the solicitor from which the complainer benefits. No explanation of how this figure was computed has been given or indeed any justification provided for the sharp increase. It is assumed to be based upon income. If that is indeed the case then how can there possibly be justification for an across the board figure of £20,000.00? There are enormous income disparities between solicitors cross border and indeed between urban and rural communities. We appreciate that it was the English White Paper on Complaints Handling that introduced the £20,000.00 figure. An English solution appears to be being imposed on a Scottish problem.

Many Scottish firms operating from an income of Legal Aid only will find their position untenable in the event of one such award made against them in any fiscal year. Between 1992 and 2004 there was no increase whatsoever in the Legal Aid rates in Scotland. Subsequent increases were minor and certainly not in line with the increased levels of compensation. Legal Aid rates applicable to solicitors in England are twice those of their Scottish counterparts. This is an anomaly that has never been properly addressed but in our view should be reflected in the compensation levels.

Cost

There is no proper cost or cost benefit analysis of the new Scottish Legal Complaints Commission. It's predicted budget for the first year is £2.4 million, to be borne by the profession. What check will be put upon the general levy that is imposed on each individual case?

No Fault Liability

It has been propagated that the charging mechanism for the Commission is based on the premise of “polluter pays”. This is not the case. Irrespective of whether or not a complaint is upheld the practitioner complained of is expected to pay a case fee (presently estimated at £300.00). To put it mildly this gives concerns for an abuse of process. It will act as a positive encouragement to dissatisfied (justified or otherwise) clients feeling free to advance even nonsensical claims as there will be no financial deterrent upon them not to do so. It is only equitable that those advancing frivolous claims, at the very least, should be made to pay the Reporter’s fee. It is strongly felt within the profession that this particular aspect of the Commission’s powers is a clear breach on the individual solicitors human rights. There is absolutely no balance in a system where if the complaint is upheld the solicitor pays and if the complaint is not upheld then the solicitor pays. This is contrary to natural justice.

Access to Justice

As already touched upon Legal Aid practitioners work with marginal profit levels. The compensation awards that can be made against them have quadrupled without there being a correlative increase in Legal Aid rates. Practices operating solely from Legal Aid are unlikely to be able to absorb the increased costs. Such practitioners regularly undertake Legal Aid Advice and Assistance work that garners them very small fees, regularly less than £150.00.
Having regard to the complaint levy fee alone such practitioners are unlikely to consider it worth their while continuing to do such work. The present Legal Aid rate for Advice and Assistance amounts to £40.50 per hour. To pay for one complainant’s Reporter’s fee alone a solicitor would require to complete seven-and-a-half hours work, virtually a full working day. Likewise this will impact upon a solicitors willingness to take on board particular types of work. There are various areas of the law (including divorces, boundary disputes and interdict actions generally, to give but a few examples) where clients rarely feel that the law has served them well. In many of these cases there is no absolute solution for a client and a compromise is forced upon him either through expediency or the Courts. These dissatisfied clients basically look to take out their frustration upon their legal advisor. The system as laid down by the Commission will frankly encourage them to do so.

**Independence**

The Commissions Committee will be appointed by Scottish Ministers. Therefore these appointments are political. It is a genuine concern that these appointees will be swayed by political opinion and there will not be neutrality in dealing with complaints. Many solicitors fear the Commissions appointment will go the way of the FSA whose rulings against IFAs are based on political pressure and no proper findings of negligent handling.

**Appeal**

The only appeal within this system is to a further committee rather than a stand-alone, independently appointed body. No indications have been given this as a level of proof that will be considered by the Commission and the Appeal Committee yet the Commission has the right to deal with a negligence case valued at less than £20,000.00. No guidance is given as to the burden of proof. In acts of negligence against every other professional body this simply does not happen and the complainant is obliged – appropriately in our view – to establish his loss to the satisfaction of a Court. Yet in this instance the Committee is made up of a majority of lay persons who carry the same powers as Sheriffs and Judges. Why then are solicitors adjudicated upon by political appointees with no legal background whatsoever? All negligence claims should remain within the appropriate forum at the Sheriff Court or Court of Session.

**Human Rights**

Having regard to the foregoing we cannot accept the new system complies with the European Convention of Human Rights. The Board is politically appointed no solicitor representation is guaranteed, there is no proper appeals forum and case fees are paid by the solicitor even if he is exonerated.

We would ask the Committee to take all of the foregoing in to account when finalising the terms of the Bill.