Submission from Chris Stuart for the Legal Profession and Legal Aid (Scotland) Bill

My background
At the outset let me confirm my own background is as a property lawyer in Scotland for over 25 years. My work has been mostly residential conveyancing, but also some commercial conveyancing, some Wills and other general private client work. I have no experience of legal Aid and am therefore making no comment about Legal Aid proposals.

Some General Concerns
I am concerned that the Scottish Executive and the public at large have a very false perspective regarding the legal profession. Lawyers are an easy target and everybody loves to hate them. There are numerous anti-lawyer jokes (only recently I watched on television the film Super Nova about the destruction of the world and comment was slipped in that those chosen to be saved for the good of mankind would not include lawyers) and the media love to run articles making us out to be money grabbing and incompetent. All this may be “fun” but the reality is that the perception is not only untrue but is actually highly offensive. The majority of solicitors in Scotland are extremely hard working (often long hours for no extra payment), honest men and women who care passionately for their clients and are providing an excellent service, in increasingly difficult circumstances, and with little thanks or understanding from society. The majority are not earning the kind of income which the public fondly imagine. Indeed with the current tax laws of this country there is little incentive to earn any amount into the 40% tax bracket as that is increasingly hard work for a self employed person. The sheer volume of legal work being undertaken daily in Scotland is staggering. You will hear nothing from the vast majority of clients who have no complaint to make. What we are dealing with here is an extremely small percentage. It is believed that complaints account for less than 1% of the total volume of legal work carried out in Scotland.

Let us have some perspective then.

Good Points about the Bill

Emphasis on Resolution
I am pleased to note there is a stated emphasis on resolution between the client and the solicitor. Most issues, I am sure, arise largely owing to a lack of communication and could therefore be dealt with amicably if there was better communication between the solicitor and their client. Both sides of any dispute need to address this.

This is also in accordance with the general legal principal that an “injured” party is under a duty to minimise their loss. Generally this means that an injured party should always give the other party the opportunity to rectify matters before instigating further action. This is only right and proper.

Complaints handled outside the Law Society
For years the problem for solicitors has been that nobody has fully looked after our interests. The public perception is that the Law Society always favours solicitors and not the client but that simply is not true. With complaints being processed outside the Law Society, in time, the Law Society will hopefully become more like a Union for the legal profession and we will eventually get a more robust representation of our interests.

Bad Points about the Bill

Claim by Any Person having an Interest
This is too wide. Solicitors undertake work exclusively for their client. Under the law of agency the solicitor is agent for their client who is principal. A solicitor cannot owe a duty of care beyond that. If what is done by the solicitor affects others, then it could be argued the client (as principal) is actually responsible. A solicitor has a duty to act in the best interests of their client. I am concerned that the proposals could lead to all sorts of persons making a
complaint. This in turn could lead to solicitors feeling unable to undertake certain actions for the benefit of their client (which hitherto would be considered quite normal) for fear of generating a complaint. I have seen evidence that this is already happening. A solicitor must advise a client what is best in that client’s interests, not worry about whether that advice may be adverse to some other party who might then lodge a complaint.

Board with non-lawyer majority
Care will be needed to ensure there is sufficient legal representation. It is clear having read the Ombudsman’s reports over the years and also some Complaints Reports that lay people do not always have a full understanding of all the issues that can arise in legal transactions. Any form of justice must be fair and must be seen to be fair. I am concerned that the Board could be prejudiced and biased against the legal profession, and could lack a full understanding of the issues. While I appreciate the need for lay persons to be involved I am concerned that high standards of impartiality and understanding by those lay persons will need to be applied. What proposals are there to ensure this?

Maximum Compensation of £20,000
If a solicitor makes an error and a client suffers loss a claim for negligence can be made and dealt with as an insurance matter so that the client is recompensed. I have no difficulty with that, although there is still a high self insured amount and premiums will be increased to compensate.

But if, in addition, the solicitor is to face a compensation penalty of up to £20,000 then frankly this could put a solicitor out of business. I am concerned that the awards of compensation could be made without any real sense of proportion to the complaint, or the damage they could cause. The Scottish Executive should be aware that solicitors can not insure against compensation awards. Such payments will have to come from the solicitor personally. An insurance company would never consider insuring against compensation awards without a right of appeal.

I am in no doubt that solicitors (especially, but not exclusively, sole practitioners and smaller firms) will go out of business as a result of these proposals. This means that local employees will be out of work and access to legal services, especially in rural areas will become increasingly difficult to obtain.

Human Rights
It cannot be right (morally or legally) that a solicitor has to pay £500 towards a case being heard whether found “guilty” or not. This is frankly outrageous. I have serious misgivings that this could lead to a claim culture as there will be an obvious incentive to clients (and others) threatening to make a claim. Solicitors will become wide open to blackmail. In an average conveyancing transaction a legal fee of say £650 will generate a profit element of about £150. It is therefore blindingly obvious that a charge of £500 will more than wipe out any profit made from a transaction which generates a claim. This is grossly unfair on the legal profession.

In addition the Bill provides no right of appeal to the solicitor against any finding of the Board. Again this has to be contrary to human rights. I am concerned, however, that even if amendments are made to allow an appeal – this could prove so costly and time consuming that most solicitors could not afford to appeal, even if they feel they have a good case.

Summary
All of us in any walk of life like to think that we work hard, to the best of our ability and do a “professional” job. In my view the true professional is the one who has personal liability for what they do. Lawyers come into that category.

The standards being applied to solicitors seem to be getting increasingly more onerous and unrealistic. Nobody on this planet is perfect and nobody can be 100% correct all the time. It is
logical therefore that even the most diligent and able solicitor will at some point in their career have a complaint lodged against them. The proposed system seems likely to generate more complaints and like most government bodies nowadays the Complaints Commission will need to process numbers of complaints to justify their own existence. The implications of this are as obvious as they are worrying.

There is a flip side to all this. The Scottish Executive want to make the legal profession more accountable. In theory that is fair enough – but the system must be as fair and reasonable to lawyers as it is to the public. What safeguards are being put in place to ensure lawyers receive a fair hearing?

**Working Conditions for Solicitors**

This needs to be addressed. For years solicitors have granted *Letters of Obligation* in conveyancing transactions. We do this to cover time gaps in search reports because the system is less than perfect. Effectively the legal profession shores up the whole system. We get no thanks or recognition for this – indeed we pay insurance premiums because in granting such letters we are personally taking on a risk (and some solicitors have had to pay out in costs as a result) that is really the responsibility of the client. My personal view is that this is madness. The solicitor is not party to the transaction and should not be making any personal undertakings to shore up a system which is flawed (and certainly should not be paying for the privilege of doing so).

Perhaps the legal profession should simply stop doing this (then no conveyancing transaction could settle) and let the Executive find a solution?

We have to work with a *land registration* system which is far from perfect. The problems with the system are too numerous to go into here. But they stem from lack of funding, lack of physical space and lack of sufficient numbers of trained staff to deal with the sheer quantity of the workload.

We have to deal with the total shambles that is *Stamp Duty Land Tax*. This now much better than it was but remains difficult to deal with in many instances. Another example of government incompetence and failure to listen to advice from those at the coal face.

We have the difficulties of dealing with the numerous *mortgage lenders*. They are all trying to achieve the same end legally – but there is a distinct lack of joined up thinking here. Effectively a solicitor has to apply a different set of procedures and comply with a different set of instructions for each lender to the same job. Nobody is addressing this.

We have the difficulties of dealing with *builders missives* in purchase of new houses. For years lawyers have been trying to get builders to have fair and reasonable contracts, but without success. I believe the Scottish Executive is at last looking at this – but it has taken years.

We have the difficulties of dealing with *ever changing legislation* on just about everything. MPs and MSPs of all persuasion have a habit of tinkering with legislation so that it has become increasingly difficult for anybody, even lawyers, to understand what the current law actually is.

The above are just a few points but there are many more. Even just dealing with Money Laundering Regulations is a time consuming part of every transaction. My view is that even for the simplest of conveyancing transactions a lawyer should be charging a minimum fee of at least £650 to make any profit. Solicitors must be allowed to make a profit, otherwise there is obviously no point doing the work. Legal fees are forever under pressure to be lowered. **BUT** the public cannot have it both ways. They want an increasingly better standard of service (and rightly so). They want everything done quickly and they want it done cheaply. There is a cost implication and a time implication. The threat of increasing numbers of complaints means that solicitors will no longer undertake work cheaply, will no longer be prepared to work to ridiculously short time scales - and in many cases will simply not be prepared to undertake certain types of work.
It is also time that the difficulties of the legal profession, as indicated above, were recognised and some action taken to deal with them – in my view the responsibility for many of these matters lies squarely with the Scottish Executive.