Submission from Iain Gow for the Legal Profession and Legal Aid (Scotland) Bill

I have read the above Bill and now express my objections as follows:-

1. The proposed legislation seeks to forge an expensive statutory hammer to crack a small nut, underpinned by a fundamental assumption that solicitors cannot manage, discipline or control their own profession. The proposed legislation unnecessarily removes the existing self disciplinary arrangements which have worked for many years and whose effectiveness is borne out by the fact that 99% of legal cases processed by solicitors remain free of complaint.

2. If however the establishment of a Scottish Legal Complaints Commission is to be accepted as a reality, I believe that the costs of operating such a body are understated on the estimate of £2.4 million. The present system of complaints handling through the Client Relations Office of the Law Society of Scotland has a large voluntary component which will be absent from a governmental organisation which will employ between 50 and 60 full time, salaried personnel, to oversee a small profession.

3. The charging of a general levy to each practice unit coupled with a case handling levy is an unwelcome and unnecessary addition to the costs of operating a solicitor’s practice, which requires to pay annually (a) a premium to the Master Insurance Policy, (b) a contribution to the Guarantee Fund and (c) a subscription to the Law Society of Scotland.

4. The concept of “polluter pays”, which will involve a solicitor paying processing fees to the Commission whether or not a specific complaint is upheld, is manifestly and outrageously unjust and in my view flies directly in the face of a solicitor’s Human Rights. To the extent that a solicitor has to pay at all, a preferable system would be for the solicitor against whom a complaint is upheld to pay a higher case processing fee instead of a smaller special levy for every case. However, I see no justification for the principle that only the solicitor should pay and believe that a complainer should be required to pay an advance handling fee to the Commission when lodging a complaint, with possible consideration to that fee being returned to the complainer in the event that his complaint is upheld. In broad terms however, I take the view that a system which allows a complainer to lodge a complaint without any liability falling to him if his complaint is not upheld, leaving the solicitor complained against to pay the whole costs of processing of that complaint, is the statutory enshrinement of allowing the exercise of power without responsibility by a complainer.

5. There is no appeals mechanism to the Courts against decisions or awards of the Commission, which is unfair and which in my view is contradictory to the Human Rights legislation. If “watchdogs” are appointed to watch over the profession, then it makes for good justice if some institution is appointed to “watch the watchdogs”.

6. The level of compensation is excessively high at a level of £20,000. This is an unjustified increase in the existing level of £5,000 from an earlier level of £1,000 last year. I have neither heard nor read any word of justification from the Scottish Executive for the increase from the level of £5,000 which was fixed by the Justice Minister last year. I understand that the idea for a sum of £20,000 has been taken from proposed English legislation. My view is that it would be more appropriate to identify a Scottish solution to a policy issue than simply to adopt levels of compensation from England.

7. The fact that the Commission essentially replaces the functions of the Courts in the handling of negligence claims for sums less than £20,000 is a usurpation of the existing system of claims to the Master Policy Insurers with recourse if necessary to justice through the Courts. The compensation arrangements also duplicate the professional indemnity insurance arrangements for the profession under the Master Policy.

8. I believe that the proposed legislation is an assault on the independence of the legal profession in Scotland, through legislative arrangements which enable Ministers to appoint members to the Board of the Commission, empower the Commission itself to force the Law Society of Scotland to take action on certain conduct issues and to oversee the running of the Master Policy and the Guarantee Fund, both of which are private arrangements which for
many years have been funded by solicitors themselves for the protection of themselves and
the benefit of the public. These statutory features are in my view proof positive of the
Scottish Executive's fundamental conviction that the legal profession is incapable of
managing and disciplining its members, despite the fact that the profession enjoys the
confidence of the greater part of the public in Scotland.

9. I believe that the creation of the Commission will cause a negative economic impact on
the legal profession and the public, in the following ways:-

(a) Once the operating costs of the Commission are known it is to be expected that the
Scottish Executive will insist that the legal profession pays for the overshoot in costs.

(b) The additional operating costs of paying the general levy and the special case levy to the
Commission will be passed to the consumer in the form of higher fees, giving the public real
reason to complain.

(c) Some legal practices may go out of business as a result of the imposition by the
Commission of fines, special levies and the requirement to pay mediation fees.

(d) Some legal practices will withdraw from certain areas of business which are particularly
prone to attracting complaints. In certain areas of Scotland this may have the effect of
preventing members of the public from being able to obtain legal advice in their particular
localities. In other words, access to justice will be denied.

I take the view that if a Scottish Legal Complaints Commission is to be established, then all of
the above issues must be addressed carefully for the benefit of the profession and the wider
public interest.