Submission from Lynne McLean for the Legal Profession and Legal Aid (Scotland) Bill

I am writing to you in connection with my concerns about the LPLA Bill which are as follows:-

Human Rights

Although certified as compliant, the Bill contravenes Article 6 and should be reviewed now. There is no reason why this legislation should be rushed through. As Cathy Jamieson said recently in connection with other legislation we are keen to see change but if “we get this wrong and …… changes are found wanting in the courts it could set us all back years”.

Article 6 – Right to a fair trial

(i) The Commission would not be independent and impartial. Appointments and removals are to be made by the Scottish Ministers.

(ii) There is no provision for an external independent appeal either for the complainer or the practitioner.

(iii) The Commission will be a quasi-judicial body dealing with complaints and negligence arising therefrom. There are no known provisions for compulsory public hearings, leading of evidence and procedure before the Commission, proof, an impartial and independent judge and no appeal in fact and law. Professional reputation could be destroyed without the ability to question the decision.

Article 8 Rights to respect for private and family life

This extends to respect for correspondence. The complainer obviously waives any right to confidentiality but what of a third party? The Commission has the power to obtain information or documents from individual practitioners in order to allow it to carry out its complaints handling functions. This could feasibly extend to “the other sides” files, which would contravene ECHR.

Costs

Solicitors have to pay the running costs of the Commission although the Executive will pay certain start up costs. The balance of collection of costs between the general levy for the whole profession and the special levy for those who have been found guilty of IPS is decided by the Commission and not by the Law Society. This strikes at the heart of what it is to belong to a profession and should be carefully considered.

Lawyers should be given some meaningful control over the budget and how it is spent. The Bill provides that the Commission has to consult the profession annually on budget and workplan. The importance of this cost element cannot be overstated. There will be a knock on effect on fees charged to the public and access to justice, creating areas in Scotland which are bereft of legal advice. This cannot be good for a country our size. There must be an audit trail.

The public purse will contribute an estimated £450,000 to cover some start-up costs but this is simply an estimate as to how “the budget might look”. It could be pure guesswork and simply wrong.

The estimated full year running costs are £2.4m. We have heard recently that the Ombudsman’s current budget of around £400,000 is not sufficient to fund her department to allow her to meet her targets. She deals with around only 2900 complaints each year. The members must bear that in mind when setting the figure for the Executive’s Contribution.
The Law Society and the legal profession will still have to fund the conduct complaints function.

There is no mention in the Bill of the contribution the Executive will have to make in terms of the TUPE regulations, which may be substantial.

Public Interest

The Public are not being well served by this Bill because:-

1) As mentioned above they will have to pay for establishment costs, which have not been properly measured or controlled and could spiral out of control. We have seen an example with The Ombudsman's department being so underfunded that it is unable to meet targets. The existing Law Society System has met the targets set at no cost to the public.

2) A Consumer Council spokesman said on the radio that the Public would be quite prepared to pay much higher legal fees to meet the extra costs if it meant they had an independent complaints handling commission. I believe that to that to be naive. Solicitors do not have complaints in 99% of all transactions. With a turnover of £1 billion p.a. that is a lot of complaint free work. The costs of a government “quango” without provision for proper control of budget and independent auditing has to be paid for by lawyers by both general and special levy. The special levy may have to be paid by innocent lawyers, along with compensation, repayment of fees etc, with consequential damages to reputation. This would be without a fair hearing and no real right to appeal. Increased legal fees and, more likely, closure of legal offices (especially rural ones) are inevitable and will result in advice deserts.

Legal firms are small businesses employing 20,000 people. They are a source of revenue and uphold the rule of law required in any civilised Country. Small businesses are “the engine driving our economy”, required for growth and prosperity. Remember 10,000 leave Scotland each year. In the words of another politician we must reassert this “entrepreneurialism” so that Smart Successful Scotland does not become Smart Successful Scotland elsewhere.

If a lawyer is correctly found guilty of IPS then he or she deserves the decision but that is not what is proposed in the Bill. A practitioner who is complained about has to pay no matter what.

3) There is no independent right of appeal for the Complainer.

4) Unless you are the complainer, the general public should have right to confidentiality of communication and correspondence with his solicitor.

5) The Guarantee Fund and existing P.I. Insurance Schemes are the cornerstones for the Law Society of Scotland’s system of dealing with the public’s claims. Our Scottish system is the envy of many Countries all over the world. The Executive should not tinker with this system. Aggrieved clients would not be at all well served if lawyers were forced to source their own cover.

Scottish Solutions

Much is said by all Political Parties represented in the Scottish Parliament that we should find Scottish Solutions for Scottish problems.

One SNP MSP stated on record that the Scottish legal system has long been viewed with pride, and rightly so. He went on to say that it has been shown scant respect by the Westminster Government which has tinkered with a system of which they have no real knowledge or understanding. The Scottish legal system has helped and is still helping to
shape Scotland’s liberty, economic prosperity and cultural integrity. In the words of Cathy Jamieson “we do need to ensure any solution is appropriate for Scotland and that it works”.

The legal profession in Scotland is being made to change because England after the Clementi Report has had to. We are therefore still dependant on/addicted to Westminster for our policies. For example no one can give any justification for the £20,000 compensation level in the Bill other than that is what England is getting. Scotland’s legal profession is being compared with the English. The Justice 1 Report recognised our ability to co-regulate and much time, effort and expense has been expended improving the system. We have no backlog or bad administration problems as have the English. In spite of this we have accepted that the Consumers perception, fuelled by media hype, now makes the LSS IPS Complaints handling untenable and a Commission is acceptable to all sides for service complaints.

This Commission must be independent, in all senses of the word, must be fair, must have an appeal system and above all be delivered within a budget controlled by the profession and the public and audited independently. We do want the Scottish Parliament to demonstrate that in fact they are no longer dependent on Westminster and do have more powers than the Scottish Office. Scots Law is a devolved matter and as with the intervention on the extradition treaty today the members can say that Scotland will be treated differently.