Submission from Fergus Brown for the Legal Profession and Legal Aid (Scotland) Bill

I am writing in response to the consultation on this Bill which is currently before the Parliament. I am writing in my personal capacity rather as the Director of Regulation and Compliance at the Institute of Chartered Accountants for Scotland. I have been involved in complaints handling since 1992 when I joined the Law Society of England & Wales and where I remained as Quality Manager until 1999 when I returned to Scotland to take up a post with the Legal Services Ombudsman. In 2001 I joined the Institute of Chartered Accountants for Scotland where I now oversee the investigation and disciplinary procedures for complaints about the Institute’s members.

I have a number of concerns about the terms of the Bill, as it currently drafted, which centre on justice, fairness, transparency and its compliance with Human Rights.

Clause 2 of the Bill provides that the Commission is required to determine whether a complaint is vexatious or frivolous. In particular I note that when a determination has been made by the Commission there is no provision in the Bill for a right of appeal for the individual lodging the complaint. All such decisions must in the interest of fairness and transparency have a right of appeal. Under the current complaints system complainers have a right of appeal to the Legal Services Ombudsman. I would submit that there needs to be such an appeal mechanism included within the Bill and would suggest that an appropriate review could not be undertaken internally within the Commission. The appeal would need to be to an independent body such as the Public Service Ombudsman.

Furthermore, while the Commission is required to consult with the Professional Bodies on combined conduct/service complaints I am of the view that this should be extended to include complaints which are purely conduct in nature. In the interests of fairness the consultation process should be initiated at the initial sifting stage for complaints. As the Commission will be comprised of non-professionals there needs to be input from the Professional Bodies at the earliest stage in the complaints process. This will ensure that conduct complaints are correctly and properly identified.

It is noted that Clause 23 requires the Commission to make rules and that an appeal mechanism for service complaints is included within this. However there appears to be no mechanism for a complainer with a service complaint to have an independent review of how their complaint has been handled. This is particularly iniquitous given that the Commission is tasked with fulfilling this role for conduct complaints which have been investigated by the Professional Bodies. Not only is the lack of independent review for service complaints flawed in terms of Human Rights legislation but the current proposals favour conduct complainers to the disadvantage of service complainers. I would submit that the Bill needs to be amended to make provision for an independent review mechanism for service complaints in order to establish a level playing field. Such a review needs to be carried out by an independent body which should deal with, not only service complaints but also conduct complaints to ensure consistency of approach. Again I would submit that this body should be the Public Services Ombudsman given that the Commission is an establishment of the Scottish Executive.

I have reservations about the fixing of the maximum compensation level at £20,000 and that this will to some extent encourage complaints which should properly be dealt with by the Courts as negligence claims. It is to be noted that the provisions of the Bill do not provide that negligence matters remain to be dealt with by the Courts. It would be inappropriate for the Commission to deal with negligence matters as these are legal issues which can only properly be dealt with by a thorough testing of the evidence through the appropriate forum which is a Court of law. Furthermore the establishment of the Commission as a “lay” dominated organisation is not the appropriate forum within which to deal with the legal aspects of a negligence claim. Clause 8(2)(d) should be amended to limit compensation to “inconvenience or distress caused to the complainer”.

The level at which the maximum compensation award has been set has the potential to cause lasting and damaging affects on smaller practices particularly in the more rural areas of
Scotland. Whilst I accept there needs to be a provision for compensation in appropriate circumstances this needs to be balanced by setting the maximum at a proportionate level bearing in mind income levels of rural practitioners. As set out in the Bill the maximum level could see smaller firms forced out of business if they had one or more awards within a year or two. Were this to happen then rural communities could be disenfranchised from the provision of legal services at a local level. Additionally the further and logical impact of this is that rural and smaller firms will not take on work which at the current time can lead to complaints; such as contentious divorce work, personal injuries cases or contentious executries. Again this will lead to individuals being unable to obtain legal advice at a local level and will require them to travel to more urban areas for advice. Not only will this lead to greater travel costs for individuals but will also lead to increased cost of legal advice as the fees of firms in more urban centres of population tend to be higher. If there is a reduction in the work of rural firms then there will also be a financial impact on rural economies not only in terms of income generated locally but also in terms of employment as those firms reduce staff numbers.

My final concern relates to the complaints’ levy and that a practitioner will be required to pay this to the Commission even in circumstances where the complaint has not been made out against them. This is inherently unfair given that the practitioner will have been informed that the complaint has not been made out against them but they will still be levied a charge. The levy should be discretionary and should only be made against practitioners who have a significant number of complaints lodged against them. It is not in the interests of either the practitioner or the Professions for such a levy to be imposed as currently proposed within the Bill. Indeed there is potential to encourage complaints which have no substance in detail but are such that they cannot be screened out at first instance.

I would request that the Committee considers these concerns and gives serious consideration to amending the Bill to ensure that it delivers a proportionate, fair and transparent system for dealing with complaints.