Submission from Robert Carty for the Legal Profession and Legal Aid (Scotland) Bill

I wish to make certain representations in relation to the establishment of the Scottish Legal Complaints Commission. I have considered the terms of the Legal Profession and Legal Aid (Scotland) Bill. As a Solicitor, I broadly welcome the introduction of an independent Commission to deal with service complaints against solicitors. However, there are a number of issues which concern me which are as follows:-

1. The proposed levy system seems to me to be unfair. There is a proposed general levy for all solicitors to fund the commission and I can appreciate the need for such a levy. However, I note that there is also a proposed levy of approximately £300 being made by the Commission and payable by the solicitor even where the complaint is not established. It seems remarkable that a financial penalty is payable by a solicitor who is exonerated by the Commission. I am not aware of similar penalties for other professions. Such a penalty is clearly inequitable. I find it difficult to find an argument to support additional funding being provided by people who are wrongly accused of providing a poor service.

2. This system of funding will inevitably restrict clients’ access to justice. With a potential £300 penalty for every case taken on, there is obviously very little incentive to take on poorly paid legal aid work. Huge numbers of cases pay a fee of less than £50 and I simply cannot see solicitors being willing to risk taking on cases where the level of payment is low. It would not make good business sense. This would be a very unfortunate result. Such cases obviously can be extremely important to an individual and they will be much less likely to be able to get assistance.

In addition, I believe that there are types of work where people will have difficulty obtaining representation because the solicitor believes there is a high risk of a complaint. A clear example is cases involving mental health issues. Scotland has set up its own system of mental health tribunals with a system of appeals and reviews. My perception is that the Mental Health Tribunal for Scotland has worked well and the system is widely used. However, the patients who are seeking reviews will often be dissatisfied with the outcome of the case. Often appeals and reviews go against them due to medical evidence. They are very likely to blame their legal representative when a case is decided against them. Accordingly I see access to justice being restricted for a very vulnerable group. I would not have thought that the Scottish Parliament would want to discover that such a vulnerable section of society cannot get legal representation. I certainly believe that is a likely unintentional effect of the proposed levy on complaints.

I would anticipate that there might be similar difficulties with victims of domestic violence. Clearly, a legal representative will not always be able to get such victims the remedy that they seek such as exclusion orders with powers of arrest. I think it is already a matter of concern for the Executive that less and less firms are willing to do civil legal aid work. The statistics provided by the Scottish Legal Aid Board show a considerable decline in the number of legal firms undertaking such work. My own view is that the levy on complaints will probably further diminish the number of firms willing to carry out this sort of work for low paid and vulnerable sections of society.

3. I am also concerned by the proposal to increase the maximum sum payable by solicitors in a case for providing an inadequate professional service from £5,000 to £20,000. I assume that this figure has simply been copied from England. I think it is important to emphasise that the penalty imposed is not the only penalty payable. It is not a ceiling on negligence claims. A negligence claim would be decided in addition to an inadequate professional service penalty. As I understand it, inadequate penalty service penalties do not apply in other professions. On that basis, I would suggest they should not be too high. I am concerned that penalties for any sort of failure are simply going to increase fourfold. I believe that the overall result of the new maximum penalty will be to reduce the number of solicitors engaged in practice and further restrict the publics access to justice.

4. I would also feel that some cap should be kept on the running cost of the Commission. Obviously if the costs did spiral out of control then if it is to remain self funding the general
levy in complaints would need to be higher. If the levys became prohibitive, then there would be a reduction in the number of solicitors in practice, which would result in a decrease in the number of solicitors available for the public to consult.

5. I would also have thought that there would need to be some right of appeal from the decision of the Commission. I note that it is proposed that there is no such right, which would appear to me to be contrary to natural justice.

I would accept the idea of the new Commission is to increase public confidence in the system of dealing with inadequate professional service complaints against solicitors. My concern however is that the public will suffer. A lot of members of the community will be unable to obtain legal representation. I believe with a more equitable levy system that this difficulty could be overcome.

To be successful, the new Commission will have to increase public confidence in the system of dealing with IPS complaints against solicitors. My own view is that the Bill as it stands will not significantly assist the public. The restriction of access to justice seems to me the worst effect of the legislation. Until now, the Executive have professed to be very anxious to increase access to justice. I would suggest that there should be much wider consultations before this Bill passes on to the Statute Book.