Submission from Lesley A Gray for the Legal Profession and Legal Aid (Scotland) Bill

I am writing to you to express my deep concerns about the Legal Profession and Legal Aid (Scotland) Bill (the Bill) as follows:

HUMAN RIGHTS

Although certified as compliant, it is quite clear that the Bill contravenes Article 6 and should be the subject of immediate review. It makes little sense to rush through an ill-conceived Bill in the knowledge that it will be subject to challenge in the courts at the first available opportunity. 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

The following points of criticism can be made:

(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 by the complainer or the practitioner.

(iii) The Commission will be a quasi-judicial body dealing with complaints and negligence arising therefrom. There are no 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. This is blatantly contrary to natural justice and, to the best of my knowledge, applies to no other professional body.

Article 8. Rights to respect for private and family life

This Article covers the right to respect any correspondence. Should a complaint be lodged against a solicitor, the complainer waives any right to confidentiality. The Commission, however, will have wide ranging powers to obtain information or documents from individual practitioners in order to allow it to carry out its complaints handling functions. This could extend, feasibly, to compulsory disclosure of the files of the solicitor or party litigant on the other side, which would contravene ECHR and may breach solicitor/client privilege.

COSTS

Solicitors have to pay the running costs of the Commission although the Scottish 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
to be decided by the Commission and not by the Law Society. Surely this aspect of the new regime has not been given proper consideration as, what is currently proposed, is so vague as to be unenforceable and erodes the very heart of our profession.

The Legal Profession 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 work plan. The impact of this cost element cannot be overstated. There will be repercussions both on fees charged to the public and access to justice, creating areas in Scotland which will be devoid of legal advice which cannot be beneficial to the public interest of Scotland as a whole.

The potential costs have not been estimated in a realistic manner. It has been suggested that 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 is pure guesswork and blatantly misleading. We are told the estimated full year running costs are £2.4m. On the other hand, 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 2,900 complaints each year. Has that statistic been considered when estimating the figure for the Scottish Executive’s Contribution?

The Law Society and the Legal Profession will still have to fund the conduct complaints function. In addition, 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 as illustrated by the following points:-

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 under funded 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 is reported to have said during a radio broadcast 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 venture to suggest that is naïve in the extreme.

What seems to have been forgotten in this whole exercise is that, in 99% of all transactions, solicitors do not have complaints levied against them. With a turnover of £1 billion per annum, that percentage represents an overwhelming amount of complaint-free legal services. The costs of yet another government "quango", without provision for proper control of budget and independent auditing, has to be paid for by lawyers from both a 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 prospect is the inevitable consequence of a Dickensian scheme which excludes a fair hearing and no real right to appeal. If a lawyer is found rightfully guilty of IPS, then he or she deserves to face the consequences, but that is not what is proposed in the Bill. A practitioner against whom a complaint has been lodged is required to pay without reference to the merits of the complaint.

Increased legal fees and the real potential for closure of legal offices are the inevitable result of these proposals, leaving in their wake an advice vacuum which will be impossible to fill. Does the Scottish Executive really want the Legal Profession to be denuded to such an extent that "Smart Successful Scotland becomes Smart Successful Scotland somewhere"?

3) As mentioned above, there is no independent right of appeal for the Complainer.

4) Leaving aside the Complainer, the general public should have the right to confidentiality of communication and correspondence with his solicitor. Solicitor/client privilege should not be eroded in this less than transparent way.
5) The Guarantee Fund and existing P.I. Insurance Schemes are the cornerstones for the Law Society of Scotland's system of dealing with claims from members of the public. Our Scottish system is the envy of many Countries all over the world and the Scottish Executive should be slow to interfere with a system which provides such conclusive protection to the public. Aggrieved clients would not be at all well served if lawyers were forced to source their own cover.

SCOTTISH SOLUTIONS

In the words of Cathy Jamieson "we do need to ensure any solution is appropriate for Scotland and that it works". Much is said by all Political Parties represented in the Scottish Parliament that we should find Scottish Solutions for Scottish problems.

It seems to me that no case has been made out for a change in the present complaints system which has withstood the test of time and served the public interests well. The Legal Profession in Scotland is being forced to change, not out of necessity or overwhelming public demand, but because England has done so following the Clement Report. What the Scottish Executive fails to take into consideration is the huge gulf between the Scottish and English complaints procedures. There is no doubt that the English system is in need of reform. It seems, however, that where Westminster goes, Scotland has to follow. No one, for example, can give any justification for the £20,000 compensation level in the Bill, other than it corresponds with the English level. Scotland's Legal Profession is being compared, unfairly, 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. Why is the Scottish executive so determined to tear such a successful system apart.

If a Commission is the inevitable way forward, it is absolutely crucial that it 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 independently audited. Scots Law is a devolved matter and the members should be able to demonstrate both in words and deeds that Scotland, rightly, will be treated differently.