Submission from Peter Nicholson for the Legal Profession and Legal Aid (Scotland) Bill

May I offer some personal comments for your consideration. I write as a non-practising member of the Law Society of Scotland: I edit the Society’s Journal, and have closely followed the debate on regulatory reform of the legal profession as it has unfolded over the last couple of years. I have also recently taken on the role of reporter to the Client Relations Office at the Society and have prepared reports on the first few service complaints referred to me for investigation.

My comments relate to aspects of the proposed new complaints handling system which I believe will impact unfairly on the legal profession. I am quite happy with the principle of an independent body, but I do believe that the Executive is being naïve and/or complacent in assuming that the present proposals will result in a level playing field as between solicitor and complainer.

I ask the Committee to look closely into the following issues before reporting on whether the Bill should proceed.

Qualifications
While the principle of a lay majority can be defended, there appear to be inadequate safeguards at present that the proposed Complaints Commission will have sufficient legal expertise among its members to reach an informed view as to whether professional standards of service have been met. From my limited experience as a reporter I know that even where no questions of professional misconduct arise, complaints can raise a considerable number of issues from a single transaction or case, and require a degree of insight into the likely course of events in order to reach an informed conclusion.

If the demands of some were met and the Commission were also to take responsibility for misconduct investigations, the provision for legal expertise would be seriously inadequate.

Cost
The Executive makes the rather glib statement that as the profession pays for complaints handling at present, it should pay for the new Commission. That overlooks some important differences:

- Under the present system the profession pays for complaints handling as part of its funding of the Law Society of Scotland. Much of that funding will require to continue as the Society is to retain its role in misconduct cases, in which a prosecution as well as an investigation function has to be financed.
- The present system relies heavily on the goodwill of people like myself who take on cases for a flat fee of £100 irrespective of the number of hours involved in investigating a complaint. Again I can already state from experience that this number can be substantial, especially if complainer and solicitor continue to submit answers to each other’s correspondence after a reporter has been instructed. As this is also in effect piece work, overheads are minimal. If all work is undertaken by salaried Commission staff, costs will far outstrip those currently incurred by the profession.
- Certain areas of practice will inevitably generate more complaints than others, and these are likely to involve smaller firms with a less well off clientele – firms who provide essentially a social service in advising on criminal charges, family breakdown, tenancy disputes or whatever, who operate on slimmer margins and who may well not survive the financial burden of repeated Commission levies, with or without compensation awards. I put it to the Committee that the principle of charging only the firm and not the client, whether or not a complaint is upheld, is a particularly pernicious one against this background.
- At the same time the Executive wishes complaints to be resolved without recourse to the Commission. The more this aim succeeds, the higher the levy the Commission will have to charge for those cases referred to it – still only on the firm, whether or not the complaint was justified. Logically as well as a matter of justice this is unsustainable. It also leaves the firm open in effect to blackmail by a client.
anticipating that a firm will prefer to settle a complaint rather than incur Commission levies. The Executive must be prepared to underwrite the Commission to the extent necessary to avoid these consequences.

Appeal
I suggest it is a serious flaw in the bill that there is no right of appeal to an independent judicial body. I note that the Executive considers the mechanism of internal review plus the availability of judicial review to be human rights compatible. You will be aware that there are experts in the field who take a different view. In any event certain conditions have to be met before judicial review proceedings can be brought, and to attempt to get away with the bare minimum by way of provision for appeal is unacceptable if penalties of up to £20,000 can be imposed with no right of independent review.

There is also a glaring anomaly when this is compared with the new power in the Law Society of Scotland to fine up to £2,000 and order compensation up to £5,000 for unsatisfactory professional conduct, from which there is a right of appeal to the independent Scottish Solicitors’ Discipline Tribunal. There seems no justification at all for not allowing a comparable appeal against the much greater £20,000 penalty.

I hope these comments are helpful to the Committee.