Submission from Patrick Mennie for the Legal Profession and Legal Aid (Scotland) Bill

I have been a practising solicitor since 1960 and have operated in most areas of general practice. I was a partner in the firm of Grigor & Young in Elgin for more than 40 years and I am still actively involved with the firm as a Consultant. I am also an Honorary Sheriff at Elgin and am called upon from time to time to deal with both Civil and Criminal Business.

I am also a Reporter for The Law Society of Scotland, Client Relations Department for endowment mis-selling complaints and therefore I do have some knowledge of how the present system of dealing with complaints operates.

I have seen the Submission by The Law Society of Scotland in relation to the Bill and support what is said on behalf of our profession.

Having studied the Bill I have serious concerns about the impact of this on the members of the legal profession in Scotland and on the members of the public in relation to the provision of legal services particularly in rural areas. My main concerns are not particularly for myself but for the younger members of the solicitors profession and for those considering coming into the profession who, because of the financial risks involved under the proposed complaints regime, may be advised against coming into private practice.

There are various specific matters I wish to raise.

1. The Complaints Commissions will have to take cognisance of the various courses of action which could arise in relation to a complaint and have a clearly defined policy of prioritisation in relation to these

   a. Where there is a claim for negligence and this is being dealt with by the Master Policy Insurers no action should be taken on the complaint until such time as the claim has been dealt with and any Court action concluded. Under the present system The Law Society takes this position.

   b. Where a complaint raises issues of professional misconduct no action should be taken until such time as The Law Society and it is referred to them the Disciplinary Tribunal have completed their procedures.

   c. Where the complaint raises issues of Unsatisfactory Satisfactory Professional Conduct no action should be taken until The Law Society have completed their procedures.

   d. Where the complaint raises issues of both services and conduct no action should be taken until The Law Society have completed their procedures.

2. Section 8(d) which provides for compensation of an amount not exceeding £20,000 could have a severe financial impact on sole practitioners and small firms which are prevalent in rural areas including the central belt and could well drive them out of business. Virtually all practitioners are diligent and conscientious in dealing with their client’s affairs but it is human to err and a small mistake or oversight can result in a substantial loss to a client. That type of situation would normally be dealt with by way of a claim on the Master Policy and any financial loss to the client recovered in this way. The practitioner would have to pay the self insured amount of £3,000 per partner in relation to the claim but could still be required by the Commission to pay compensation for inconvenience or distress which would not be covered under the financial loss claim dealt with by the Master Policy Insurers.

Because of the interaction between the Commission’s powers in relation to compensation and claims under the Master Policy it is essential that the Committee obtain information from the Master Policy Insurers as to how they will operate after the introduction of the new regime and what the financial implications for practitioners
will be in relation to premiums, loadings and self insured levels as it will not be possible to insure against the financial aspects of any direction by the Commission. The Committee require to have a full understanding of the full implications to practitioners.

3. **Section 8(3)** sets out what the Commission must take into account in arriving at its determination. There should be added to the end of (b):

“or agreed, extrajudicially and paid by the Master Policy Insurers to the client”.

There should also be added at the end of the subsection after “in relation to the subject matter of the complaint”:

“and

(d) the circumstances of the event leading to the complaint;

(e) the amount of the self insured contribution paid by the practitioner to the Master Policy Insurers in connection with the claim;

(f) the personal and financial circumstances of the practitioner”.

These are matters which any Court will take into account in fixing a sentence or other determination. There could also be a case for allowing payment by instalments where a large sum is involved.

4. **Section 8(6)** provides that where the practitioner concerned was an employee the direction is to be applied to the employing practitioner as well as to the employee in respect of whom the complaint was made. This is in effect joint and several liability.

Under the present complaints system service complaints are directed against the firm rather than the employee on the basis of vicarious responsibility. This proposed double finding will cause particular problems where the employee may no longer be with the firm and there could also be a similar scenario if the practitioner concerned was a partner who had subsequently left the firm. Unless there was some contract between the parties to regulate how the liability is to be dealt with the former employee if he or she wished to continue to practice as a solicitor would have to find some way of dealing with direction and any financial payment without having any right of recovery against his former employers.

The scenario of a young solicitor starting off in his or her chosen career earning £20,000 to £30,000 per annum probably with a student loan still to repay and mortgage payments to meet on accommodation, being faced with a substantial finding for compensation arising as a result of a simply mistake is totally unacceptable. The employing practitioner at the time should be the only party against which a direction should be made.

5. **Section 18** deals with the Annual General Levy. This should not be greater than the equivalent cost of servicing The Law Society Complaints Department or it would be argued that it should in fact be less as the Complaints Department, albeit in a much reduced form, will still operate to deal with conduct complaints. There should be a cap on the amount of the Annual General Levy with provision for an annual increase at a rate not exceeding inflation.

6. **Section 19** the Complaints Levy payable by the practitioner, should be fixed at a reasonable level and should be refunded if the complaint is not upheld. The fee should not be payable if there are conduct issues which are referred to The Law Society until such time as their procedures have been completed and the complaint is remitted back to the Commission. Complainers should pay a fee of £50 to £100 if they wish the Commission to proceed. If a complaint is determined to be frivolous or
vexatious and is rejected by the Commission at the preliminary stage no fee should be payable by the complainer.

7. The Commission is being set up for the benefit of the public and if a member of the public wishes to use its services it is not unreasonable that they should make a contribution towards the administrative cost. This would be in line with other government agencies where a fee is payable with an application even in a situation where the applicant is required to register as a result of legislation by the Scottish Parliament e.g. private landlords with their local authority under the Antisocial Behaviour etc (Scotland) Act 2004 and owners of country properties with SEPA for their septic tanks under the CAR regulations.

8. In Section 34 interpretation – “practitioner” the reference at paragraph (h) to “whether or not the solicitor had a Practising Certificate in force at that time and “ is not appropriate. If the individual against whom a complaint is directed was an employee of the firm at the relevant time and not a qualified solicitor they cannot be a “practitioner”. The only likely scenario which may be what is envisaged is the position of a trainee solicitor who subsequently qualifies to become a solicitor. It would not be appropriate to have the actions of a trainee subject to proceedings by the Commission. The “practitioner” in that situation is the firm.

9. Section 29 refers to the Guarantee Fund. While it is appropriate that the Commission should have information on the operation of the Guarantee Fund in order to be aware of the overall picture of client/solicitor relationships they should not have any power of direction as to the operation of the fund. The fund is financed by practising solicitors for the purpose of reimbursing clients whose funds have been mis-appropriated by solicitors. The fund has operated successfully for many years paying out 100% of all claims admitted. This provides the clients with greater protection than they have in depositing funds with other financial institutions. The operation of the Guarantee Fund should remain undisturbed.

10. With regard to the commencement of application of the Bill the provisions should not be retrospective. The Commission should only be entitled to consider complaints which have originated from an event occurring after the commencement of the Act. The Law Society Complaints Department should continue to deal with existing complaints and complaints arising from the events occurring prior to the commencement of the Act.

11. Section 43 proposes that Notaries Public be practising solicitors. I consider this to be entirely inappropriate. The Law Society has performed the administrative function of looking after the Register of Notaries Public since 1992 and arranging petitions for the appointment of Notaries Public. Previously this was done by an appointed Clerk. The appointment of Notary Public is entirely separate from the admission of solicitor and The Law Society have no supervisory control over Notarial functions. This is a matter for the Court of Session.

To apply for appointment as a Notary Public the person concerned has always had to be a solicitor. Most Notaries Public have their particulars and seals registered with the Foreign and Commonwealth Office for overseas certifications. There has never been a requirement for the solicitor to hold a Practising Certificate as a qualification.

I was admitted as a solicitor by Decree of the Court of Session on 27th October 1960 in terms of the Solicitors (Scotland) Acts 1933 to 1958. I will continue to be a solicitor so long as I maintain my name on the roll of solicitors whether or not I hold a current Practising Certificate. I was constituted a Notary Public in terms of Act 23 and 24 George V Chapter 21 by Decree of the Court of Session on 8th May 1963. I do not see why if I can be a solicitor without having a Practising Certificate I cannot continue also to be a Notary Public.
The function of a Notary Public relates to certifying or counter signing documents. This is not a function which falls within an area of work which is reserved to a practising solicitor. This is authorised by the Court. Many of the documents can also be signed by other recognised office holders e.g. Ministers of Religion, Justice of the Peace, Civil Servants etc. With the growth and the number of documents which are now required particularly for identification purposes, Passport Applications etc., it is important to have, particularly in rural areas, a good number of suitably qualified people available for members of the public.

The proposed section would also mean that Notaries Public who are employed in central government, local government and industry and also in some cases as employees in private practice who don’t have Practicing Certificates will be arbitrarily removed from the Register of Notaries Public. Section 58 of the Solicitors (Scotland) Act 1980 already provides that where a solicitor who is also a Notary Public is struck off the Roll of Solicitors and the name is also removed from the Register of Notaries Public. This legislation is sufficient. Section 43 should be removed from the Bill.

12. There requires to be included in the Bill provision for an Appeal against any determination by the Commission in terms of Section 8 of the Bill, to the Courts or alternatively to an independent tribunal with a further appeal on any point of law to the Court of Session. The Tribunal could be the present Solicitors Disciplinary Tribunal. Without a provision to this effect the legislation will not comply with The European Convention on Human Rights. If such provision is not included in the Bill it is inevitable that proceedings in relation to this will following probably on the first significant determination by the Commission.

I trust that the foregoing representations will be taken into account in the consideration of the Bill and appropriate amendments introduced to deal with them.

On a wider front the Justice Committee may wish to consider as a separate issue, perhaps in conjunction with the Scottish Law Commission, the future of the legal profession in Scotland and how the provision of legal services are going to be delivered. Problems are already beginning to emerge in relation to Civil Legal Aid and Advice and Assistance where fewer and fewer firms are prepared to undertake this work because they can only do it at a loss. In the days before Legal Aid solicitors acted for clients in both Civil and Criminal matters on a pro bono basis through the Poor Rolls which were established in the High Court and the Sheriff Courts. These operated on a rota basis. These disappeared with the advance of Civil Legal Aid in 1949 and Criminal Legal Aid in the mid 1960’s. Nowadays because of the overheads which exist in the running of any legal practice no one can afford to do much pro bono work or undertake Legal Aid work which does not produce a profit.

There is a mis-conception which is held by the general public and indeed by most people outside the legal profession that solicitors make a lot of money. While undoubtedly those who are partners in large commercial firms and in firms with niche activities can make substantial sums, the ordinary practitioner is not in that category. The most recent Law Society survey for 2005 shows the average earnings of a sole practitioner as being £67,000. The range is quite wide and can be less than £30,000 for full time work. Most solicitors in private practice work very hard and many of them for longer hours than the average Civil Servant. Depending on the structure of the business most firms have to work between two thirds and three quarters of the year in order to meet their annual overheads and before the equity partners earn a penny for themselves. Overheads are increasing all the time and a compensation order of £20,000 would have a considerable impact on even a medium sized firm which could cause serious problems for the firm and possibly destabilise the partnership. Legal practices make a very substantial contribution to their local economy and provide employment for a considerable number of people. The loss of a firm or a restriction in its field of activities which might be brought on by legislative changes because of risk management factors, could result in substantial redundancies.

There undoubtedly will always be a need for Lawyers of some kind but the time may come for them to be absorbed into some form of public legal service similar to Doctors in General...
Practice. I am sure that this would be welcomed by many members of the profession. The public defender agency has been recently set up and this could be expanded to deal with the bulk of the criminal representation business before the Courts using employed solicitors and advocates. A similar body could be set up to deal with civil court actions and claims. There could be a similar government agency set up to deal with domestic conveyancing employing solicitors, conveyancing practitioners and paralegals. This could be an extension of Registers of Scotland Agency with local branch offices.

Although Estate Agency in most areas of Scotland is largely in the hands of solicitors, if the conveyancing is detached this activity can be hived off as a separate business for which no legal qualification is required.

The main areas remaining are company and commercial work and executry, trust and private client work. While these could be nationalised they are probably more appropriately left to private enterprise. Having said that, however, there is a case for total and partial deregulation and to allow solicitors practices to operate purely commercial enterprises with no professional regulation and no requirement for professional indemnity insurance. This would totally open up the market, allow firms to become multi disciplinary entities and to operate with others in free competition in the market place. The Clementi Report seems to point that way for England.

There is also a school of thought emerging that the law and the legal systems of the whole of the UK should be merged. There is a concern that the intensive legislation by the Scottish Parliament is causing wider and wider differences particularly between the Scottish and English parts of the UK and that this may not be in the greater interest of the UK as a member of the EU and in national and international commerce.

Finally I have had the impression for many years that the Westminster Government and more recently to some extent the Scottish Government have something against lawyers in private practice. This I have found surprising as many of the politicians are lawyers. I wonder whether this is based on jealously in the mistaken belief that lawyers make a lot of money or whether it may be fear because historically, lawyers have been the driving force behind most revolutions.