Submission from Inhouse Lawyers Group, The Law Society of Scotland for the Legal Profession and Legal Aid (Scotland) Bill

I regret that it appears to be the general public perception that the current system is not working well. Whilst I do not agree, I share the Council’s pragmatic view that complaints relating to inadequate professional service (“IPS”) should be dealt with by a non-Law Society body which will be viewed as independent both of the Law Society and the profession. Such a body should however also be free of influence/pressure from other outside bodies including the Scottish Executive. I would strongly oppose any attempt to hive off from the Law Society and the Scottish Solicitors’ Discipline Tribunal consideration of complaints of professional misconduct and I can see no justification for the proposed Commission to have oversight of the Guarantee Fund and the Master Policy. These three areas are hallmarks of the legal profession in Scotland. If removed or compromised, the profession’s traditional role in a society founded on respect for the rule of law will, in my view, cease “to be” and the provision of legal services is likely to become just another business activity with its practitioners pursuing only “the fast buck” and not the aims and ideals which brought me into the profession. The need for regulation is clearly understood and accepted in areas where the public relies on their advisers fulfilling their fiduciary duties, and applying their professional skills diligently. In relation to lawyers, the public has the benefits of the protections offered by the Law Society of Scotland – as augmented by the proposals in the Bill. However, in relation to legal services provided by non-lawyers (e.g. claims handling, will writing and executry business), the public does not have these protections. It is therefore disappointing that the Bill does not take this opportunity to extend public protection to those areas outwith the legal profession who offer legal services. To extend these protections would provide appropriate public protection, and would apply a level playing field to the provision of legal services.

I have further concerns on the compatibility of the Commission to Article 6 of the ECHR. The members of the Commission are to be appointed for a period of 5 years by the Scottish Ministers who will also have the right to remove members before the end of their term under limited circumstances. The Commission can decide on service complaints. However the Bill as proposed contains no external right of appeal leaving Judicial Review as the only route of challenge. The limits of Judicial Review are such that any application is likely to fail. This suggests therefore that the Bill is incompatible with Article 6 and so, by virtue of S29 of the Scotland Act 1998, is outwith the legislative competence of the Scottish Parliament.

I fear that the sanctions available to the Commission under Section 8 of the Bill may result in a severe lack of access to justice. It should be noted that although the compensation element of an award in regard to IPS is limited to £20,000, which is large in itself, the cost to the practitioner of the other sanctions are not so limited, eg the rectification by the solicitor of errors by the solicitor and the taking of other action by the solicitor in the interests of the client as the Commission may so direct. Also these sanctions are not mutually exclusive. The parallel with the current situation regarding dentists is obvious. Firms will switch from the risky areas and in particular concentrate on commercial work. The fact that there is no effective right of appeal from decisions made by the Commission is simply untenable and the Bill will presumably be amended to remove this obvious incompatibility with Human Rights legislation at Stage 2.

As an In House lawyer, I have practical concerns about the manner in which the Commission will be funded and in particular the annual levy which it would appear it is envisaged will be payable by all solicitors holding a practising certificate. The practising certificate subscription for most In House lawyers is met by their employers and such solicitors are not entitled to provide legal services for members of the public – only for their employer. I suspect that many employers will baulk at meeting this additional payment given that it would be unheard of for an employer to deal with any issue of inadequate performance by their employee other than through a disciplinary route. The In House sector of the profession is its fastest growing area with the number of those employed in public sector and commerce being some 27% of those holding practising certificates. From an analysis of what such practitioners do, it is clear that only a limited numbers of employers decide to employ solicitors purely for the carrying out of work for which a practising certificate is required. They are valued because of
the other skills and qualities which their training develops and enhances. As an example, the Church of Scotland currently employs 11 solicitors with practising certificates, most of whom are entirely engaged in work which does not require a practising certificate. Strictly speaking, the Church could function with only one Solicitor holding a practising certificate.

In addition, faced with the possibility – even a remote one – that a vindictive employer, as well as taking disciplinary procedures, might also endeavour to obtain an award of compensation for alleged IPS, many In House lawyers may in future positively decide not to take out a practising certificate.

The loss of this section of the profession would clearly increase substantially the levy to fund the Commission payable by those in private practice. More importantly, it will imperil the viability of the Law Society to carry out its remaining functions both of regulation and of representing the interests of both the profession and the public – for example its much valued role of commenting on proposed law reform.

I also fear that members of the profession in private practice may decide to take the decision not to have practising certificates for their staff unless they are working within the three categories of Section 32 of the Solicitors (Scotland) Act 1980 which requires solicitors to have practising certificates to prepare writs in relation to property transactions, applying for confirmation or documents in relation to court proceedings. Should this occur and persons providing legal services are no longer required to be solicitors this could cause grave harm to the public who will no longer be able to know or differentiate between persons operating within the ethics of a properly regulated profession. The Law Society has over the years dismissed from its ranks solicitors whose behaviour has fallen below the standards in the Practice Rules made by The Society under the powers in the Solicitors (Scotland) Act 1980. This legislation could potentially free up those persons to provide legal services to the grave harm of the public.

The Inhouse Lawyers Group will be seeking exemption for inhouse lawyers from the requirement in Section 18, ie. the annual levy to pay for the upkeep of the new Scottish Legal Complaints Commission.

Inhouse lawyers generate minimal complaints to the Law Society from the public and even fewer from their employers. The move to have solicitors fund the Commission will result in many employers questioning the need to fund solicitors’ practising certificates, and indeed may result in some looking at the employment of paralegals. This will be to the detriment of the public and inhouse clients when they seek the provision of legal services. It can also be expected to harm the Law Society as its members start to be largely private practitioners - even then firms may look more towards the employment of paralegals, a trend which is already underway.

In regard to the powers of the Commission to deal with a services complaint against an inhouse lawyer, employers already have adequate remedies available to them (dismissal or disciplinary procedure) and any complaint by a member of the public would normally and indeed should be addressed to the relevant employing body. Employed solicitors do not normally have PI cover themselves and where their employer does carry such cover it is often subject to an excess greater than one million pounds. Where they are not principals in private practice they would expect to be supervised and indemnified by a partner and therefore benefit from the firm’s PI cover. Inhouse lawyers are frequently going to be exposed as principals but without PI cover and open potentially to the Commission imposing its maximum sanction under Section 8 as noted at the start of this note. This could exceed £20,000. We cannot see the merit in this exposure, when the problem sought to be addressed is not apparent and the risk reward balance for inhouse lawyers will be very much skewed towards risk.

In House Lawyers owe a professional duty of care to their client, their employer. A wide range of in-house legal professionals require to act in the interests of their employers, for example, local authorities, the Scottish Executive and the like, in ways which may be seen to be or are adversarial as regards a number of third parties. This is particularly the case in, for
example, a range of planning matters, obtaining anti-social behaviour orders, a range of licensing decisions and an entire range of regulatory matters. The same principles apply through the entire sector of in-house lawyers. It is imperative that lawyers require to act in the best interest of their clients. It would require to be clearly established in terms of this Bill that there was no facility for any aggrieved party, such as a member of the public, who wished to complain regarding an in-house lawyer, to do so in terms of this Bill. The protection of the public can only be preserved if any such remedies relate to a Solicitor who is providing a service to that person.

I would therefore urge that the Bill be amended firstly to exempt those solicitors who work in house from the annual levy. Secondly, I would also urge the Committee to re-consider the manner in which the running of the Commission is to be funded and the possibility that part of such costs be met from public funds.