The Committee will meet at 2.00 pm in Committee Room 4.

1. **Items in private:** The Committee will consider whether to take item 3 in private.

2. **Legal Profession and Legal Aid (Scotland) Bill:** The Committee will take evidence from—

   Caroline J. Flanagan, President, Douglas R. Mill, Chief Executive, Michael P. Clancy, Director, Law Reform Committee, Philip J. Yelland, Director, Client Relations Office, Oliver Adair, Convener, Legal Aid Solicitors Committee and Anne Hastie, Non-solicitor Member, Client Relations Committee, Law Society of Scotland

   Valerie E. Stacey, QC, Vice Dean, and Kenneth Campbell, Advocate, Faculty of Advocates

   Craig Bennet, President, and Ken Swinton, Ex-president, Scottish Law Agents Society

   Robert Sutherland, Convener, Scottish Legal Action Group.

3. **Legal Profession and Legal Aid (Scotland) Bill – consideration of written evidence:** The Committee will consider the written evidence received in relation to the Bill and consider whether to seek additional oral evidence.

4. **Legal Profession and Legal Aid (Scotland) Bill (in private):** The Committee will consider the main themes arising from the evidence session, to inform the drafting of its Stage 1 report.

5. **Legislative Consent Memorandum on the Police and Justice Bill (in private):** The Committee will consider its approach to the debate on LCM (S2)
4.1 on the Police and Justice Bill, currently under consideration in the UK Parliament.

Tracey Hawe/Alison Walker
Clerks to the Committee
Papers for the meeting—

Agenda Item 2


Lines of questioning (PRIVATE PAPER) (to follow) J2/S2/06/12/1

Summary of submission from the Law Society of Scotland J2/S2/06/12/2

Submission from the Faculty of Advocates J2/S2/06/12/3

Submission from the Scottish Law Agents Society J2/S2/06/12/4

Submission from the Scottish Legal Action Group J2/S2/06/12/5

Letter from Deputy Minister for Justice – Equalities Issues J2/S2/06/12/6

Agenda Item 3

Note by Clerk on written evidence (PRIVATE PAPER) J2/S2/06/12/7

Paper from adviser – written evidence summary (PRIVATE PAPER) (to follow) J2/S2/06/12/8

Written evidence (PRIVATE PAPER) (sent separately) J2/S2/06/12/9

Documents circulated for information only—
Letter from the Deputy Minister for Justice in relation to use of DNA

Documents not circulated—

Forthcoming meetings—
- Tuesday 9 May 2006, 2pm, Committee Room 2
- Tuesday 16 May, 2pm, Committee Room 6
MEMORANDUM OF EVIDENCE
BY
THE LAW SOCIETY OF SCOTLAND
ON
THE LEGAL PROFESSION AND LEGAL AID
(SCOTLAND) BILL
(APRIL 2006)

INTRODUCTION

This Memorandum of Evidence is prepared on behalf of the Law Society of Scotland. The Society is the statutory body under the Solicitors (Scotland) Act 1980 representing 11,777 solicitors on the Roll of Solicitors in Scotland. 53 Council members represent the solicitors and clients in each of their constituencies and the response represents the majority view of the solicitor’s profession in Scotland.

The Law Society of Scotland has radically changed and improved its complaints system over the last five years and supports further change which benefits the public and the profession.

The Parliament and the Justice 1 Committee supported the changes made. They were achieved by a committed team in the Client Relations Office and dedicated solicitor and non-solicitor committee members and reporters. The Justice 1 Committee and the Scottish Executive agreed in 2002 that complaints handling functions should remain with the Society. To work, the new body should handle service complaints only. Reach into conduct, negligence, overview of the Master Policy for Insurance or the Guarantee Fund risks compromising the independence of the legal profession, breaching the law, limiting access to justice and inflating costs.

The Society shares the Justice Minister’s commitment to “reforming and modernising our justice services to meet the needs of all who use them”1 and agrees that “most people receive an excellent professional service from their lawyer”. Less than 0.4% of the business solicitors undertake for their clients results in a complaint. That reflects the high standards and successful regulation of solicitors in Scotland. The Executive acknowledged this when they passed the regulation of conveyancing and executry practitioners to the Society in 2003.

The impact of the bill’s proposals on legal businesses, clients and the Scottish economy needs careful consideration by the Committee. Scotland is recognised as having the highest standards of regulation and a good track record where England and Wales are not. The Scottish Parliament has promised Scottish solutions for Scottish issues but many of the Executive’s proposals are based on English systems and coincide with Department for

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1 Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland page 1
Constitutional Affairs policy in England and Wales. England and Wales have very different complaints issues in a different marketplace.

The Society believes the legal advisers proposed in the legal aid section of the bill should be regulated by the SLCC and is concerned that bureaucracy and potential costs involved in becoming an adviser will mean low uptake under the scheme.

The Society has given evidence on many bills considered by the Scottish Parliament to improve the law of Scotland for people in Scotland. The Executive’s proposals show neither a holistic understanding of regulation nor the impact of the new process. The proposals risk serious consequences for clients, businesses and professionals in Scotland. The Society believes they will not work effectively. The bill needs substantial and fundamental change if it is to improve the current system, while remaining cost-effective, proportionate and fair.

SOME KEY STATISTICS

Complaints in Perspective

The Client Relations Office handled 4,852 complaints in 2005. That represents 0.4% of recorded business – approximately 1.2 million items of work recorded by solicitors in 2004. Much more unregistered work and general advice is undertaken by 9,637 practising Scottish solicitors working in firms and in-house (in business, local authority and government) but it means that over 99.6% of the publicly recorded business is completed without complaint to the Society as detailed in Appendices 1 and 5.

Solicitors in the Scottish Economy

Every solicitor’s firm is a business and the 1,265 firms in Scotland make a significant contribution to the economy and community, turning over more than £1 billion per annum and employing around 20,000 people. The impact of some of the proposals will probably be damaging to those businesses, their employees and clients as well as the wider economy – for no significant benefit.

KEY ISSUES

The Society has examined each section of the bill and is principally concerned about five issues: independence; compliance with the law; access to justice; cost; and viability.

1. Independence
The independence of a country’s legal profession is the foundation stone of any democracy. That independence guarantees that a person can be represented in an action against the state, defend themselves against accusations of crimes and enforce their rights.
The Scottish Legal Complaints Commission (SLCC) as proposed is not independent of Government. That is a direct threat to the rule of law. The range of powers proposed by Ministers mean that the SLCC will be a cipher for the Scottish Executive – a government controlled quango.

The Bill states that Scottish Ministers will have power to:

- appoint the SLCC’s Board members for up to 5 years under scrutiny of the Scottish Commissioner for Public Appointments;
- remove members from office if satisfied that they are “unfit to discharge the functions of a member or … unsuitable to continue as a member”;
- approve the appointment of the Chief Executive;
- direct the SLCC on the appointment of employees and their terms and conditions of their employment;
- approve pay for the staff. (Schedule 1, paragraph 8);
- change the SLCCs duties and powers (Clause 31);
- direct the SLCC in the exercise of its functions.

These powers should be independent of government control. This view is reflected by Professor McCrone in his Review of Governance which is attached as Appendix 2. Powers of appointment and deselection should be made by Ministers acting with the Lord President.

2. Compliance with the law

The Society believes the Bill breaches Article 6 (1) of the Human Rights Act and the Scotland Act and that it is incompetent and unlawful.

Right of appeal

The SLCC will take over from the Scottish Courts in deciding issues of fact and law in negligence and other matters yet there is no right of appeal against SLCC decisions on service complaints to the Court of Session or other independent, impartial tribunal. As the Society has repeatedly stated to the Scottish Executive, that contravenes human rights law. There must be a proper external right of appeal rather than an internal right of appeal or review.

Unlike the existing system, the bill gives no meaningful appeal for solicitors or equally or more importantly their clients.

Opinion

The Society obtained the Opinion of Lord Lester of Herne Hill QC, who is a leading authority on Human Rights law. In his opinion, which is attached as Appendix 3, he states that the proposals to reform complaints handling in the legal profession are “flawed…and wrong in law”. The opinion continues:

“For the reasons set out below, in my view, the scheme proposed in the Bill is not fully compatible with Article 6 (1) of the ECHR, because:
(i) the proposed Scottish Legal Complaints Commission (“the Commission”) would not be an independent and impartial tribunal in determining service complaints against practitioners;

(ii) the lack of an external appeal from a determination by the Commission to uphold a services complaint would not be compliant with Article 6 (1);

In my view, if the Bill were enacted in its present form, the Act would, by virtue of Section 29 (1) of the Scotland Act 1998, be outside the legislative competence of the Scottish Parliament to the extent of the incompatibility identified in my advice."


The Society believes that the bill will limit access to justice by forcing solicitors out of certain markets and leaving advice deserts for clients.

In addition to ordering the refund or reduction of fees, the bill allows the SLCC to order payment of compensation of up to £20,000 for inadequate professional service. The limit for compensation was £1,000 from 1991 until 2005, when it was increased to £5,000. £20,000 is the amount the Department for Constitutional Affairs proposes for England and Wales. The impact of this dramatic increase in Scotland will be considerable and does not take account of the marketplace in Scotland.

Unacceptable Business Risks

All solicitors have professional indemnity insurance. The profession’s insurers have increased the self-insured amount per partner in private practice to £6,000. This ensures that the compensation limit for service complaints is not covered by the Master Policy for Insurance. It is not clear how the insurers will react to an increased compensation limit of £20,000. Practitioners are clear that the business risks of taking on important but low value work will lead to firms refusing certain business and, depending on the cover agreed by the insurers, could lead some solicitors to cease practice.

High street practice

The increased costs of insurance and of practice will have a knock-on effect on firms as businesses. That will impact on clients and areas of work where the increased costs of practice cannot be met, for example in legal aid work and in law centres.

For high street solicitors, the business risks and the cost of practice will force some hard business choices. The prospect of paying a fee for a complaint which is not upheld is an unfair penalty. The likelihood is that solicitors will cherry pick new business, refuse to advise potentially difficult clients or to take on contentious work. Others may decide to close their doors and make their staff redundant. That could create advice deserts particularly in rural areas of Scotland.

Impact on legal aid

The Scottish Legal Aid Board’s figures confirm that in 2004-2005 the gross payments of legal aid made to 52% of registered firms across Scotland
totalled less than £20,000 per annum. Civil litigation; divorce and separation; family and matrimonial; interdict; state benefits; housing; hire purchase and debt; and criminal court work are the areas clients seek the majority of advice. If each piece of business carries the risk of a complaints levy as well as the risk of a compensation order for up to £20,000 then legal aid work may become too high a risk. If most practitioners receive less from legal aid in a year than the risk for each piece of business, then solicitors will be further discouraged from legal aid work.

Limiting Access to Justice through the Scottish Courts
The SLCC will have no claims handling experience but is to be given the same power as the courts to decide issues of professional negligence up to a compensation limit of £20,000. The potential for inappropriate and disproportionate compensation awards must be avoided by having a proper appeal.

4. Cost

The Executive has stated their costs are guesstimates and that their costings are based on the Financial Ombudsman’s Service and the Law Society of England and Wales which are inappropriate comparators. The proposals for financing the new quango are neither independent nor fair. To meet the level of independence the public expect, SLCC must be funded at least in part by the taxpayer. The public expect that level of independence.

Funding the SLCC
The SLCC will be funded by two types of levy on the legal profession. The amount and balance of the levies will be decided by the SLCC after consultation. The Financial Memorandum suggests “for purely illustrative purposes” the annual general levy on each practitioner could be £120 and the specific levy for each case £300.

It is unjust to have to pay a levy to prove one’s innocence. The charge creates negative incentives for the SLCC to increase funding by accepting more complaints and solicitors who pay a financial penalty for not resolving every complaint at source. The SLCC levy for every complaint applies whether the complaint is upheld or not and whether mediated or not. This is being described as “polluter pays” but it is in fact “practitioner pays”.

Fraudulent Complaints
The experience in the Financial Services industry indicates that advisers cannot prevent fraudulent complaints when customers have nothing to lose by complaining. The Bill will create just such a system; one where there is no risk to the fraudulent complainer and considerable risk to the solicitor complained against. The complainer may not even be the client of the solicitor who will none the less have to pay and go through the complaints procedure.
**Lack of Independence**
The current complaints system is funded by the profession and creates the perception of a lack of independence so the funding should change. The Ombudsman’s office has, to date, been funded by the taxpayer and has been seen as independent. Those savings should be put towards the new body, aspects of which should be funded by the taxpayer.

**Increased Costs**
The Society will still handle conduct complaints. Some savings will be made as service complaints pass to the new body but they will not be enough to fund the SLCC, even on its estimated costs. The cost of handling service complaints will be disproportionate to the costs of all other regulatory functions and significantly more than at present. A more searching assessment of costs is in the Society's response to Financial Memorandum, attached as Appendix 4.

**Cost of CRO**
The current cost of a practising certificate for all regulatory functions and services including complaints handling is £550 per member. The Society has 12 Client Relations Committees underpinned by 254 reporters of whom 168 are solicitors and 86 are non-solicitors. Those preparing reports and attending Committee meetings are paid a nominal fee but give their services on a voluntary basis. The new body will not be able to rely on a similar resource which has tremendous value in terms of input, independence, quality of decision-making and cost.

5. **Will it work?**

The SLCC is likely to be slow, rule-based, bureaucratic and expensive. The Society believes it will push firms out of business and create advice deserts for clients. The new system should take the best of the current system and improve on it, rather than reinvent the wheel and lose the benefit from lessons already learned.

**Slower System**
Just as the Society is increasing the speed of complaints handling, meeting and exceeding its targets of handling 90% within 9 months and 75% within 6 months, the new system is likely to slow complaints handling down and is directly contrary to the objectives set by the Ombudsman.

**Vexatious Complaints and Conciliation**
The introduction of a statutory sift for vexatious complaints is necessary and must be robust. The Society’s current system encourages the complainer to raise any dis-satisfaction with their firm’s Client Relations Partner and successfully promotes conciliation and dispute resolution of many complaints. In 2005, 518 cases were resolved before going to a committee, reducing the time, cost and inconvenience of complaints for all concerned.

**More Red Tape and Bureaucracy**
The Society’s success with sifting complaints and conciliation was achieved without the bureaucratic notice-based system envisaged in sections 6, 7 and 11 of the Bill. This will take more time than the current system and benefit neither client nor solicitor.

**Insufficient Detail**
One of the difficulties with the proposed system is that there is little detail provided although from discussions with the executive the Society have formed the view that the proposed system is likely to be inflexible and rule-based. Legal complaints are often complex, opinion-based and emotions can run high. That is why the Society’s system has tight targets built around a more flexible system.

**Oversight and Over-complication**
The Guarantee Fund and Master Insurance Policy are regarded as consumer protections which operate to the highest standards. The Master Policy has passed the closest scrutiny by the OFT and the Guarantee Fund is an unrivalled protection for the Scottish consumer. The unspecific provision for SLCC oversight of these functions smacks of state control and interference, is unspecific and potentially damaging. The over-complication in the proposed legislation is neither justified nor in the public interest.

**Substantial Change**
The SLCC, as currently proposed in the bill, will not improve the existing provisions. It will cause more delay, bureaucracy, expense and inconvenience than the current system. It undermines the independence of the solicitors profession, risks being declared illegal, has a negative effect on access to justice, its costs don’t add up and it will not work effectively. Any change must improve on the current system and provide the best possible complaints system for clients and solicitors. To achieve that, the bill needs substantial change. The Society remains willing to support and work towards change for the better.
APPENDIX 1

**Approximations of Scottish Solicitors’ Workload And Complaints Statistics**

Registers of Scotland (2004-2005 Figures)

Land Register:
- First Registrations (intake): 66,589
- Transfers of Part (intake): 25,898
- Dealing with Whole (intake): 267,224

Sasine Register:
- Intake (Gross): 121,438

Chancery and Judicial Registers:
- Intake: 46,121

Register of Inhibitions and Adjudications:
- Intake: 22,933

Scottish Legal Aid Board (2004-2005 Figures)

Advice and Assistance:
- Total Civil Advice and Assistance & ABWOR (Intimations): 128,944
- Total Criminal Advice and Assistance & ABWOR (Intimations): 152,174
- Total Children’s Advice and Assistance: 5,687
- Total: 286,805

Civil Legal Aid:
- Total Number of Grants: 10,989

Criminal Legal Aid:
- Total Number of Grants (Summary Legal Aid): 80,496
- Total Number of Grants (Solemn Legal Aid): 13,518

Civil Court Actions (2002 Figures) (more recent figures not yet available)

Court of Session:
- Total Number of Actions Initiated: 5,059

Sheriff Court:
- Total Number of Actions Initiated: 115,326
Criminal Court Actions (2004-2005 Figures)

Solemn Disposals:
- High Court: 852
- Sheriff & Jury Courts: 3,611
- Total: 4,463

Summary Disposals:
- Sheriff Court: 83,355
- District Court: 41,292
- Total: 124,647

Companies House (2004-2005 Figures) (incomplete - approx)

- No. of New Companies Incorporated in Scotland: 17,766
- No. of Changes of Name Registered: 3,992
- TOTAL: 1,213,264
APPENDIX 2

SOCIETY’S SUMMARY OF PROFESSOR DAVID MCCRUNE’S ANALYSIS OF GOVERNANCE ISSUES

The Law Society of Scotland commissioned a report by Professor David McCrone, co-director of Edinburgh University’s Institute of Governance, into the background to, and contents of, the Legal Profession and Legal Aid (Scotland) Bill. Professor McCrone also provided a broad analysis of the regulation of the legal and other professions. The Institute studies the sociology, politics and governance of Scotland. Key points identified by the Society include:

• Professor McCrone is scathing of the consultation exercise and analysis which led to the Bill. He describes the process as being “quick and dirty”, containing “elementary howlers”, “half-baked evidence” and misleading information about levels of criticism of the current system and options for change.

• In general, he believes the proposed system could be costly and over-elaborate – a “hammer to crack a nut”. More specifically on costs, Professor McCrone questions if the estimated running costs of £2.4 million a year are realistic and warns that costs could escalate in the future. He says “there appears a ratchet effect as regards costs”.

• He says membership of the new body seems too closely in the gift of government and politicians.

• He points out that professionals are in the majority in the regulatory system of other professions he examined – which included accountants, doctors and teachers – yet the proposed Scottish Legal Complaints Commission would have a lay majority and lay chairman, with no guarantee of solicitor representation.
APPENDIX 3

SOCIETY’S SUMMARY OF LORD LESTER’S OPINION ON COMPATIBILITY WITH ECHR

The Law Society of Scotland sought the opinion of Lord Lester on the Bill’s compatibility with the European Convention on Human Rights (ECHR). Lord Lester of Herne Hill is one of the UK’s pre-eminent experts on human rights law and, as a member of the English Bar, is not affected by the Bill’s proposals. Key points identified by the Society include:

- The Bill does not comply with ECHR and is therefore “flawed…and wrong in law”. This was because the Scottish Legal Complaints Commission (SLCC) could not be considered an “independent and impartial tribunal” as required under Article 6 of ECHR because it would consider negligence – a civil law matter – as part of service complaints yet there would be right of appeal to a judicial body against its decisions.

- The SLCC, and its proposed internal appeals committee, cannot be considered independent because Scottish Ministers would appoint members and could direct the Commission in other ways.

- Yet the Commission will have the power to impose serious sanctions on a solicitor, with compensation payments of up to £20,000, and also by harming the reputation of a solicitor by publishing its findings about their alleged negligence.

- Lord Lester also issues a reminder that the introduction of both a general levy on the legal profession and case levies for each complaint investigated are also subject to, and must comply with, ECHR.
APPENDIX 4

SUMMARY OF SOCIETY’S RESPONSE TO THE LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL FINANCIAL MEMORANDUM

The Law Society of Scotland provided a separate response to the Financial Memorandum of the Legal Profession and Legal Aid (Scotland) Bill. This was also submitted to the Finance Committee of the Scottish Parliament as evidence for its inquiry into accountability and governance of regulation in Scotland. Key points include:

- In general, the costs lack specification and foundation throughout and they are likely, to impact markedly on the high street of Scotland – the very area of “people law” which is under most financial pressure. The result of that could be damage to access to justice and the creation of advice deserts in parts of the country, particularly in rural areas and among small firms.

- More specifically, no apparent consideration has been given to who will pay the general levy on the profession i.e. every solicitor, including those in the fiscal service, central government and local authorities, or only those in private practice?. Therefore, estimates given for the general levy (£120 for each practitioner) and for and the case levy (£300) for each complaint investigated are meaningless.

- The estimated running costs of £2.4 million a year appear to take no account of how much work is currently undertaken through the Society by volunteer Committee Members and Reporters who receive only a nominal fee.

- A lack of consideration, or unrealistic estimates, have been given in relation to a range of issues, including: recruitment and training (£40,000 for training up to 60 staff who will be unlikely to have background knowledge of the job; staff turnover (no provision is made for recruitment in subsequent years yet the Society is well aware that the work is stressful and turnover is higher than other posts); National Insurance and pension costs (15% allowance seems worryingly low).

(Law Society Comments on specific sections of the Bill and Appendices 5, 6(a) – (f) are contained in the full Law Society submission, circulated to members with written evidence on the Bill.)
RESPONSE by THE FACULTY of ADVOCATES

TO

The LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

PART I: INTRODUCTION

1. The Faculty of Advocates is pleased to have the opportunity to give evidence on the Bill. It opposes Part 1 of the Bill (with which we bracket section 35 in Part 2) and section 45 in Part 4. It has no comment on Part 3 of the Bill.

2. The Faculty’s objections to Part 1 of the Bill may be summarised as follows.

(a) Looked at overall, the proposed legislation is an unjustified intrusion by the state into the independence of the legal profession. Independence of the legal profession is part of a sound constitutional structure based on the rule of law. Self-regulation is an important feature of the independence of the profession which should be departed from only where and to the extent that there is a cogent and compelling justification for doing so.

(b) The number of complaints against advocates is very small. There were 47 complaints against advocates in each of the calendar years 2004 and 2005. There is no justification, in the number of complaints against advocates, for imposing an external, bureaucratic complaints-handling system.

(c) The proposed Commission is likely to lack the necessary expertise to determine complaints against advocates fairly and effectively. The present arrangements for complaints handling secure that complaints against advocates are investigated and determined by bodies which include among their members experienced advocates, who are in a position to scrutinise the conduct of the professional against whom the complaint has been made from a position of knowledge and expertise. It is most unlikely that persons employed by the proposed Commission will have similar expertise. Without such expertise, complaints-handling arrangements will not command the confidence of the profession and will not merit the confidence of complainers.

(d) The proposal is likely to be more costly than the current arrangements for resolving complaints against lawyers in Scotland. Those costs are likely to be passed on to clients. The proposed legislation would impose on the legal profession a substantial new and bureaucratic body which is disproportionate to any relevant public interest.
(e) The proposed funding arrangements are objectionable in principle and, in particular, are unfair as regards advocates. If a new, external, complaints handling body is required in the public interest, then the costs of that body should be met from public funds. In any event, the proposals take no account of the relatively low incidence of complaints against advocates; nor of the fact that of the small number of complaints against advocates, about half involve allegations of misconduct and will, accordingly, continue to be dealt with by the Faculty.

(f) The proposed legislation does not take account of serious public interest issues relating to the administration of justice. There would be no bar to a disappointed litigant seeking to re-run the merits of a decision which has been made by the Courts by way of a complaint about the quality of his or her representation. The Inner House of the Court of Session has recently highlighted the damage which this could have for the administration of criminal justice in Scotland in the case of Wright v. Paton Farrell 2006 SLT 269.

(g) The Bill would supplant the proper role of the Courts in determining allegations of professional negligence. Practitioners would be at risk of substantial financial awards without the ordinary safeguards which apply where such allegations are pursued through the Courts. The terms upon which any such awards might be capable of being covered by insurance are not certain, but there is liable to be an increase in costs, which will no doubt be passed on to clients.

(h) The proposals do not secure the independence of the Commission. Not only are Commissioners to be appointed by the Scottish Ministers, but the Scottish Ministers are to have power to give the Commission directions as to the exercise of its functions.

(i) The Bill does not prescribe the procedures which the Commission should follow. If the rights of citizens are to be determined by a non-judicial body such as the Commission, then Parliament should lay down the procedures by which those rights are to be determined.

(j) The Bill does not take account of the legal professional’s fundamental obligations of confidentiality.

(k) The proposal to empower the Commission to investigate the handling by the professional bodies of conduct complaints is unacceptable in principle. It is proposed that, ultimately, the Commission may direct the professional organisation to comply with a recommendation of the Commission. Ultimate control of issues of conduct will be removed from the professional bodies and the Courts where, properly, such questions belong. In a case where the professional has been cleared of misconduct, the proposal will be unfair, since the making of a recommendation by the Commission may cast doubt on the validity of that finding.

(l) Without amendment, the proposed legislation could allow complaints to be made about judges, sheriffs and tribunal chairs, particularly where adjudicative functions are carried out on a part-time basis by practising professionals.
The rules in relation to prematurity are inappropriate in their application to advocates.

Furthermore it is suggested that the proposals are not compliant with the European Convention on Human Rights and Fundamental Freedoms (ECHR). These concerns and a consideration of the constitutional role of an advocate are outlined in Part IV of these submissions.

The reasons for the Faculty’s opposition to Part 1 of the Bill requires an appreciation of the role and function of the advocate in the administration of justice in Scotland, as well as the existing arrangements for dealing with complaints against advocates. These are described in Part II of these submissions. The Faculty’s objections to Part 1 of the Bill are further developed in Part III of these submissions.

So far as section 45 is concerned, the Faculty is concerned that it is proposed that legal advice and assistance will be funded from the public purse even though it is given by an adviser who, so far as the proposed legislation is concerned:

i. need not have a legal qualification;

ii. may not meet the professional standards to which members of the legal profession are required to adhere;

iii. are not subject to a duty to act in the best interests of the client; and

iv. need not have professional indemnity insurance or provide a guarantee fund.

The Faculty’s position is further developed in Part IV of these submissions.

4. It is paradoxical that the Scottish Ministers should wish, in Part 1 of the Bill, to impose additional regulation on the legal profession – which is already heavily regulated in the public interest - but should propose, in section 45, to promote the giving of advice by persons who are not subject to the professional disciplines and public interest regulation which applies to members of the legal profession.

PART II: GENERAL BACKGROUND

The Faculty of Advocates

5. The Faculty of Advocates is the professional body to which all advocates in Scotland belong. It regulates the profession. The Faculty is committed to the maintenance of high professional standards. Advocates, like other members of the legal profession, are subject to regulation in the public interest. They must satisfy entrance requirements designed to ensure that only persons who are suitably qualified enter practice as advocates. Advocates are subject to well-recognised duties to the Court as well as to those whom they represent. They must adhere to a Code of Professional Conduct, breach of which may give rise to disciplinary sanction. In their conduct of cases in Court, advocates are accountable not only to those whom they represent, but to the Court. Indeed, the duty of an advocate to the Court may, on occasion, come into conflict with (and prevail over) the interests or desires of those whom the advocate represents. Advocates carry out a significant part of their professional work in public and are subject to scrutiny not only by those whom they
represent, by solicitors and by interested members of the public, but by the Court. This is, in itself, an incentive to the maintenance of high standards of advocacy.

6. The Faculty's position as the professional body which regulates advocates derives from its recognition as such by the Court. Advocates are admitted to the public office of advocate by the Court of Session and may be deprived of that office only by the Court. Since the seventeenth century the Court has admitted as advocates only persons whom the Faculty has examined and found to be fit, although the Court maintains oversight of admissions since the Faculty's rules on admission are subject to approval by the Lord President. Likewise, in matters of discipline, while the Court may retain a role, in practice the Court has for over 150 years acted in questions of suspension and deprivation of office only on the petition of the Dean of Faculty.

7. In addition to its practising membership, the Faculty has a substantial number of non-practising members. These include judges, sheriffs, tribunal chairs, parliamentarians, academics and advocates who, though formerly in practice, have retired or have, for other reasons, decided to give up practice. The total membership currently stands at 744, of whom 461 are advocates practising as such. A small number of the non-practising membership are engaged in legal practice, though not as advocates at the bar. Many advocates are engaged part-time in adjudicative functions (as tribunal chairs, part-time sheriffs and temporary judges) while continuing in practice at the bar.

Advocates

8. Each practising advocate is an independent, self-employed professional, available to receive instructions on behalf of any client and to appear in any court or tribunal in Scotland. Advocates: (a) specialise in advocacy, in the presentation of cases before Courts and tribunals throughout Scotland; and (b) give advice as required on questions of law. Advocates are independent referral practitioners: in other words, they act only on the instructions of a solicitor or other professional person (in addition to solicitors, members of a large number of recognised professional bodies may instruct advocates on behalf of their clients). Advocates do not have a direct relationship with the lay client.

9. The existence of a strong bar of independent advocates is in the public interest. The duty of an advocate to advance the interests of the people upon whose behalf he or she is instructed, while fulfilling the advocate’s obligations to the Court, plays an important role in maintaining the rule of law in a democratic society. In *Medcalf v. Mardell* [2003] 1 AC, paragraphs 51-55 Lord Hobhouse of Woodborough made the following remarks, which, though concerned directly with the law of England and Wales, are equally germane to the position of the advocate in Scotland:

“*The Constitutional Aspect:*

51. The starting point must be a recognition of the role of the advocate in our system of justice. It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed. The judicial system exists to administer justice and it is integral to such a
system that it provide within a society a means by which rights, obligations and liabilities can be recognised and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional advocate is central to achieving this outcome, particularly where the judicial system uses adversarial procedures.

52. It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. In England the professional rule that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite in a manner too often taken for granted this constitutional safeguard. Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the Executive, the Judiciary or by anyone else. Similarly, situations must be avoided where the advocate's conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest.

53. Thus the advocate owes no duty to his client's opponent; inevitably, the proper discharge by the advocate of his duty to his own client will more often than not be disadvantageous to the interests of his client's opponent. (Orchard v S E Electricity Bd [1987] QB 565, 571) At times, the proper discharge by the advocate of his duties to his client will be liable to bring him into conflict with the court. This does not alter the duty of the advocate. It may require more courage to represent a client in the face of a hostile court but the advocate must still be prepared to act fearlessly. It is part of the duty of an advocate, where necessary, appropriately to protect his client from the court as well as from the opposing party. Similarly, the advocate acting in good faith is entitled to protection from outside pressures for what he does as an advocate. Thus, what the advocate says in the course of the legal proceedings is privileged and he cannot be sued for defamation. For similar reasons the others involved in the proceedings (e.g. the judge, the witness) have a similar immunity.

54. The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession. This again reflects the public interest in the proper administration of justice ... The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time. The codes of conduct of the advocate's profession spell out the detailed provisions to be derived from the general principles. These include the provisions relevant to barristers which preclude them from making allegations, whether orally or in writing, of fraud or criminal guilt unless he has a proper basis for so doing. ...All this fits in well with an appropriate constitutional structure for a judicial system for the administration of justice.”

10. Any solicitor (and many other professional persons) may, as required, call on the services of any advocate to act on behalf of any client, wherever situated. Solicitors and other professionals throughout Scotland are able to call on the
specialist expertise of any advocate to advise or represent their clients. The individual client of a small firm of solicitors in, say, Thurso or Lanark or Kirkcudbright has the same access to the most experienced members of the bar as the corporate client of the largest firms in Glasgow and Edinburgh. The impecunious client on legal aid has, through the availability of an independent referral bar, the same access to representation as the most powerful institutions. The availability of independent referral advocates to accept instructions on behalf of any client accordingly promotes equal access to justice throughout Scotland and the ability of solicitor’s firms, no matter what their size or where they are situated, to meet the needs of their clients.

The role of the advocate

11. In considering the proposals in Part 1 of the Bill as they would apply to practising advocates, it is important that the Parliament is aware of the manner in which advocates are instructed and carry out their professional duties, and of the respective responsibilities of solicitors and advocates. Advocates do not undertake responsibility for the administration of a case. That is the responsibility of the solicitor, who is the client’s agent. The solicitor will “run” the litigation, engage in all necessary correspondence, carry out any necessary investigations, lodge and intimate Court documents and so on.

12. An advocate will normally be instructed by a solicitor (or other professional) to carry out a specific and discrete task. This might, for example be: (1) the provision of an Opinion on a specific question of law; (2) the drafting of a particular document (e.g. a summons or other Court pleading); (3) the preparation of a Note on a particular issue which has arisen in the context of a litigation (e.g. advice as to the lines of evidence which the solicitor should investigate; advice on the likely value of the claim; advice on prospects of success); or (4) appearance at a particular hearing. Typically, the solicitor will send counsel only such papers as are necessary for the particular task in hand. Counsel will fulfil the instruction, and return the papers to the solicitor. The advocate does not correspond directly with the lay client. Nor does the advocate maintain or need to maintain an ongoing file of papers relating to the case. That is part of the solicitor’s function. The solicitor may choose to instruct different counsel for different tasks in relation to the same case. If one counsel is unable, for whatever reason, to accept instructions to carry out a particular task, then the solicitor may instruct any other counsel to carry out that task. The inherent flexibility which the solicitor has in choosing an advocate with appropriate expertise and seniority for the particular task in hand is one of the merits of the current system.

13. Because of the nature of the work which they do, advocates do not need to – and do not – maintain an office with support staff. Unlike barristers in England and Wales, they do not work from chambers. They work from the Advocates’ Library, where they have available to them the legal resources necessary to fulfil the tasks entrusted to them. Such limited administrative support as they require is available to them from clerks employed by Faculty Services Limited. Advocates are thereby freed from the demands of office administration, to devote themselves to fulfilling the particular tasks entrusted to them. The low overheads which the nature of their practice allows enable advocates to provide a cost-effective and competitive service.

14. The division of responsibility between solicitors and advocates is practical and sensible, having regard to the nature of the work which advocates do. When an advocate is in court, or preparing for a court appearance, he or she cannot be available to meet the day-to-day demands of clients or of running an office. A
solicitor, who is subject to such pressures, may be less able than an advocate would be, to devote himself or herself to the demands of a lengthy court hearing. Equally, giving sound legal advice on a difficult question requires the freedom from other demands fully to research the law in depth and to consider its application to the facts. Advocates, by their training, and by virtue of the way the legal profession is organised, are able to do this. The division of responsibility also promotes the development of expertise in advocacy, which is of advantage to individual litigants generally and to the administration of justice as a whole.

Implications for regulation

15. The differences between practice as an advocate and other forms of legal practice have regulatory implications. These are reflected in the regulatory structures of the two branches of the legal profession. For example, advocates do not handle clients’ money and accordingly do not require to be subject to Accounts Rules or to contribute to a Guarantee Fund. The regulatory framework applicable to advocates is adapted to the nature of the work which advocates do and is proportionate to the regulatory risks applicable to practice as an advocate in Scotland.

16. There is a marked difference in the incidence of complaints against solicitors on the one hand and advocates on the other. The Report of the Law Society of Scotland Client Relations Department for 2005 discloses that about 4,800 complaints had been received in the year in question. In the same year there were 9,637 solicitors (Law Society of Scotland Annual Report). This represents an incidence of approximately 50 complaints for every 100 solicitors. By contrast there were 47 complaints against advocates in each of the calendar years 2004 and 2005. This is an incidence of approximately 10 complaints for every 100 advocates in each of those years. The number of complaints against advocates is tiny compared with the number of instructions undertaken by advocates each year.

17. The relative incidence of complaints against solicitors and advocates is reflected in the respective costs of complaints-handling. We understand that the Law Society maintains a staff of 38 people in its Client Relations Department and that it has ten Client Relations Committees to consider complaints (The Law Society of Scotland, Client Relations Office Annual Report 2005). The Faculty employs two members of staff who, along with other duties, are involved in the administration of complaints. As we describe below, the actual process of investigating and determining complaints against advocates is carried out by committees of advocates and lay members, who do not charge for their time.

18. Further, the nature of an advocate’s practice bears upon the sort of complaints which may typically be made against advocates.

(a) Because the role of the advocate is limited to the fulfilment of discrete tasks, in the form of advice on specific questions or representation at a specific hearing, complaints against advocates may be more likely to be concerned with the substance of what has been done than with the overall manner in which the service has been provided.

(b) Misconduct complaints against solicitors are a small proportion of all complaints against solicitors (Law Society of Scotland Client Relations Office Annual Report 2005). By contrast, of the 47 complaints against advocates in 2005, 20 may be characterised as conduct complaints and 5 as involving both conduct and service
elements. Of the 47 complaints against advocates in 2004, 17 may be characterised as conduct complaints and 1 as involving both conduct and service elements. It is not easy to decide which category complaints fall into.

19. These considerations have implications for complaints-handling. Insofar as a complaint relates to the manner in which a service has been provided, it may be susceptible to being addressed by way of a file audit. However, this is not true where the complaints relates to the substance of what has been done – to the content of advice which has been given, say, or the way in which the lawyer has conducted proceedings in Court. These are, of course, the very tasks which advocates typically carry out. In order to assess the validity of such complaints, it is necessary that the body which determined them should have the appropriate expertise.

20. For example, in a case where a client complains that the advice given by counsel was not of the quality which could reasonably be expected of a competent advocate (the test for service complaints which is proposed in the Bill), the complaint cannot be assessed without knowing in some detail: (a) what the relevant law is; and (b) what ordinary practice is. It is necessary for the body determining the complaint to form a judgment about what could reasonably be expected of a competent advocate. It is essential that the matter should be investigated and determined by a body which has the necessary expertise to for that judgment against a properly informed appreciation of the relevant law and practice. This is essential, not because such a body is more likely to excuse what has been done (other practitioners generally have an interest in maintaining standards and the reputation of the profession as a whole), but because it is only from a position of knowledge that the right questions can be asked and, indeed, that explanations which may be advanced by the practitioner can, if necessary, be effectively challenged and questioned.

21. Particular issues arise in the context of complaints about an advocate’s conduct in Court. Often both parties to a litigation are convinced of the justice of their cause. Inevitably, one party will be disappointed. Advocates are at risk of complaints from clients who are disappointed at the outcome of the case, even if the outcome simply reflected the objective merits of their position. Advocates are also at risk of complaints from other parties to a litigation. A party to a litigation may for example, perhaps not fully understanding the role of the advocate, complain about the way that his opponent’s advocate conducted the case. There is a real risk that a disappointed litigant may seek to re-run the merits of the case by way of a complaint about the conduct either of his own advocate or the advocate who appeared for another party. This is not a hypothetical risk: the Faculty’s experience has been that a proportion of the complaints made against advocates do come from other parties to the case. We address, in more detail, the public interest considerations which arise in such cases below.

The current complaints system
22. In considering the proposals in the Bill as they will apply to advocates, it is necessary to have regard to the current arrangements for handling complaints against advocates.

23. Under the Disciplinary Rules of the Faculty, a complaint may be made against an advocate in writing to the Dean of Faculty. The Dean may of his own accord initiate disciplinary proceedings. After initial inquiry by the Dean (or another office-bearer) to establish whether or not the material facts are substantially in dispute, the
complaint will be considered by the Complaints Committee. The Complaints Committee in a particular case consists of four persons drawn equally from a panel of members of Faculty and lay persons nominated by the Scottish Ministers.

24. The Complaints Committee has wide powers. These include:
   a. making further inquiries;
   b. remitting the matter to the Investigating Committee (which would comprise three advocates appointed for the purpose) to ingather evidence or further evidence;
   c. dismissing the complaint where it considers it unjustified, unreasonable or vexatious;
   d. upholding the complaint; and
   e. remitting the complaint to the Disciplinary Tribunal.

25. If the Complaints Committee upholds the complaint, it may impose the following penalties:
   a. a written direction to the member;
   b. verbal admonition;
   c. written reprimand;
   d. severe written censure;
   e. order for cancellation or repayment of fees exigible in respect of the work which has given rise to the complaint;
   f. an order for compensation to the complainer not exceeding £5,000;
   g. a fine not exceeding £7,500;
   h. suspension for up to one year.

26. Either the complainer or the advocate may appeal to the Disciplinary Tribunal against the dismissal or final disposal of the complaint. The Disciplinary Tribunal is chaired by a retired senior judge appointed by the Lord President of the Court of Session, two counsel from a panel approved by the Faculty for the purpose, and three lay persons from a panel nominated by the Scottish Ministers.

27. The Disciplinary Tribunal has power to impose, in addition to any of the penalties mentioned above:-
   a. a fine not exceeding £15,000;
   b. suspension from practice for up to five years;
   c. suspension from membership of Faculty for up to five years; and
   d. expulsion from membership.

28. The members of Faculty who serve on the Complaints Committee, an Investigating Committee or Disciplinary Tribunal do so without charge or fee. The Lay Members do likewise, although they are entitled to be reimbursed their travelling expenses.

29. The current system is accordingly characterised by the following features:

   a. It secures that the decision-making bodies contain both: (a) persons who are directly familiar with and experienced in the practice of advocacy in Scotland; and (b) significant independent lay involvement including, in the case of the Disciplinary Tribunal, an independent senior judge as chair. These bodies are therefore able to bring to bear both expertise and independence. The Faculty rejects unequivocally any suggestion that the advocate members of these bodies will be “soft” on their professional colleagues: all members of Faculty have an interest in maintaining high
standards of conduct, and indeed, high levels of confidence in the complaints handling system. But even if there might be a suggestion to that effect, the presence of the lay members on the Complaints Committee and the Disciplinary Tribunal secures that a complainer should have no legitimate apprehension on that score. What is important – and it is important in ensuring that complainers, no less than practitioners against whom complaints may be made, can have confidence in the system – is that complaints should be investigated and determined by bodies which have the expertise to carry out appropriate investigations and to apply appropriate standards.

b. The system does not require a permanent infrastructure, but operates as, when and to the extent required by the number and nature of complaints against advocates. It operates without charge to the public purse or to complainers. Members of Faculty who are involved in the system devote their time and energies to it, at a loss to their fee-earning practice. They do so on the footing that it is part of being a member of an independent legal profession to play a proper part in securing that the profession as a whole maintains appropriate standards of service and discipline.

c. The Faculty arrangements do not distinguish between service and misconduct complaints. The Faculty takes the obligations of its members to comply with their professional duties equally seriously in all respects. While some complaints would plainly be of inadequate services (e.g. delay in fulfilling an instruction where this does not bear on the advocate’s responsibilities to the Court) and others would plainly involve misconduct (e.g. misleading the Court), a proportion of complaints may involve both service and misconduct elements. Any complaint by the client about the way an advocate has conducted a Court or tribunal hearing is liable to involve potential issues of misconduct as well, perhaps, as a complaint of inadequate services. Further, even a complaint of inadequate services may be bound up with the substance of the advice given or action taken.

d. The present arrangements operate as part of a system of self-regulation. The importance of this should not be underestimated. The independence of the legal profession is part of a sound constitutional structure based on the rule of law. The Faculty has consistently maintained the position that self-regulation is an important feature of the independence of the profession. The principle of self-regulation should be departed from only where and to the extent that there is a cogent and compelling justification for doing so. Any justification advanced for a departure from the principle of self-regulation must be carefully considered and assessed against the damage which the proposed departure will do to the principle of self-regulation. Furthermore, it is because the current arrangements are part of the system of self-regulation of the profession that advocates are willing to participate without charge in the system as members of Complaints Committees, Investigating Committees and the Disciplinary Tribunal. As part of a system of self-regulation, the arrangements have a legitimacy and authority for members of Faculty which an external regulator is unlikely to be able to match. The lay representation on the decision-making bodies secures that complainers should have no legitimate apprehension about the independence of the decision-making process. We refer below to the likely absence of practising advocates from the staff of the Commission and limited representation on it and the implications which this will have for the expertise – and authority – of the proposed Commission.
30. Apart from the Faculty complaints system, a member of the public who is dissatisfied with the services of an advocate may, where he or she has a basis for doing so, advance a claim for professional negligence. The test of “inadequate professional services” set out in the Bill is similar to the test which the Court would apply in assessing whether or not a professional negligence claim has been established. The Court may, of course, award full compensation for any loss which the client may have suffered as a result of professional negligence. This risk is covered by insurance, so that: (a) client who suffers as a result of professional negligence will recover full compensation; while (b) practitioners are not subject to the personal risk of bankruptcy as a result of a single instance of professional negligence. On the other hand, the professional against whom the claim is made has the procedural safeguards which are ordinarily attendant on parties to a litigation.

PART III: REASONS FOR OPPOSITION TO PART 1 OF THE BILL

31. Against that background, the Faculty’s reasons for opposition to Part 1 of the Bill are as follows.

The number of complaints against advocates is very small

32. The number of complaints against advocates in any year is very small. There were 47 complaints against advocates in each of the calendar years 2004 and 2005. Of the 47 complaints against advocates in 2005, 20 may be characterised as conduct complaints and 5 as involving both conduct and service elements. Of the 47 complaints against advocates in 2004, 17 may be characterised as conduct complaints and 1 as involving both conduct and service elements. There were fewer than 30 pure service complaints in each of these years. In light of these figures, to impose the burden of a new external regulator on the Faculty and on individual advocates is, quite simply, disproportionate.

The proposed Commission will lack expertise

33. It is anticipated that there will be nine Commissioners, of whom four will be drawn from the legal professions. Of those four, it may be thought unlikely that more than one or two will be advocates. It further appears from paragraph 13 of Schedule 1 that it is envisaged that the Commission may delegate its decision-making functions to other persons – presumably to members of its staff. It is not clear who the members of staff will be, but a full-time member of the Commission’s staff will necessarily not be a practising advocate. It may be doubted whether employment with the Commission will be attractive to advocates who have been successful in practice.

34. From the point of view of expertise, then, the proposal is likely to be significantly less satisfactory than the current arrangements. The key test which the Commission will be called upon to apply will be whether or not services provided “are … not of a quality which could reasonably be expected of a competent advocate”. In order to apply this test, the Commission (or the employee to whom the question is delegated) will need to know what could reasonably have been expected of a competent advocate in any particular situation. This may involve an assessment of what advice a reasonably competent advocate would have given or how a reasonably competent advocate would have approached a particular matter in Court. It seems unlikely that the Commission will have the expertise in-house to assess such questions. It is certainly likely to have less ability to scrutinise what has been done by the advocate complained of than the experienced counsel who currently sit
on the Investigating Committee, Complaints Committee and Disciplinary Tribunal of the Faculty.

35. Further, the Faculty questions how confident a member of the public with no experience of the practice of an advocate might be in identifying whether or not a complaint which is ostensibly about poor service is really, or to some extent, about conduct. There are liable to be preliminary difficulties at this stage. There will be scope for a complainer or the professional complained of – or indeed, conceivably, the professional body - to challenge (by way of judicial review) a preliminary determination on the question of whether or not there is a conduct complaint. Equally, it is open to question how confident the public might be in identifying whether or not a complaint against an advocate is frivolous or vexatious.

36. The current system which has a detailed machinery to secure that decisions are made by bodies with an appropriate mix of lay and professional representation. By contrast, under the Bill, a decision which could have serious repercussions for a professional’s standing and livelihood may apparently be imposed by an individual with no particular expertise to whom the Commission may have delegated its functions. It is no answer that the decision would be subject to an appeal to an appeals committee – the composition of which is not specified in the Bill in any event. There is no reason to believe that an appeals committee will have the same qualities of expertise and independence which the Faculty Complaints Committee and Disciplinary Tribunal present.

37. Lacking expertise, decisions of the Commission (or of the staff to whom, it appears, decisions are to be delegated) will not command legitimacy and authority with professionals complained against. Nor – and the Faculty regards this as equally significant – would those decisions be entitled to command the confidence of complainers, who are entitled to expect that any serious complaint will be dealt with from a position of knowledge and experience, what the professional has done.

**The proposed arrangements are likely to be more expensive than the present system**

38. The Faculty does not accept that the proposal will be cost-neutral. It is likely that the arrangements will be more expensive than the aggregate costs of the present arrangements. The aggregate cost of the proposed system is likely to be greater than the aggregate cost of the present arrangements. One likely effect of the proposal will therefore be to increase the cost of legal services in Scotland. Even if the cost is, as proposed, to be borne in the first instance by the legal profession, it is likely to be passed on to clients in the shape of higher fees.

39. It is anticipated that, in addition to nine Commissioners, the Commission will employ 50-60 members of staff. This is more than the number of employees (38) currently employed in the Law Society Client Relations Department to which one may add the two members of staff employed by the Faculty who are involved in the administration of complaints. Yet the Commission will only handle pure service complaints. The Faculty will require to maintain arrangements for handling misconduct complaints and one imagines that the Law Society will need to do likewise. On the Ministers’ own projections, the overall number of people employed in dealing with complaints against lawyers will increase.
40. There must, in any event, be doubt about the validity of the Ministers’ projection of 50-60 employees. Under the current arrangements, the work of actually investigating and determining complaints against advocates is carried out, not by the two employees who are involved in the administration of complaints, but by Faculty office-bearers, Complaints Committees, Investigating Committees and Disciplinary Tribunal. Likewise, to make a fair comparison between the two systems, it is necessary to consider not only the 38 persons employed by the Law Society Client Relations Office, but also the reporters and the Client Relations Committees of the Law Society. It seems optimistic to suggest that the work put into the handling and determination of complaints by members of the professions will be replaced by some 20 employees. We also doubt whether the provision in the Executive’s projections for the costs of external advice will prove adequate.

41. The proposal will, further, impose additional handling costs (both for the Commission and the professional bodies) in sorting out whether complaints are service complaints or conduct complaints and in liaison between the Commission and the professional bodies.

42. The costs of the exercise, it is proposed, will be borne by the profession. We oppose that suggestion in principle, for reasons we explain below. But if the costs are to be met by the profession, they will, no doubt, be passed on to clients in the shape of higher fees.

The funding arrangements are objectionable in principle and, in particular, would be unfair to advocates

43. If it is considered to be in the public interest that there should be an external complaints handling body, then as a matter of principle, the cost of that body should be met from the public purse. It is one thing to expect the profession to fund and support a system of self-regulation – as it currently does. It is quite another to expect it to fund an external body which is imposed upon it.

44. It is particularly objectionable that an additional charge should be levied on a practitioner against whom a complaint may be made – irrespective of whether or not the complaint should be upheld. This is not a reflection of the “polluter pays” principle - plainly a practitioner who is exonerated is not a “polluter”.

45. If the proposed Commission is to be funded by the profession, it is unfair to do so by means of a levy which falls equally on solicitors and advocates. We have pointed out above that the incidence of complaints against advocates is significantly lower than the incidence of complaints against solicitors. Furthermore, of the small number of complaints against advocates, only about 50 % are pure service complaints of the sort which the Commission will determine. Advocates are currently subject to a complaints system which is proportionate, given the incidence and nature of complaints made against advocates. It would be unfair to require advocates to fund, at a level equal with solicitors, a new system, the scale and nature of which is, so far as complaints against advocates are concerned, disproportionate.

The proposal does not take account of the public interest in the administration of justice as it bears on complaints about advocacy in Court

46. It would not be in the interests of the administration of justice for a decision of the Courts to be subject to collateral challenge by means of a complaint about the quality of representation. If a litigant believes that the outcome of the case has been
affected by defects in representation, then the appropriate remedy is for the decision to be appealed in the ordinary way. The particular significance of this consideration in the context of criminal trials was recently emphasised by the First Division in the case of *Wright v. Paton Farrell* 2006 SLT 269. *Wright* concerned a claim for damages for professional negligence against a firm of solicitors. One of the partners of the firm had represented the pursuer in criminal proceedings. It was alleged that the representation of the pursuer had been negligent. The case was dismissed because the pursuer had not averred that the failings complained of made any difference to the outcome of the proceedings. However, the Lord President and Lord Johnston took the opportunity to express the view that it would be contrary to the public interest in the due administration of justice for such a claim to be allowed. Three compelling reasons for this view appear in their opinions.

(a) Decisions about the conduct of a criminal trial (and in particular whether the accused should be called to give evidence) involve extremely difficult judgments. If the advocate were liable to be sued for making what is, with hindsight, perceived to have been a wrong decision, this might well lead to decisions being made out of an abundance of caution to lessen the risk of a subsequent claim (Lord President, paragraphs 22-23, 32; Lord Johnston, paragraph 179). The Lord President made the following remarks (paragraph 23):

“There seems little doubt that trials, particularly jury trials, are in general more protracted today than they were 10 or more years ago. There are no doubt many reasons for that development but the perceived need for the defence to avoid any possible criticism cannot be excluded. The risk of such prolongation with its consequences for the efficient and effective disposal of criminal justice, is liable to be materially increased if a representative not only faces possible criticism in the appeal court process but is also potentially exposed to a suit for damages in a civil court on the ground of alleged negligence.”

(b) In a civil action brought against the legal advisers following a criminal trial it would be necessary to contend that, but for the negligent representation, the accused would have been acquitted. Such an action would accordingly, inevitably involve a re-run of the merits of the criminal prosecution (Lord President, paragraphs 17-18; Lord Johnston, paragraph 180). The Lord President said this (paragraph 17):

“There is, in my view, a strong public interest in the soundness of subsisting criminal convictions not being capable of challenge, directly or indirectly, otherwise than by the processes of appeal or review set down by Parliament or recognised by well-established criminal procedure. … public confidence in the administration of criminal justice “is likely to be shaken if a judge in a civil case were to hold that a person whose conviction has been upheld on appeal would not have been convicted but for his advocate’s negligence.” A similar effect on public confidence is likely where no appeal is taken or where leave to appeal has been refused.”

(c) A person who has been convicted of a criminal offence may appeal the conviction on the ground that a miscarriage of justice has arisen by virtue of defective or inadequate representation (*Anderson v. H.M. Advocate* 1996 JC 29). In appeals on this ground, the Court will, as a matter of practice, invite the lawyer or lawyers against whom the allegations are made to respond. As the Lord President observed in *Wright* (paragraph 28):
“... it is difficult to underestimate the importance, for the efficient and effective administration of criminal justice in Scotland, of the Court having a full, frank and prompt response from the legal representative or representatives in question. The difficulties occasioned for such administration by the absence of a response or by a delayed response have been noted by the court on more than one occasion ... Any development liable to exacerbate such difficulties is a matter of concern.”

Both the Lord President and Lord Johnston took the view that to allow a claim for negligence to follow a criminal trial would undermine the administration of justice (Lord President paragraphs 29, 32; Lord Johnston, paragraph 181). Quoting again from the Lord President (paragraphs 29, 32):

“In my view there is a real risk that, in the event of a legal representative being liable to be sued for alleged negligence in the conduct of a criminal trial, that representative will be less willing to assist the court by responding fully, frankly and promptly to an invitation to do so made by it in a criminal appeal where defective representation is alleged. This position is likely, in most if not in all cases, to be made the more difficult by the attitude of professional indemnity insurers to disclosure of information which may bear upon any issue of civil liability. That attitude may also affect the willingness of legal representatives to co-operate with inquiries made by the Scottish Criminal Cases Review Commission. ...

... Any exacerbation of such difficulties could lead only to impairment of the administration of justice, including potentially to the doing of justice to the convicted person who has complained of defective representation. Lack of co-operation by a former legal representative could impair not only immediate rights of appeal but also any subsequent investigation, leading potentially to a referral to the High Court by the Scottish Criminal Cases Review Commission.”

47. The very same damage to the public interest would be occasioned if a lawyer should be at risk of a complaint to the proposed Legal Services Commission that his or her conduct of a criminal trial had been inadequate. If a lawyer were to be subject to the risk of a complaint (which, if upheld, could result in a requirement to pay up to £20,000) at the instance of a client whom he had represented in a criminal trial: (a) there is a risk that he would be inclined to make decisions defensively to minimise the risk of complaints; (b) the determination of the complaint would involve a collateral challenge to the criminal conviction; and (c) the lawyer would be unable to respond frankly to any request by the Court to assist in the context of an Anderson appeal or to inquiries made by the Scottish Criminal Cases Review Commission.

48. The last of these considerations does not apply in the context of civil proceedings. But the other two considerations do. It is difficult to over-state the uncertainties and exigencies of a contested litigation. The current senior Law Lord, Lord Bingham of Cornhill, once described the difficulties in this way:-

“All judge who is invited to make or contemplates making an order arising out of an advocate’s conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side
of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach.” (Ridehalgh v. Horsefield [1994] Ch 205, 236)

49. It is easy, after the fog has cleared, for a complaint to be made. In the Bill, “complaint” means “any expression of dissatisfaction”. With the benefit of hindsight, it may well be apparent that it would have been better if different decisions had been made about the conduct of a litigation. This is, however, very different from saying that the service provided was not of the standard which could have been provided by a competent advocate. One can only assess whether or not an advocate’s conduct of proceedings has plainly been unjustifiable if one knows: (a) the whole circumstances bearing upon the advocate’s decision to act; and (b) what is properly to be regarded as acceptable or unacceptable practice. In order to determine complaints about the quality of representation in Court, it will be necessary to investigate precisely what instructions were given to the representative and it may well be necessary to seek to reconstruct, in some detail, the course which the proceedings themselves took, so that the decisions taken can be put in their proper context. Where the complaint is made by someone other than the advocate’s client, the advocate may be disabled by the obligations of confidentiality which he owes to his client from defending himself against the allegation. Inevitably, if the complainant is seeking compensation, it will be necessary for him or her to allege that if the proceedings had been conducted differently, there would be a different outcome – and this will involve, in effect, a review of the decision which the Court has made.

50. If complaints about the way in which an advocate has conducted Court proceedings may be considered by the proposed Commission – and penalties such as those set out in the Bill imposed - there is a risk that advocates will act defensively, with regard to the risk of complaints being made, rather than fearlessly in the interests of those whom they represent and in the interests of the administration of justice. If complaints may be made by parties other than the advocate’s client, there is a risk that the basic principle, that an advocate owes duties to those whom he represents and to the Court, and not to his client’s opponent, will be undermined. This will in turn undermine the confidence which all litigants are entitled to have that their legal representative will fearlessly pursue their interests. And it would not be in the interests of justice for the merits of a civil case, decided by the Courts, to be re-run in the context of complaints proceedings. If a decision by the Court is to be challenged, this should be by the ordinary processes of appeal or review. On these grounds, the Scottish courts have not hitherto allowed actions for negligence arising out of the manner in which court proceedings have been conducted: Batchelor v. Pattison and Mackersy (1876) 3R 914. English law in this regard has now been changed by a decision of the House of Lords: Arthur J.S. Hall v. Simons [2002] 1 AC 615. Whether or not that decision represents Scots law remains an open question, although the Lord President in Wright acknowledged that it would be highly influential on a Scottish court (paragraph 13). But whatever the position is in relation to professional negligence actions, these considerations are cogent objections to allowing complaints about the quality of representation in Court to be assessed and determined by a body which will not have the expertise, experience and understanding to make properly informed judgments about these matters.

51. We should make two things clear:
Any limitation which may be placed, in the public interest, on claims against lawyers relating to the quality of representation in Court does not mean that lawyers involved in the conduct of proceedings are unaccountable. Proceedings take place in public. The conduct of the advocate is subject to the scrutiny, not only of the client and instructing solicitor, but of interested members of the public, other members of the legal profession and of the judge. No other professional carries out his professional activities in public and subject to the scrutiny of an informed and independent judge. This is a strong incentive for the maintenance of standards. But the greater public interest, in relation to proceedings in Court, is in securing finality and in not promoting satellite litigation which would undermine the decisions of the Courts other than through the ordinary processes of appeal and review.

We do not suggest that these considerations would justify any restriction on complaints about misconduct. It is of the greatest importance, in the public interest, that any allegations of misconduct in the conduct of legal proceedings should be fully and effectively considered and that appropriate penalties should be imposed if an allegation of misconduct is established. But these considerations should be taken into account when considering any regime for service complaints.

The Bill supplants the proper role of the Court in determining questions of professional negligence

The Bill would supplant the proper role of the Court in determining complaints of professional negligence. It is ultimately for the Court to decide the standards to which an advocate should adhere. Yet, under the proposed legislation, a complaint that an advocate has provided services which are not of the quality which could reasonably be expected of a competent advocate may be determined against the advocate by someone (not specified in the Bill) to whom the Commission may choose to delegate its functions, by way of a procedure which is likewise not specified in the Bill. In effect, perhaps uniquely among professionals, lawyers are to be deprived of the procedural safeguards which normally pertain when professional negligence is alleged.

The effect of an adverse finding would be a serious matter for the practitioner. In addition to the adverse impact which such a finding could have for the practitioner’s professional standing and reputation, the Bill proposes that the Commission should be able to direct a practitioner against whom a services complaint is upheld: (a) to pay compensation of up to £20,000; (b) to take at his or her own expense (without financial limit) such other action in the interests of the client as the Commission may specify. These are potentially significant costs for an individual practitioner. Even if the risks can be insured (and this is yet to be confirmed), the terms upon which insurance is made available may involve an excess and additional premiums. It is objectionable that decisions of such significance should be taken by a body which is unlikely to have the expertise necessary to make judgments about professional conduct and which does not provide the normal procedural safeguards which would apply in Court proceedings.

The proposals do not secure the independence of the Commission

If the rights of citizens are to be determined by a non-judicial body such as the Commission, it is essential that its independence be adequately secured. The Faculty has two concerns in this regard.
i. It is proposed that the Commissioners should be appointed by the Scottish Ministers. The Faculty would suggest that, at least, the lawyer members should be appointed by the professional bodies and that all the members should be approved by the Lord President of the Court of Session.

ii. The Scottish Ministers are to have power to give the Commission directions of a general character as to the exercise of its functions: Schedule 1, paragraph 17. There is no qualification on this general power. This would be an unacceptably wide-ranging power, in the context of the general principle of the independence of the legal profession.

There are no procedural safeguards enshrined in legislation

55. It is envisaged that the Commission will make rules as to its practice and procedure: rule 23. If the rights of citizens are to be determined by a non-judicial body such as the Commission, minimum procedural rights and safeguards should be enshrined in primary legislation. If the Bill is to be passed, it is the Parliament’s responsibility to secure that the rights of citizens are properly protected.

The Bill does not take account of the legal professional's fundamental obligation of confidentiality

56. Every member of the legal profession owes obligations of confidence to his or her client. This obligation is fundamental to the relationship of trust and confidence between legal adviser and client. In the context of litigation, it is in the interests of justice that client and legal adviser can discuss matters freely in the sure knowledge that their communications will be kept confidential. The Bill does not take account of this obligation. In particular, the Commission is to have power to require the production or delivery of documents and the provision of an explanation: section 13. No provision is made to require the Commission itself to treat information provided to it as confidential. Where a client makes a complaint about his own legal adviser, it may be that the client can be regarded as waiving the obligation of confidentiality which would otherwise be owed. But under the proposed legislation, a complaint may be made by persons other than the lawyer’s client. In such circumstances, it is essential that adequate provision is made to secure that information confidential to the lawyer’s client is not disclosed inappropriately.

The proposal to permit the Commission to investigate the handling of conduct complaints is objectionable in principle and is unfair

57. The determination of allegations of misconduct by the professional bodies (subject, ultimately, to control by the Courts) is an intrinsic element in the independence of the legal profession. The proposal that the Commission should have power to investigate the handling of conduct complaints and to issue directions to the professional bodies to comply with its recommendations is an infringement of the principle of the independence of the profession. It is objectionable in principle.

58. The Bill proceeds on the footing that the Commission will not deal with misconduct complaints. It appears to be recognised that the Commission will not be an appropriate body – not least, no doubt, because of its relative lack of expertise – to determine conduct complaints. Yet the Commission is to have the power to make recommendations – and give directions – to a professional body that it “consider exercising its powers in relation to the practitioner concerned”: section 16(2) (d).
59. In a case where a professional against whom a complaint of misconduct has been made has been cleared of the allegation, it would be unfair to the professional concerned that doubt should be cast on the validity of the finding by the making of a recommendation by the Commission.

The Bill could result in complaints being made about judges

60. We have mentioned above the large non-practising membership of the Faculty. Any complaints system should apply only to advocates engaged in legal practice (whether or not practising as independent referral advocates at the bar). Moreover, complaints should not be admissible insofar as they relate to any activity other than the provision of legal services. Neither full-time judges who happen to be members of Faculty nor practising advocates who engage in part-time adjudicative functions should be subject to complaints in relation to their responsibilities as judge.

The rules in relation to prematurity are inappropriate for advocates

61. Section 3 provides that a complaint will be regarded as premature if the complainant has not communicated the substance of the complaint to the practitioner, his firm or employer and given a reasonable opportunity to deal with it. This provision seems to have been framed without regard to the differences in practice between solicitors and advocates. In relation to a service complaint against a solicitor – with whom the client has a direct contractual relationship in any event – such a provision may be appropriate, particularly when the matter may be dealt with by a colleague (often the senior partner) of the solicitor against whom the complaint is made. In the case of advocates, it will often be quite inappropriate for the advocate to engage in correspondence directly with the client. The impropriety of direct communication is even greater where the complaint comes from the opposing party in a litigation.

62. The Faculty recognises that the proposal does not relate directly to misconduct complaints. However, the Faculty would view with concern any implication that informal resolution would be appropriate in the case of complaints alleging misconduct. There is a public interest in a well-founded complaint of misconduct being prosecuted and, if well-founded, in an appropriate penalty being imposed.

The proposed legislation is an unjustified departure from the principle of self-regulation

63. The independence of the legal profession is a basic principle of modern constitutional democracies. It underpins the independence of the Courts and the rule of law. Self-regulation by the profession of its members is an intrinsic part of the independence of the profession. This is not to say that external regulation of the profession can never be justified, but that the justification for imposing external regulation must be a cogent and compelling one, which takes full account of the impact on the independence of the profession.

64. Having regard to the considerations mentioned above, this Bill is an unjustified departure from the principle of self-regulation. This is not a technical point. The Commission will have a statutory function of deciding whether or not an advocate has provided “professional services which are in any respect not of the quality which
could reasonably be expected of a competent advocate”. In effect, the Commission will have the power to decide what quality of service is reasonably to be expected of a competent advocate. The Commission will also have the power to direct the professional bodies in their handling of conduct complaints. These are matters which are properly for the professions themselves, subject, ultimately, to control by the Courts.

65. The proposal singles out the legal profession: other professions are not subject to a statutory complaints system such as that envisaged. The small number of complaints against advocates does not suggest that there is a compelling case for change at least so far as the Faculty is concerned. Indeed, on the contrary, it suggests that the imposition upon the Faculty and upon individual advocates of the proposed new Commission would be disproportionate to any public interest.

PART IV: OBSERVATIONS ON CERTAIN CONSTITUTIONAL AND ECHR ASPECTS OF THE BILL

66. An advocate holds a public office and is regarded as an officer of the court because of the function which he or she fulfils in the administration of justice in the courts. It is this function which distinguishes the legal profession, and especially court lawyers, from other professions. The constitutional aspects of the role of an advocate were recognised and discussed by Lord Hobhouse of Woodborough in Medcalf –v- Mardell [2003] 1AC 120 at paragraphs 51/4 (see paragraph 9 above).

67. In a system of democracy such as ours it is generally accepted that Parliament, the Executive and the Courts have their distinct and largely exclusive domains, and that the Courts should be protected from political and other improper pressures. Independent judges rely on the assistance of a body of independent court practitioners, who are similarly free of any outside influences which might tend to interfere with their duties to the Court and to their clients.

68. In the case of Wouters [2003] ECR1 – 1577 the European Court of Justice identified a legitimate public interest in maintaining rules of professional conduct which guarantee the independence and integrity of the legal profession in the interests of the quality of the administration of justice. To date the independence of advocates has been guaranteed by a system of self regulation delegated to the Faculty of Advocates by the Court. The public interest in complaints about advocates has been safeguarded by substantial lay involvement in the relevant Faculty committees and procedures, and by oversight by the Scottish Legal Services Ombudsman.

69. If the current system of regulation is to be altered it is of importance that reform proposals are considered and assessed against the background and in the context of the role of the advocate in the administration of justice, and with regard to the constitutional importance of the independence of advocates from government or any other outside body which might exert control or influence, either directly or indirectly, on the profession as a whole or on individuals within it.

70. The professional bodies do not adjudicate upon civil disputes between a practitioner and client. Rather the regulatory activity is aimed at the broader issues of the good administration of justice and the promotion, upholding and enforcement of proper professional standards. The Bill proposes giving the Commission power to
adjudicate upon claims of negligence against practitioners and to award compensation therefor. However there appears to have been no consideration of the extent to which this would innovate on the present state of Scots common law in respect of an advocate’s immunity from suit, not least in the wake of the decision in *Wright v Paton Farrell*, referred to in paragraph 46 above, and the absence of any Scottish equivalent of the House of Lords decision in the English case of *Arthur JS Hall v Simons*, referred to in paragraph 50. Reference is also made to the discussion above in paragraphs 52/3.

71. In any event such private civil disputes involve an arms length adversarial system; expert witnesses; legal representatives; and all the important safeguards inherent in the court system, not least a properly qualified judge to adjudicate on the difficult issues of fact and law which such disputes commonly create, and where professional reputations are at stake. It is suggested that the proposal to involve the new Commission in such matters has substantial legal, practical and perhaps also financial implications, and is likely to alter the objectives and the culture of complaints handling.

72. The new Commission will require to distinguish between “service” and “conduct” complaints, retaining only the former for its own adjudication. Having regard to the relevant definitions in the Bill, this will be a difficult task, perhaps especially in the context of a court lawyer. At present the Faculty makes no such distinction in its procedures. It is entirely possible that the early years of the Commission will be bedevilled by definitional disputes and very possibly a number of resultant court challenges. At any rate, perhaps especially in the initial stages of the Commission, delay and extra expense can be foreseen.

73. The Commission will be asked to resolve issues of private rights and obligations which belong to the class of cases where the rule of law requires that they be entrusted to the judicial branch of government, all as discussed by Lord Hoffman in *Ruma Begum v Tower Hamlets London Borough Council* [2003] 2AC 430 at paragraphs 43/4. This class of cases can be contrasted with those involving administrative or policy decisions, such as the resolution of planning applications. The House of Lords has recently decided that such policy decisions are immune from judicial control, even under article 6 of ECHR, except insofar as is necessary to ensure that the decisions are taken fairly and in accordance with the relevant legal framework. However, and in accordance with long standing constitutional custom and practice in the UK, in the case of justiciable issues such as those entrusted to the new Commission, article 6 of ECHR requires both parties to have access to an independent and impartial tribunal. This means a court or a body with the essential characteristics, qualities and safeguards of a court. It is also necessary that this tribunal has the power to determine all issues of fact, law and merits. Thus the preservation of rights of judicial review will not render the procedures Convention compliant in the event that the Commission itself does not satisfy the requirements of an independent and impartial tribunal.

74. The Policy Memorandum at paragraph 71 recognises that if enacted, the proposals will mean that practitioners lose their civil right of access to a court for most purposes and as regards their possessions. In other words the practitioner no longer has the safeguard of a court resolution of, for example, a negligence claim; whereas the complainer/claimant can choose either or both routes. It is therefore necessary that the Commission itself amounts to an independent and impartial
tribunal within the meaning of article 6 of ECHR. The Memorandum asserts that the Commission will be compliant with the Convention. However the procedures for appointment of the Commission members by Scottish Ministers are no different from those applicable to any public appointment. Furthermore the lack of any security of tenure over a fixed and reasonably lengthy period for Commission members; the unfettered power of the Executive to discharge members; the lack of any requirement for appropriate experience and qualification on the part of Commission members; the ability of Scottish Ministers to direct the Commission in the exercise of its functions; and the ability of the Commission to delegate its functions to “any…person”, all indicate that neither the Commission nor an Appeals Committee of the Commission will possess the necessary characteristics of an independent and impartial tribunal properly constituted for the purpose of exercising judicial functions.

PART V: SECTION 45

75. The Faculty opposes section 45 of the Bill. It may be thought surprising that the Scottish Ministers should be promoting the giving of legal advice and assistance by unregulated and unqualified persons, who are not required to be members of any professional body, and who are not therefore subject to the regulatory disciplines and public interest obligations which apply to members of the legal profession.

76. Solicitors and advocates:
   a. are qualified, by study and training, to give advice on legal matters;
   b. subject to professional codes of conduct;
   c. have an obligation to act in the best interests of their clients;
   d. have duties of confidentiality to their clients;
   e. are subject to complaints and disciplinary regimes; and
   f. carry professional indemnity insurance against negligence.

77. There is nothing in the Act which would require any of these safeguards for the client and the public interest to be in place so far as registered advisers are concerned. These matters are left to a non-statutory code of practice, to be promulgated by the Scottish Legal Aid Board which does not require, even, the approval of Parliament.

78. The Faculty recognises that the proposal may be intended to enable unmet legal needs in relation to particular subject-matter (e.g. housing, welfare rights) to be met by persons who have a particular knowledge of the law in that particular area. This is not explicit on the face of the Bill. There are various sources of front-line advice on matters such as we have mentioned (e.g. Citizens Advice Bureaux; Welfare Rights Offices) and the Faculty would support the funding of such front-line advisory services. But the present proposal concerns the funding of legal advice and assistance. It is when a client is dissatisfied with the advice which he or she has initially received – it may be from a Housing Department or the Benefits Agency itself – that he or she may require explicitly legal advice. What the legal adviser should bring is an ability to consider the problem from the standpoint of a general knowledge of the law, and in particular of remedies and procedure. For example, a claimant who is dissatisfied with advice about housing may need to be advised not only about the possibilities of internal appeals, but also about the merits or otherwise of an application for judicial review. It is important that those who give legal advice should be properly qualified. The Faculty suggests that it is unacceptable for the Parliament to delegate to the Scottish Legal Aid Board decisions as to whether or not someone
is properly qualified to give legal advice at public expense. It is also essential that those who give legal advice should be independent. This is particularly so when the advice is concerned with public law when the client’s interests may be opposed to those of the state. The best safeguard of independence is membership of a recognised professional body.
The Scottish Law Agents Society was established by Royal Charter in 1884. It is the largest voluntary association of Scottish Solicitors from all branches of the profession and from all parts of Scotland. We have some members practising abroad. The Society does not have any responsibility for regulation but its objects include the promotion of legal services in Scotland.

SLAS is active in responding to consultative documents issued by the Scottish Executive, the Scottish Law Commission and others and is generally interested in the good government of Scotland. The Society has a number of specialist committees.

The Society publishes a legal journal called the Scottish Law Gazette published six times a year with articles on professional practice and developments in the law and the Memorandum Book published annually containing valuable information for practitioners.

In its response to last year's consultation exercise we were in favour of independent complaints handling for inadequate professional services complaints. We remain of that view. The Society recognises the great steps forward taken by the Law Society of Scotland over the last four years in reforming its complaints processes however we recognise the need for the public perception of independence in the process. We therefore support the general intentions behind the Legal Profession and Legal Aid (Scotland) Bill. We have a number of concerns however about the scheme adopted to implement those intentions. These concerns are set out in this response. One is that with the Bill, as currently drafted, there may be new perceptions of a lack of independence in the arrangements. In our view the new Commission which will operate is a quasi judicial capacity is not sufficiently independent of the Scottish Executive.

In our view it is important to establish a complaints process fit for the 21st century which has the confidence of the public, the profession, the Executive and the Parliament. The system must produce results which are fair and are seen to be so. Those results must be delivered with reasonable expedition and at reasonable cost. The legal profession is Scotland produces work of generally high quality at reasonable prices and ought to have nothing to fear from a principled approach to complaints. The system must not become a claimant's bonanza but equally the system must recognise that solicitors are only human and make mistakes. The culture which should be fostered is one where solicitors ought to be prepared to acknowledge errors and, when necessary, to pay out appropriate compensation to well founded claimants who have suffered loss.

Our comments are therefore made with this intention. We have made no comment on Parts 4 and 5 of the Bill as resources do not permit this. We have also made no comment of the application of the Bill to the Faculty of Advocates.

Lack of a coherent philosophy

The underlying policy for the regulation of any industry or profession has to be that regulation is required in the public interest or perhaps more correctly the consumer interest - “the proposed reforms ...aim to put the users of legal services at the heart
of regulatory relationships.¹. The Legal Profession and Legal Aid (Scotland) Bill establishes the Commission in s1 and sets out its constitution in Schedule 1 but never states what regulatory purposes it is intended to achieve and what its objectives are. This can be contrasted with the very clear regulatory purposes and objectives given the Financial Services Authority in section2 of the Financial Services and Markets Act 2000 which are then fleshed out in s3-6 [confidence in the markets, public awareness, consumer protection and the reduction of associated crime]. The comparison is particularly apposite given the proposed Scottish Legal Services Commission is said to be modelled on the Financial Ombudsman Service [FOS].

One measure that meets this aim of public protection is s43 of the Bill which will prevent notaries public acting unless they hold a practising certificate as a solicitor. This proposal came from the Law Society of Scotland [LSS] following a recent case where a solicitor acting as a notary failed to achieve the requisite effect for a deed causing loss. Because the agent did not have a practising certificate and did not hold indemnity insurance². This has to be a welcome move because it will protect the public.

The geometry of complaints procedure

While the proposals in the Bill are said to be modelled around the structure of the Financial Ombudsman Service provided for in the Financial Services and Markets Act 2000 the place of the new Commission in the structure is not the same as the relationship of the FOS with the regulator the Financial Services Authority.

The geometry of the Financial Services Sector regulation places the FSA at the apex of the pyramid of regulation. It has the oversight role of dispute resolution systems [FOS]. It is responsible for the rule making and enforcement of the rules. It has power to deal with certain disciplinary matters in house with a right to reject its findings and to seek a hearing before the Financial Services and Markets Tribunal. The FSA has an oversight role in relation to compensation arrangements in the event of insolvency through the Financial Services Compensation Scheme Ltd.

The proposals in the Bill give the Commission, which determines consumer complaints, an oversight role in relation to disciplinary matters [s28], an oversight role in relation to compensation for negligence matters and fraud/insolvency problems [s29]. A body which is charged with resolving disputes is being placed in a setting which cannot be seen as neutral with these roles. As such the integrity and independence of the proposed Commission is compromised by the structure adopted.

In our view greater attention should be paid to the lessons which can be learned form the FOS system:

¹ Hugh Henry Deputy Justice Minister 18th Dec 2005
² See Scottish Solicitors Discipline Tribunal Annual Report 2005 p7
Comparison between FOS and SLCC

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<th>SLCC</th>
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<tr>
<td>Statutory body</td>
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<td>Reports to Scottish Executive</td>
<td>Reports to Financial Services Authority</td>
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<td>(FSA reports to Treasury)</td>
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<td>Members of Board sit on appeals</td>
<td>Member of board oversee management of FOS</td>
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<td>Ombudsmen, who are employed by the Board,</td>
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<td>have security of tenure</td>
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<td>Board members do not adjudicate.</td>
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<td>Qualifications of board members</td>
<td>All 32 ombudsmen have experience as</td>
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<td>Minority solicitors</td>
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<td>Others need have no qualifications</td>
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<td>Operates as single gateway for all</td>
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<td>complaints including conduct</td>
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<td>Has oversight role in relation to conduct</td>
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<td>Can award up to £20K</td>
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<td>Awards for ips and negligence</td>
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<td>Not clear on inconvenience &amp; distress</td>
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<td>No free hits</td>
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<td>reject findings but once accepted takes in</td>
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Prior to the introduction of the FOS there were a number of separate ombudsmen dealing with sectors of the financial services industry. Professor Farrand was Insurance Ombudsman and held for a fixed term of 5 years. Industry representatives on the Council of the IOB let it be known prior to the end his period of office that they had not agreed with a number of his decisions which were seen as too weighted in favour of consumers. As a result they would oppose his reappointment. After lobbying from a number of quarters he was re-appointed but his authority was compromised and he left to become the Pensions Ombudsman shortly thereafter.

The proposals in the Bill will permit the Executive similar opportunities for influence at the end of a five year period. The power of the Executive to issues directions [Schedule 1 para 17] to the Commission with which it must comply also suggests a lack of independence. Independence is required, in what will be a quasi judicial function, in determining the civil rights and obligations of solicitors, but not complainers because they will still have the option to take claims to the courts. As a result article 6 of the Europeans Convention on Human Rights [ECHR] and article 1
Protocol 1 ECHR will, in our view, be engaged and there is a need for decision making process to be impartial and to be seen to be free from any suspicion of bias. We are concerned that the proposed arrangements will not achieve this. Lessons can be learned from the financial services sector both in relation to the current FOS and earlier voluntary schemes. For example Schedule 17 of the Financial Services and Markets Act 2000 requires the FOS board to establish a panel of ombudsmen whose terms and conditions of employment regarding remuneration and duration of appointments are sufficient to be consistent with their independence [para 4]. The Board of the FOS is separate from the ombudsmen. They require to be sufficiently independent of the FSA [para 3]. Applying this to the Bill currently before the committee it can be seen that the roles of the ombudsmen who adjudicate and the board which is charged with the running of the whole of the dispute resolution system are rolled into one in the shape of the Commissioners. The FOS system was carefully considered in a number of FSA consultation papers to ensure that it was ECHR compliant. A similar separation of functions is required for the new Commission to be ECHR compliant. In our view this can be achieved by establishing adjudicators within the Commission who would solely determine appeals and whose independence is enshrined in the legislation in a similar way as is provided for the FOS system.

Internal reviews or a right of appeal to a court?
We are not attracted to an appeal from the Commission to the Courts provided the system is made ECHR compliant as noted above. There is no requirement for a system to incorporate appeals to be ECHR compliant. An appeal to a court would only increase costs and engender delays in obtaining a final outcome. We note that there are very few appeals taken by solicitors regarding IPS to the Scottish Solicitors Discipline Tribunal. It may be because of satisfaction with the process but we think it more likely because the cost of an appeal outweighs the initial award and on financial considerations appeals are unattractive.

In our view this could be remedied by looking to the FOS model so that the Commission would be responsible for the management of the complaints service but that the adjudicators in respect of appeals should be full-time employees who enjoy security of tenure and will make principled decisions based on legal considerations.

Our view of the process would be:
As with the FOS the initial sift would be done by one team to determine jurisdiction.

A second team would deal with conciliation.

Where that failed a third team would investigate, obtain papers and prepare a report. The parties would either accept the report or reject it and then it could be placed before an adjudicator to determine.

This adjudication should be binding with no right of appeal to the courts. The adjudication should follow FOS protocols and be entirely written unless one or other party seeks an oral hearing which is ECHR compliant. The result of this hearing should be final with no appeal on point of law. The very limited safeguard of judicial review should still be available where the adjudicator has reached a decision which falls within the Wednesbury principles of unreasonableness.

A level playing field?
While the role of the new Commission is restricted to solicitors and advocates the
provision of Legal Services is not restricted to these groups. The style of regulation can therefore be described as institutional and not functional.

There are claims handlers, will writers, immigration advisers and many others who offer already legal services. Those areas which are reserved to solicitors are related to representation in court actions and drawing conveyances for profit. In other areas they are in competition with other providers. Solicitors are subject to a large variety of quality standards. Generally, they will have a law degree from an accredited Scottish University. Many will have a Diploma in Legal Practice and all will have undertaken a two year training contract. They will complete 20 hours of CPD annually in their own time.

They must have a practising certificate; must have in place professional indemnity [PI] insurance through the Master Policy arrangements and make contributions to the Guarantee Fund administered by the Law Society. The minimum PI cover is £1m and the guarantee fund offers unlimited compensation should funds be embezzled. Where a complaint is made about conduct or service then it must be considered and investigated. If the complainer is not satisfied then she can refer the matter to the LSS who will investigate and can now award up to £5k for service matters and where it relates to conduct refer the matter to the Scottish Solicitors Discipline Tribunal [SSDT] which has a range of disposals in its toolkit including the ultimate sanction of striking off.

For a wills writer or a claims handler of the protections mentioned above as a matter of legal requirement the following apply: NONE

So is there no need to regulate in those areas? Well the Compensation Bill which is presently passing through the Westminster Parliament will create a new regulator for claims handlers in England and Wales. They will require to register with a new regulator and comply with the regulatory regime. Why? Because of the evidence of consumer detriment suffered at the hands of such persons. The excesses of claims handlers have been well documented and some major players have collapsed when their business practices have been exposed. They have been more concerned with lining their own pockets, selling expensive insurance policies and encouraging fictitious claims than the interests of consumers they serve. Yet the present Scottish Bill makes no provision for extending the perimeter of regulation to cover such persons.

Isobel and her husband bought their local authority house a few years ago and now have two young children. They thought it was time to make a will when then got a leaflet through the door. This offered wills for only £30 instead of the regular price of £120. This seemed a great opportunity so they made an appointment for the will writer to call. He explained that the fee would be £30 each and there would be VAT on it. Isobel had been assured that there was no VAT when she phoned. The will writer gave advice about what would happen should they die intestate. Although Isobel did not know the advice was based on English law and was wrong. He explained that they would need trusts because the children were under age again quoting the wrong age of majority and that there be an additional fee for this. He explained that he had professional indemnity insurance for £40,000 which meant they were covered should anything go wrong and this was superior to any cover offered by solicitors. No evidence of cover was produced. Solicitors of course have £1m as a minimum. There would additional fees for his acting as executor and
annual fees for safe storage. In all, the bill came to £432 and he took payment immediately before any wills had been produced by demanding payment by credit card.

Isobel was worried about the cost overnight and tried to cancel next day. She was told she could not. Only after involving a solicitor and her credit card company was the money refunded. She paid her new solicitor a fee of £100 including VAT for two mirror image wills.

Examples such as this demonstrate that there is clear evidence of consumer detriment in this field.

The following comparison may be instructive:

<table>
<thead>
<tr>
<th>Will writer</th>
<th>Solicitor</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Professional qualifications</strong></td>
<td>None</td>
</tr>
<tr>
<td><strong>Complaints procedures</strong></td>
<td>None</td>
</tr>
<tr>
<td><strong>Complaints regarding fees</strong></td>
<td>None</td>
</tr>
<tr>
<td><strong>Professional Indemnity Insurance</strong></td>
<td>No requirements</td>
</tr>
<tr>
<td><strong>Misappropriation of funds cover</strong></td>
<td>No requirements</td>
</tr>
<tr>
<td><strong>Business failure protection</strong></td>
<td>No provisions</td>
</tr>
</tbody>
</table>
Since the coming into force of the Immigration and Asylum Act 1999 immigration advisers have required to be regulated again because of evidence of the business practices of advisers who were not lawyers resulting in significant consumer detriment. Notwithstanding that regulation there is still evidence of such detriment continuing. In *Asmat Mushtaq Petitioner*\(^3\) the unqualified adviser who it would appear was not registered sought to argue he was providing legal advice and not immigration advice and in *Mahmood Petitioner*\(^4\) it again appeared that the service provided by the immigration adviser had not assisted the petitioner's cause. There are examples available on the regulator's website of advisers being sent to jail for taking large sums of money to give no advice or service or a service which was wholly deficient.

There is a cost associated with compliance for solicitors. If the rationale for the erection of a complex edifice of protection is the protection of the public then why is the perimeter of regulation not widened to include, for example, wills writers and claims handlers in Scotland. This would provide a level playing field for competition.

One of the insights of the original Financial Services Act of 1986 which is continued in the Financial Services and Markets Act 2000 is the necessity to protect consumers not by institutional regulation but by functional regulation. Solicitors are not some sort of historic monuments which need protection in their own interest. We welcome competition but where all players offering the same services play by the same rules - functional protection. The absence of functional protection for services where the public are vulnerable to exploitation seems inexcusable.

We consider that there are good reasons to expand the perimeter of regulation in relation to the provision of legal services. We therefore recommend that the Bill be amended to make provision for the inclusion of complaints relating to other areas of legal services as falling within the competence of the new Commission rather than the institutional model now adopted covering only solicitors and advocates.

If this is not done then we are concerned firstly that other providers with no professional standards and with no consumer safeguards in place are thereby permitted to compete with solicitors on a playing field which is not level. And secondly that consumers may find that they are left with no effective complaints mechanisms where work, which falls outwith the regulated sphere, is undertaken by businesses, which are effectively controlled by solicitors, who have chosen to structure their services in relation to matters which are not reserved, outwith their regulated solicitor practice in order to compete with other non-solicitor players on a similar cost and risk basis.

If the costs of complying with the new regime increase which we expect other businesses employing solicitors who currently hold practising certificates but who do not work within the reserved areas may no longer support the costs of practising certificates. The cost of servicing the Law Society and the new Commission would fall on an ever decreasing profession with obvious consequences.

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\(^3\) 2006 CSIH 19  
\(^4\) 2005 CSOH 52
The costs of complaints

SLAS favoured the introduction of an independent complaints system for IPS complaints on the basis that public perception of such a system would be preferable to that presently run by the LSS. The current system operates at comparatively low expense levels as it runs to a large extent on the goodwill of the profession and those lay members of the complaints committees where services are provided with either no reward or a reward which does not reflect the cost of time expended. It is inevitable with the model proposed in the Bill that the new system will cost considerably more than the current system. In the policy memorandum it is stated that the expense of the new system will be borne by the profession.

To some extent that may be true but where the cost of providing a service increases to the service provider it is almost inevitable that the cost will not be absorbed but passed on to the end user, the client. We expect that will happen with these proposals. Where the service provider is unable to pass on the costs to the service user because the service user is not paying for that service then we expect other considerations to apply. Where clients are legally aided some, or all, of the cost is borne by the public purse through the medium of the Scottish Legal Aid Board. If the Board is not prepared to increase the level of payments we anticipate this will have an impact on the provision of legal aid by High Street practitioners.

The Public Defence Solicitor's Office which has a presence in Inverness now has to provide services in Orkney as the local legal firms no longer undertake criminal work as they find it profitable.

The impact will be slow and at least in the early stages difficult to detect. Solicitors with mixed practices may consider that the risk of claims for IPS from a client group which is potentially more likely to complain may make it desirable to disengage from the provision of services to that group. They will withdraw from offering legal aid. The risk/reward ratio in relation to legal aid work is such that we are aware of our members withdrawing from legal aid to concentrate on other more profitable areas of practice or those clients who may, for a variety of reasons, be less prone to complain. The current proposals will hasten that process.

The barriers to setting up in practice on one’s own account are also increasing each year. The cost of financing a new business and carrying this until it become profitable are considerable. Factored into this are the costs of the annual practising certificate, professional indemnity insurance and now a new levy on top. The costs of the new system will in our view be considerably greater than the savings on the existing practising certificate. We also expect the costs of professional indemnity insurance to increase substantially as a direct result of these proposals. This will not be because of significantly greater payments to clients because of negligence but because of a leap in administration costs.

We therefore expect that the rate of new enterprise creation in legal practices will not keep pace with the rate of closures. Many rural practitioners appear to be from the ‘baby boomer’ generation and are reaching the end of their working lives.
This will manifest itself gradually but in 10 years time we fear finding a legal aid solicitor in many rural parts of Scotland may be as easy as finding an NHS dentist now.

**Why 'free hits' are important.**

It has been said that the principle in relation to the complaints process is 'the polluter pays.' We are not sure what that means but in fact the current proposals are the solicitor pays, whether a complaint is upheld or rejected. In some cases solicitors will factor into the costing and therefore their charge-out rate the fact that they will have to pay annual levies for the new complaints body and may have to pay case fees as well should complaints be made. The current case fees to be paid to the Financial Ombudsman Service are a little below £500. The costs per case of an examination by the Scottish Legal Services Ombudsman of the handling of a complaint by a professional body are just under £800. We therefore expect the costs of complaints cases taken before the Commission will be of the order of £500-800. It will have to cover the administrative costs of the Commission over a much smaller number of cases compared with the FOS and even with lower wages and rents in Scotland in our view this is a reasonable yardstick to apply.

| Alan has been in practice for many years. He was approached by Jack in relation to an employment dispute. After only a little investigation by Alan it became clear that Jack did not have a legal problem which Alan could resolve. Alan did however suggest to Jack that he might benefit from counselling for what appeared to be mental health problem. Jack complains to the new Commission with a perfectly plausible letter suggesting Alan failed to act on his instructions to lodge a claim to an Employment Tribunal and as a result his claim is now time-barred. He seeks compensation.  

The claim is on the face of it well written, it discloses a ground of complaint within the terms of reference and passes the first sift. It then goes to conciliation which Alan refuses and is then passed on for investigation. The investigator gets the file, makes some other inquiries and concludes that the complaint is not well founded, is not supported by the facts and rejects it.  

Alan is sent an invoice for £500 case fees. |
Claire bought a house for Paul some three years ago. Paul had been moving up from England because he had a new job here. Claire had sent Paul a copy of part of a deed relating to the property which set out the burdens. Paul did not read at the time. Claire has only just received the Land Certificate from the Registers of Scotland and send a copy to Paul. He now has time to read it through and is dismayed to see that he is entitled to keep only one dog. Ever since he bought the property he has had two. This was in the extract Claire had sent before. No-one has objected to Paul's two dogs in the three years and both his immediate neighbours have dogs as well.

Paul claims Claire was negligent and he would not have bought the house had he known of the condition. He asks for the fees of £750 back. Claire refuses. Paul says 'He will settle for half because it will still be cheaper for you than a complaint to the Commission'.

Ms D was concerned that her solicitors had not kept her informed or updated when they acted for her during her divorce. She wanted them to compensate her for delays, lack of contact, not carrying out instructions to wind up the case and for stress caused. She complained.

In fact progress had been limited by the parties' unwillingness to negotiate and settle the case, when both sides had intransigent positions. There had been no delay and no failure to communicate.

[This case is abstracted from the SLSO annual report 2004/5 page 29]. Yet under the new system the solicitor would pay approximately £500-800 for the privilege of being vindicated. This is likely to be more than the profit on the business. So why undertake divorce work at all?

Is 'polluter pays' fair in any of these circumstances?

We recognise that consumer complaints systems are generally free to the consumer at the point of engagement. However the examples illustrate how this can cause problems. If the mix of annual levies and case fees permits the first two cases per annum for a practice unit to be free then the problems will be diminished. The level of complaints is currently around 2 per year per practice unit. The blackmailer will not know if the free hits have been used and the tactic will not work. Complaints made which are wholly unfounded or where the complainer has not looked at matters objectively are less likely to result in costs being incurred by solicitors.

The profession has a long and renowned tradition of taking on the distressed, the disturbed and the dangerous but the prospect of case fees even where the complaint is wholly unfounded together with the prospect of awards of up to £20,000 is likely to result in such persons finding it more difficult to secure representation.

For very small and new practices even a case fee of £500 will be a significant cost to be met which cannot be planned for. Such a system of free hits is operated by the Financial Ombudsman Service. We therefore consider that the new system should be designed in a way which includes two free hits per annum within the annual levy.
The proposed level of compensation & its interaction with the Master Policy

The level of compensation proposed in the Bill is £20,000 [s 8(2)(d)]. Until 2005 the limit was £1,000 when it was increased to £5,000. It is perhaps too early to determine the effects of the increase but early decisions indicate that the there are few awards of more that £1000. We understand that no research has been undertaken into the grounds of such complaints and the levels of awards. We consider that it would be very useful for the new Commission to have information of this type available to it when it takes over and we would encourage the Executive to commission research into findings of inadequate professional service. We suspect that there is no reason to increase the maximum award to £20,000. In our view this should be retained at the present level of £5000.

At this level any compensation awarded where the underlying cause is negligence the amount falls within the self insured amount for the Master Policy. If the level were moved to £20000 this is above that limit and would therefore have to be intimated to the Master Policy insurers. The case will then be run by the insurers and they have authority to defend or settle the claim as they may determine and the solicitor or firm complained against has little opportunity to control the process.

At the time a service complaint is intimated the amount or likely amount of compensation sought or awarded may not be apparent. As a result solicitors are likely to refer matters to Master Policy insurers routinely. This will inevitably result in the process being delayed more hearings being requested and in some cases judicial review being sought.

If the cap fits….

The Bill contains proposals which will see the new Commission in a position to award up to £20,000. However this figure is not capped. So that the complainer can make a complaint be awarded an amount then raise a court action and seek more. Given that the internal appeal processes must be ECHR compliant the solicitors may be faced with a second process at additional costs. Other consumer complaints systems are taxative. The complainer effectively elects to use a process knowing the maximum amount of compensation he can get. If he wants more he has to go through the ordinary court system.

We see no reason why the making of an award of compensation should not be final on both parties. This is a common feature of consumer redress systems in other areas. Consumers either engage in a free at point of engagement system with a cap which is known at the outset or they go to the courts where expenses follow success but the award is not capped. The same is of course true within the court system. A case may be brought as a small claim up to £750 with a low cap on expenses in disputed matters, as a summary cause up to £1500 with a lower rate of expenses or as an ordinary action above this level with a scale of charges which is commensurate with this more elaborate process. In some cases consumer elect for a procedure not based on the amount they wish to recover but on the costs which they are prepared to incur.
Disaggregation of hybrid complaints

Under the present complaints system all complaints are made to the Law Society whether this relates to service or conduct. The complaints handler takes care from the outset to frame the heads of complaint so as to include all potential grounds.

In the majority of cases the consumer is interested in obtaining compensation and only in a small number of cases will the complaint disclose dishonesty or misappropriation of funds by a solicitor. However the consumer complaint may incidentally disclose a failure to comply some Law Society Rules –there are many! Although this is a technical breach in terms of the Solicitors (Scotland) Act 1980 such technical breaches constitute misconduct. While this may be a technical breach it is unlikely ever to proceed to the Scottish Solicitors Discipline Tribunal as a result of the test in Sharp v Law Society which determines that the taking of complaints to the Tribunal should be reserved for serious matters. A trend can be detected in SSDT decisions within the last 18 months whereby it appears that less serious cases are being taken. No doubt this trend will be reversed by the introduction of the category of unprofessional conduct with appropriate sanctions in the Bill. The complaints handler in compiling heads of complaint will therefore aggregate all potential heads of complaint. This results in many complaints being hybrid complaints. A consequence of hybrid complaints is that insofar as it relates to misconduct the solicitors complained of will adopt a more defensive attitude because of the risk, of disciplinary action.

One of the reasons we supported the introduction of a new complaints body was that this would result in the disaggregation of the heads of complaint and the new Commission would deal with service complaints only. This would leave the Law Society to deal with conduct complaints hopefully more speedily which will benefit both the public and the profession. We were also of the view that complaints regarding service might be dealt with more quickly, with less formality and with a greater sense on the part of solicitors of seeking to reach a mediated position quickly.

In our view these benefits are in danger of being lost with the current proposals. We understand the proposal for a single gateway for complaints. We think however the case for this is often overstated. If body A deals with discipline and body B deals with consumer redress a simple protocol for forwarding complaints to the relevant body suffices. Where the new Commission determines a complaint as having both conduct and service elements [s4] there is a danger of the duplication of process. Where this occurs then a more co-operative approach to resolving complaints is unlikely to develop. There will also be little in the way of cost saving on the annual practising certificate if the Law Society still has to investigate large numbers of low level technical breaches as well as the new body investigating service elements. There will be a duplication of effort and cost. If it finds any degree of a conduct complaint then it must remit it to the LSS[ s5].

Disaggregation in our view should also have benefits in the way in which solicitors respond to a service complaint. They ought to adopt an attitude which facilitates mediation. That is unlikely to happen where there is a parallel conduct investigation on going.

We do not seek to minimise the significance of solicitors failing to comply with LSS rules but where these are of a technical nature and there is no evidence of a persistent course of conduct on the part of the solicitor they are unlikely to result in
disciplinary action the requirement to refer to the professional organisation seems too onerous. We would prefer to see the Commission being given discretion as to whether to proceed as a service complaint alone and not remit the conduct element to the professional body. This requires only the substitution of ‘may’ for ‘must’ in line 23 on page 3 of the Bill.

This would lead to the benefit of speedier resolution of disputes with a more constructive approach to settlement on the part of solicitors.

**Who can complain?**

**Consumers only?**
The policy of giving consumers an effective complaints mechanism against solicitors assumes that the current regime is not effective, something solicitors probably would not agree with. While there should be no restriction on who might make complaints in relation to conduct in relation to service complaints there has to be a recognition that it must be in relation to B2C contracts and not B2B ones. The Scheme in the Bill is said to be based on the FOS. Very small businesses have resources similar to those of consumers so there is a case for extension from B2C to B2b. Tests of five employees or less or a turnover of < £1m could usefully be deployed as a means of discriminating between small businesses and those with adequate resources. The FOS use such a test.

**Third Party complaints**
The opening up of complaints to third parties [s2(1) “any person having an interest”] is particularly worrying. We have no problem with clients have a right to complain. We accept that certain categories of non-client have a legitimate interest to complain such as beneficiaries in a trust or executry where the duty is owed to the executors who may have no financial interest in the estate when the beneficiaries clearly do. However any person having an interest is exceptionally broad. We would suggest that a restriction to those who could demonstrate a patrimonial loss might be a first step however this may still produce problems.

Jamie is a young depute in the Procurator Fiscal Service. He prosecutes Billy, a well known criminal but the prosecution is unsuccessful. Billy complains that Jamie’s services were inadequate- had they been adequate the decision to prosecute would never have been taken. Billy claims he has incurred inconvenience and distress as well as financial loss as a result of the prosecution. Jamie is not employed by a firm but by the Crown. The new SLCC has power to make a finding against Jamie but not his employer because it is not a firm of solicitors so any award made will require to be paid by him. Even if he is completely vindicated he will have to pay the case fee of, we expect, around £500. He potentially might have been liable to pay up to £20,000 by way of compensation.

This raises two issues whether decisions to prosecute should be open to review in this way and whether it is fair that Jamie is liable but his employer is not.

In *Wright v Farrell & others* 2006 CSIH 7 the First Division of the Court of Session reviewed the law of liability of solicitors for the conduct of their cases. In the course of his opinion the Lord President said:
“I have come to the view that, in the context of the administration of justice in Scotland, an immunity from suit can be justified. The immunity to which I refer is that in respect of the negligent conduct in court of a solicitor exercising a right of audience in the defence of an accused person. The effect of that immunity is to deny such a person, in the event of his sustaining loss as a result of such negligent conduct, the ability effectively to sue the solicitor in civil proceedings for damages in compensation for that loss. In circumstances where, as I accept, a professional duty of care is owed by a solicitor to his client (including in the conduct of criminal proceedings in his defence), such an immunity is not lightly to be acknowledged. It involves the denial of the ordinary form of remedy for loss caused by a breach of such a duty. But if the public interest in the due administration of criminal justice is, as I believe it is, at risk of being materially impaired if such an immunity is not acknowledged, then the private interest in monetary compensation must yield to the interests of the administration of criminal justice, including its administration in the context of any appeal by that accused against a conviction arising out of the proceedings to which the complaint of negligent conduct relates. I have earlier endeavoured to identify the risks to which I refer. These relate both to the first instance proceedings themselves and to any subsequent proceedings, whether by appeal or otherwise. In particular, so far as regards the first of these, the difficulties facing a legal representative exercising rights of audience on the part of an accused person can readily, in my view, be underestimated. While it is, of course, true that the paramount duty is that owed to the court, the pressures brought to bear, or attempted to be so brought, on such a representative by the difficult or obdurate client can nonetheless be real and powerful. It is of the first importance that, while owing a duty to his client and fulfilling that duty, such a representative should nonetheless be assured that he has a status which will allow him or her fully and without qualification to observe the duties owed to the court and to the public generally in the administration of justice. So far as regards subsequent appellate proceedings, I have already noted the difficulties which can already occur in the court obtaining full and candid accounts of what has transpired in the lower court. Any exacerbation of such difficulties could lead only to impairment of the administration of justice…”

That is in relation to civil actions brought by an accused against his own agent. That it is recently authoritatively said not to be in the public interest. Yet in the example given above Billy would have a right to complain not only regarding his own legal adviser but also about the solicitor who prosecuted him. There is we submit a greater public interest in the administration of justice than the rights of consumers to complain. There is no apparent consideration of that public interest in the Bill or in the consultation exercise prior to its introduction.

Mary is a solicitor who acted for George in his divorce from Hazel. Proceedings have taken several years to draw to a conclusion and George refused to co-operate initially by initially concealing and then not disclosing all his assets and thereby sought to frustrate a fair division of the matrimonial property. Hazel complains that had Mary adequately advised her client at the outset much of the delay and expense in the action might have been avoided.

In fact Mary did advise George in these terms at the outset. She refuses however to breach professional confidence and advises SLCC that this is her reason for refusing to respond to their requests. SLCC requisitions her files under s13. She refuses and SLCC applies for a court order in terms of Schedule 2
In *Three Rivers District Council v Bank of England* [No6] 2004 UKHL 48 the issue of professional legal privilege was discussed in relation to both advice and representation. Their Lordships were unanimous in upholding the professional legal privilege in robust terms for example:

“I would go so far as to state as a general principle that the process by which a client seeks and obtains his lawyer's assistance in the presentation of his case for the purposes of any formal inquiry—whether concerned with public law or private law issues, whether adversarial or inquisitorial in form, whether held in public or in private, whether or not directly affecting his rights or liabilities—attracts legal advice privilege. Such assistance to my mind clearly has the character of legal business. It is precisely the sort of professional service for which lawyers are ordinarily employed by virtue of their expertise and experience. Indeed, it falls squarely within Dr Johnson’s description of a lawyer's function It is, moreover, a service which can only effectively be rendered if the client is candid and forthcoming as to the true facts of his case—the very consideration which justifies the absolute character of legal advice privilege in the first place”. Lord Brown of Eaton under Heywood.

“The privilege belongs to the client, but it attaches both to what the client tells his lawyer and to what the lawyer advises his client to do. It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct. The client may not always act upon that advice (which will sometimes place the lawyer in professional difficulty, but that is a separate matter) but there is always a chance that he will. And there is little or no chance of the client taking the right or sensible course if the lawyer's advice is inaccurate or unsound because the lawyer has been given an incomplete or inaccurate picture of the client's position.”

Baroness Hale of Richmond

“[T]he public interest justification for the privilege is the same today as it was 350 years ago: it does not change, or need to change, because it is rooted in an aspect of human nature which does not change either. If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client, communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and cannot be made the subject of evidence. Of course, this means that, from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available”.

Lord Rodger of Earlsferry

These fundamental constitutional and human rights questions are just not addressed in the Bill. Similar sentiments were expressed in the New Zealand case of *Russell McVeagh McKenzie Bartleet & Co v Auckland District Law Society* which came before the Privy Council on 19th May 2003.

The importance of an independent legal profession with professional privilege was recently reaffirmed by the CCBE, the European Law Societies and Bar Councils Association. The CCBE resolution on Human Rights and the Rule of Law of November 2004 includes the following:
"In a state that observes the rule of law and grants its citizens access to justice, it is vital that there exists protection of confidences that a client has made to his or her lawyer as a trusted advisor. The status of the lawyer, like the status of the press, therefore is a yardstick by which to measure a free and democratic society which strives to follow the rule of law. The obligation to report to the government runs counter to the very essence of a lawyer. Not even the dictatorships in various countries of western and eastern Europe in the 20th century have turned lawyers into policemen for the government.

A society that is based on human rights and the rule of law principle cannot be defended by putting these values out of effect. To do so only does the job of those who wish to destroy such a society".

It has to be accepted that the Scottish Legal Services Ombudsman has powers under existing legislation to require the production of files which are not restricted in the same way as the Law Society so that third party files could be obtained. We understand that the SLSO has under threat of such powers being used obtained files. We are firmly of the view that these powers would not stand up to judicial scrutiny in light of the Three Rivers and Russell McVeagh cases and that they are incompatible with ECHR. In our submission the new Commission should not have such powers.

The breadth of powers to be conferred on the new Commission [in s13 and Schedule 2] of the Bill to demand and obtain papers without any qualification reflects powers the Law Society has under the existing legislation. Its functions are however somewhat different. It has a role in adjudication of individual complaints. It has no function in stepping in to take control of a practice when the practitioner becomes insolvent or is reasonably suspected of misfeasance. The Law Society needs its powers to protect the public but the new Commission does not need such broad powers for its more limited function. It appears that this is just a case of unthinking 'copy over' from the existing law in the Bill. We would recommend that these powers are slimmed down so that they are commensurate with the complaints being determined by the new Commission.

Inadequate provisions on inadequate professional services

S34 of the Bill attempts a definition of Inadequate Professional Services. These are:

'Professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor.' Separately the section also includes negligence as falling within the definition of inadequate professional services.

We are already subject to complaints of inadequate professional services under existing legislation and basic definition has not changed. What has changed is the inclusion of negligence. The contemporary test for professional negligence can be derived from Hunter v Hanley\(^5\) and is threefold:

1. the claimant must establish that there is a usual professional practice
2. the claimant must show that the person complained about has deviated from that standard and

\(^5\) 1955 SC 200
3. the claimant must show that no reasonable practitioner would have adopted that practice\(^6\).

While the inclusion of negligence claims may seem novel the degree of novelty may be limited. While the term professional negligence is widely used and may be quite emotive most claims brought by clients for ‘negligence’ could be brought either as contractual claims or as negligence claims. Where there is a contract for professional services there will be an implied term in the contract that the solicitor will utilise the standards of a reasonably competent professional in carrying out the instruction. Clearly in relation to third party claims the third party will only be able to claim on the basis of delict but where a claim is made by a client then they will have the option of suing in contract or delict\(^7\). The test is in effect the same. However this raises a number of issues.

While some cases of negligence may be clear (for example allowing a claim to prescribe by failing to raise an action timeously) others may not (for example, failing to pick up the existence of a servitude right of access acquired by prescriptive exercise alone). The new Commission does not seem well placed to determine what professional practice is and whether there has been a deviation from it and whether the deviation from accepted practice was appropriate. This has to be a concern.

The second issue is what is the inter-relationship between the definition of inadequate professional services carried over from the current legislation and the new negligence ground. Does this give a complainer two bites of the cherry or are the two tests the same?

The Law Society issued Guidelines on 29\(^{th}\) January 1989 setting out its views as to what constituted inadequate professional services. These are to consider whether the solicitor:
- Has dealt with the matter with due expedition
- Has displayed adequate knowledge of the relevant area of law
- Has exercised an appropriate level of skill
- Maintains appropriate systems
- Has communicated effectively with his client and others

It is not clear whether the new Commission will adopt these criteria or develop their own. The second and third have a degree of commonality with the negligence test without touching the necessary third limb whether no reasonably competent practitioner would have followed it. The others deal with issues which not about the services provided so much as they way in which those services are provided. The problem seems to occur from the use of the word ‘quality’.

‘Quality’ has a number of different meanings and this can lead to confusion.

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\(^6\) see Rennie R Solicitors Negligence 1995 Butterworths/Law Society of Scotland para 2.07

\(^7\) see Rennie R op. cit. para. 2.01
The Lada and the Rolls

The Lada is mass produced. The machinery is old and the factory cannot make the cars with as close fitting panels as computerised, robotised western factories. They have a manual which specifies every detail of the car. This details the broad tolerances within which they work. Cars all comply with these easily achieved standards.

The Rolls in hand built by craftsmen. The panel fit is exemplary and the hand finish is part of the appeal of the product, Rolls don't need a detailed manual because the craftsmen all know exactly what is expected of them.

So which is the quality product?
The Lada!
It conforms to the standard set by the manufacturer and satisfies the legal definition of a quality system.

The fourth of the Law Society Guidelines deals with this type of quality.

The Sale of Goods Act 1981 s14 deals with goods being of satisfactory quality. This provides in relation to consumer goods that quality relates to:
- Fitness for purpose
- Appearance and finish
- Absence of minor defects
- Safety
- Durability

This is more in tune with the intuitive aspects of quality and measured against these standards the Rolls is the quality product. Looking at the Law Society Guidelines the second and third relate to these notions of quality.

In a restaurant at the end of a meal we may leave a tip. Why we do so is because of the quality of the service. We assess how speedy the service was, how attentive the staff were and whether the food met our expectations. In other words the manner in which the contract for services is provided is the important feature in assessing this quality of the service.

Of the Law Society Guidelines the first and the fifth relate to this type of quality.

Inadequate professional services therefore encompasses at least three different strands under the Law Society Guidelines to which a fourth with be added with negligence claims. Neither the current statute nor the Bill addresses what IPS is about and it is left to LSS guidelines. What we have is an inadequate provision which has to be explained unofficial guidelines which conflate a variety of ideas to which another is to be added. This is then given to the new Commission. While they have to take account of any award of damages made by a court [s8(3)(c)] no basis is stated for their own awards.
There seems to be no reason why clear, straightforward provisions cannot be included in the legislation. This would assist the Commission, the profession and the public in knowing that the nature of the complaint was. If the grounds were clear and there was broad consensus that they appropriate then all sides might go forward with confidence in the new regime.

We consider that claims should be restricted to those who can demonstrate a duty of care was owed to them by the 'complainee' either in contract or delict and that the complainer has suffered a financial loss. If the maximum award is to be £20,000 it should be capped at that figure with no second bite to the complainer to then raise court action for the same matter. The cap should be inclusive of any fees abated or to be refunded.

We welcome the statement in s8(2)(d) that any award made should be inclusive of an amount for inconvenience and distress. A complainer should be able to complain where they have suffered inconvenience and distress, where the manner of provision of the services has been dilatory or otherwise inappropriate but that in such circumstances the amount awarded for such matters should not exceed £1000. This is the basis on which the FOS deals with inconvenience and distress payments. It seems to command support from all sides. Such a figure which could be subject to periodic review could usefully be inserted into the section.
SCOLAG Written Evidence to Justice 2 Committee on Legal Services and Legal Aid (Scotland) Bill

Introduction
The purpose of any modern justice system in an open and democratic society should be to provide equal access to justice and just treatment to all. SCOLAG believes that there are certain key principles which underlay all aspects of such a justice system. These key principles are: transparency; impartiality; accessibility; accountability; consistency; fairness; and sustainability.

These principles should apply to those who use any part of the system or who might need to use it, and to those who form any part of any such system. These principles should therefore apply to the regulation of those who provide legal services and to the funding of legal services.

Summary of Evidence Submission
For over twenty years SCOLAG has supported reform of the handling of complaints against the legal profession. Although SCOLAG’s own proposals have not been accepted as the model for the Bill, we also recognise that there are quite a lot of people who think that one cannot hope for success in a complaint about lawyers to the Law Society of Scotland, and they vocalise this view and their complaints to others.

If an independent Commission provided a user-friendly, sympathetic ear for people who have real or imagined cause for complaint then this might help address those views. We regret that the present Bill does not, in our view, provide for a better alternative for a number of reasons which are discussed more fully below. The main criticisms of this Bill are:
- The proposals will not satisfy those who don’t trust a person or firm that they believe provided an inadequate service and therefore don’t want to be forced to attempt settlement with that person or firm, but the proposals will lead to a more expensive system of regulation whose costs will fall hardest on rural solicitors, those practitioners who do mainly or wholly legal aid work and law centres. The proposals will discourage pro bono work for people who have difficulty getting access to legal services, and could well reduce access to legal services for some people.
- We do not believe that, after experiencing the procedures set out in the Bill, that the most persistent critics of the current complaints system will accept that the Commission is independent and impartial. We do not believe that the Commission would satisfy the tests for being an independent and impartial tribunal. Complainers and practitioners ought to have a right of appeal to a court in order to make the procedures ECHR compliant.
- It is not fair that a practitioner will have to pay a complaints levy where the Commission ultimately investigate a complaint and either finds that a complainer has been unreasonable in not accepting either a proposed settlement from the practitioner or the
outcome of mediation, or where the Commission determines that in fact the complaint is unfounded.

- The proposals fail to recognise distinctions between different types of legal services and the differential impact of the proposals in these different areas.

- Complainers alleging professional negligence may be required to pursue two different routes to recover compensation. Where the outcomes differ, this will undermine the credibility of the Commission in the eyes of at least one side or the other.

- The policy of the legislation in creating a system whereby non-legally qualified advisers can provide advice and assistance, we are concerned about the piecemeal way in which this is being done. Some points of detail do require clarification.

**LEGAL PROFESSION**

**Summary of SCOLAG Response to Consultation Exercise on Reforming Complaints Handling**

In support of the principles stated above SCOLAG proposed that the office of Legal Services Ombudsman be abolished and replaced with a new independent supervisory body whose main function would be to exercise a continuous regulatory role over the professional bodies’ complaints handling systems. This body would oversee the manner in which the Law Society of Scotland and the Faculty of Advocates dealt with complaints concerning inadequate professional service, professional misconduct and professional negligence. We recommended that the regulatory supervising body had the power to either order re-investigation or to make its own decision where there was dis-satisfaction about a decision, including any decision as to the amount of compensation (if any) which the professional body might order should be paid as a consequence of a complaint. We proposed that the regulatory supervising body ought to have power to direct the professions as regards particular steps they need to put in place to ensure a proper handling of complaints by them in the first place, and that this should be accompanied by a power to enforce that decision and even to fine the professional bodies for non-compliance. We also noted that individual members of the profession can themselves be considerably inconvenienced by delays on the part of the professional bodies and that they currently have no rights of redress. We agreed that compensation should be available for actual loss and also for inconvenience and distress. We also agreed that levels of compensation should be increased, but saw no reason why the increased level of compensation should be limited to £5,000 as the Consultation proposed. We suggested that there should be no pre-set limit which would need to be constantly kept under review, and which might be wholly inadequate in a particular (and hopefully rare) set of circumstances. On the basis that, for example, a doctor would not expect his professional competence to be judged principally by a panel of lay persons, it would not be appropriate for lay persons to be involved in determining the professional competence of the profession.
We therefore recommended that the chair of the supervisory body should be either legally-qualified or otherwise be a suitably-qualified person (in the same way that a Company Secretary – who is usually a qualified lawyer or accountant, but does not necessarily have to be so, if they have other suitable, similar experience). We recommended that the remaining members consist of even numbers of Lay Members who are appointed to represent Consumer Interests – and manifestly be seen to do so – alongside an even number of members with relevant professional experience.

Comments on Proposals in Part 1

SCOLAG welcomes and supports the principle of a Scottish Legal Complaints Commission. It also supports the principle of increased levels of compensation payable to persons for losses caused by lawyers.

The main thrust of the Bill’s proposals do however differ from SCOLAG’s own suggestions in several material respects, and we believe that there are a number of potential problems which arise from the particular proposals in the Bill. The following paragraphs summarise those concerns.

a) The proposals in the Bill are likely to be perceived as bureaucratic and expensive. Clients who feel they have been badly served will not want to go back to a person or firm they do not trust in order to attempt to reach a settlement. They will likely want to go to the complaints body directly at the earliest opportunity. The procedures set out in the Bill will result in increased overall costs to individual members of the professions. The reason for this follows from the way that the bill splits complaints into “service complaints” and “conduct complaints” (following an existing distinction made by The Law Society of Scotland) and then sets out a series of procedures to determine what type of complaint it is, initial screening systems for returning complaints to practitioners or involving non-binding mediation followed by the investigation and determination of service complaints by the Commission whilst at the same time The Law Society of Scotland and the Faculty of Advocates investigate and determine conduct complaints. In our view the Bill’s proposals are bound to increase the overall costs of the complaints procedures. This is because it will require more paid persons to fulfil the functions of the Commission than are currently employed by the two professional bodies between them at the moment due to the fact that a number of people within the profession give their time and services without charge and because the Bill’s “screening” procedures are more bureaucratic than those currently operated by the professions.

b) Those increased costs will be seen as particularly significant by rural solicitors who tend to be smaller in size and who don’t have access to as large a client base, those whose main income is through legal aid work, and advocates, who collectively attract a significantly lower percentage of service complaints compared to solicitors. It is also our experience that solicitors and advocates working in social welfare law areas are more
likely to be the object of complaints than those working in many other areas of the law, although many of these complaints are eventually determined to be unfounded. The additional levy on those who are made the object of a services complaint will therefore give rise to a further financial burden which will have a greater impact on those doing legal aid work.

c) We would be concerned that the increased costs would act as a disincentive to carry out certain types of work. In combination with other aspects of the Bill we believe that this will amount to a further disincentive to doing legal aid work at a time when the number of solicitors firms doing such work continues to fall.

d) We would also be concerned that the overall increased financial costs, and the risk associated with doing certain types of work, will lead to a reduction in solicitors and advocates doing “pro bono” work. This work is done on behalf of people who have experienced problems getting access to legal services. We would also be concerned that advocates, who are presently under a professional obligation to operate a “cab-rank rule” (which prevents them from selecting clients) will either seek ways of evading that obligation in order to avoid “difficult” clients, or that obligation might be removed so that they have the same right to select a client as a solicitor does.

e) Clause 3 makes provision for complaints which are made prematurely and in clause 6 for the Commission to refer the complaint back to the practitioner to achieve settlement. It does not appear to us that this recognises the different circumstances in which lawyers operate, in particular court practitioners. It is also hard to see how this will apply in relation to advocates, especially since they are not directly instructed by their client and receive their instructions and information through solicitors. f) We note that a “service complaint” is defined as relating to an inadequate professional service and that the range of such complaints would therefore include allegations of professional negligence as well as less serious complaints. The Law Society of Scotland at present does not investigate claims which it considers are negligence claims. It will consider complaints about bad advice. In our view this distinction should be preserved and the Commission should be required in the legislation to take the same course so that poor quality service amounting to less than a claim of professional negligence would be dealt with by the Commission. It appears to us that determinations as to professional negligence which affects the regulation of professional services will ultimately be made by non-professional persons who form the commission staff or the majority of the Commission or any of its committees. Although we recognise that the thrust of the Bill’s proposals are intended to increase “consumer confidence” in the regulation of the legal professions by having a majority of non-legal members on the Commission, we do not consider that to be appropriate as a matter of principle in so far as determining questions of professional negligence is concerned. We consider that both the lawyer and the complainer will find reason to question the judgment which is being exercised. Where a complainer requires to go to court to recover the full extent of their loss the court could reach a different conclusion as to the existence of negligence. This could only undermine the overall credibility of the Commission if that happened.
g) The obligation on the Commission to investigate complaints where a practitioner has made a sufficient attempt to achieve a negotiated settlement (but by implication this effort is spurned by the complainer) will do nothing to encourage local resolution of complaints as there will be little incentive on a complainer to accept settlement. It might also be regarded as putting unfair pressure on legal practitioners to agree to settle unmeritorious claims rather than be faced with a further levy as well as the time and aggravation caused by such a claim. The making of a complaint is cost free and risk free for a complainer. We do not object to that, but it does not seem to us to be fair that a practitioner will have to pay a complaints levy where the Commission ultimately investigate a complaint and either finds that a complainer has been unreasonable in not accepting a proposed settlement from the practitioner, the outcome of mediation, or where the Commission determines that in fact the complaint is unfounded. In our view a complaints levy should only be made where a complaint is upheld and the practitioner has been found to have failed to make a reasonable effort in all the circumstances to have resolved the subject matter of the complaint. The question of whether a complaints levy should be made is a matter which the practitioner should be entitled to make representations about, and to have the right to appeal against if the representations are unsuccessful.

h) The Bill refers to mediation in Clauses 6, 7 and 11. The purpose of mediation is quite different from seeking arbitration or a judicial resolution of a complaint. Mediation invariably involves some willingness on both sides to compromise. The outcome of the mediation is determined not by the mediator but by the parties willingness to resolve their issues. Although parties to mediation may withdraw from the process before an outcome is achieved, the usual intention is that once an outcome is achieved that result should be binding on both parties. There would seem to be little incentive on a complainer or a practitioner to accept the outcome of a mediation exercise if a result is achieved which is not binding on the participants. Any practitioner who considered a complaint to be unfounded has little incentive to participate in a non-binding mediation where, regardless of the outcome, the practitioner is required to pay a complaint’s levy.

i) In our view the Commission would not generally be considered to be an independent impartial tribunal that satisfied the requirements of Article 6 of the European Convention on Human Rights. The reasons for this relate to the cumulative effect of the power of Ministers to appoint members of the Commission, the absence of any specified minimum or fixed period of appointment, the power of the Ministers to appoint the Commission’s Chief Executive, the power of Ministers to amend the Commission’s duties and powers, and the power of Minister to give the Commission directions as to the exercise of its functions. The involvement of the Commission as mediator would give rise to a further reason why it would not satisfy the test of being independent or impartial. We believe that the Commission would no longer be trusted to act fairly and independently where it has acted as a mediator in service complaints, and was then required to determine the complaint because the mediation is either discontinued or its outcome is not accepted by both the complainer and the practitioner. The Policy Memorandum accompanying the Bill suggests that any reason for believing that if there were to be a lack of impartiality or other flaw in any general sense this would not be treated as fundamental because of the possibility of judicially review of the Commission. In our view however that analysis is flawed because it fails to recognise the distinction between an administrative function and a judicial function. A dispute between a lawyer and a client as to the competence of a professional service, with a power given to the Commission to determine the professional
competence of the person complained about, and also to make a determination that an enforceable award of compensation for loss is to be paid, involves a determination of rights and obligations which is judicial in nature and not merely an administrative matter. The Commission would be seen as exercising the functions of a court determining the merits of a litigation dispute, but it would not be considered to satisfy the requirements for independence or impartiality. It is a requirement of Article 6 that the final arbiter on the merits of such a dispute is Article 6 compliant. A judicial review will not provide a right of access to a court to determine the merits of the dispute.

j) In our view the members of the Commission should not be appointed by the Scottish Ministers but should instead be appointed by the Judicial Appointments Board. We do not understand why there is a difference in treatment in the Bill between the right of advisers to obtain access to the court by way of appeal whilst there is no right of appeal available for legal practitioners. It is our view that it in order for the legislative scheme envisaged by the Bill to be ECHR compliant it will be necessary to provide a right of appeal to the courts from a decision of the Commission. Even if our views on this are not ultimately accepted we consider that where the Commission has acted as mediator it will be necessary to provide a right of appeal to the courts in order to ensure that the legislative scheme is ECHR compliant, or alternatively that the power of the Commission to act as mediator will require to be removed from the Bill.

k) In order to satisfy Article 6, ECHR the Commission should be required to give reasons for its determinations and decisions. This is not presently part of the Bill. Whether the procedural requirements of Article 6 of the ECHR will be satisfied in terms of providing a “public hearing” with a right of all parties to see and comment on evidence will require to be dealt with in the Commission’s procedural rules which are not detailed in the Bill itself and are to be left to the Commission to determine.

l) We believe that where a person has suffered actual loss then they should receive adequate levels of compensation in respect of such loss. In line with existing law regarding damages for breach of contract which give rise to “inconvenience or distress” we believe that it would be appropriate for only limited modest awards of compensation to be payable as a consequence of this. We would not expect the Commission to order compensation in respect of inconvenience or distress on any basis other than existing principles of Scots law concerning damages for loss and inconvenience as a result of a breach of contract. We would be concerned that Clauses 8(2)(d) and 16(2)(e) as presently drafted could encourage complainers to believe that significant sums of compensation might be paid as a result of alleged “inconvenience or distress” where no real loss has been suffered. Such awards would be equivalent to exemplary damages awards in England. Such awards are not available in Scotland, and we note that in Watkins v Home Secretary, [2006] 2 WLR 807 the House of Lords said that it would not be right in English law to develop the law of tort in cases of misfeasance of public office to award exemplary damages solely as an instrument of punishment in cases where there was no material damage to compensate.

m) The issue as to payment of compensation raises five other points which we believe require to be considered. Firstly, we are concerned that Clause 10(2) only provides that compensation directed to be paid under Section 8(2)(d) “may” be taken into account. In
our view where such a direction has been given then the court would be required to take that into account in the computation of damages in order to avoid a person recovering more than the loss suffered. The word “may” in Clause 10(2) ought to be replaced with “shall”. Secondly, in our response to the Consultation we had recommended that there be no limit on the amount of compensation to be paid. This was proposed on the basis that it was the professional body which assessed the complaint and determined whether there had been professional negligence at all. The absence of a limit would mean that a complainer would not have to go through two processes in order to recover the full level of damages. A weakness of the proposals in the current Bill is that two different processes might well be required where a loss exceeds £20,000. In our view it would be better for the complainer as well as the practitioner if any loss could be determined in a single process. Thirdly, as already noted the lack of practical professional knowledge and experience of those exercising that judgement means that the correctness of the decision exercised will be questioned. Fourthly, the payment of compensation for inadequate professional service amounting to professional negligence applies just as much to court practitioners as it does to all other lawyers. This cuts across the existing position as regards immunity for claims for damages arising from the conduct of court proceedings. This is an area recently considered by the courts in so far as the conduct of criminal proceedings in Wright v Paton Farrell, 2006 SLT 269. The public interest reasons for this were discussed by the court – not undermining criminal convictions through indirect challenge, the avoidance of protracted trials caused by lawyers defending themselves from future complaints, the risk of impairing the proper administration of justice in “Anderson” appeals and similarly impairing the work of the Scottish Criminal Cases Review Commission. Fifthly, we do not consider that it would be fair if claims for compensation for professional negligence which came to be determined by the Commission were not covered by the insurance cover applicable to existing court claims. We do not know what the actual position is in respect of this matter, but we would hope that the point was properly considered as part of the overall consideration of the Bill’s proposals. Despite the populist tabloid view that all lawyers are “top lawyers” with high earnings, the reality is quite different. The absence of insurance cover would have its biggest impact on small firms of solicitors, single practitioners, law centres and many advocates.

n) Clause 8(3)(d) seems to be an unusual provision. It is hard to envisage the circumstances in which a “prior direction” to pay compensation under Section 8(2)(d) might arise when making a decision as to what steps to order under Clause 8(2).

o) Clause 15(4)(b) provides that the Commission must not investigate a handling complaint “made after the expiry of 6 months after such date as the Scottish Minister may specify by order”. Paragraph 32 of the Explanatory Notes would suggest that this is the date on which the professional organisation determined the conduct complaint. We don’t see why Clause 15(4)(b) simply doesn’t state that in those terms.

p) Clause 29 provides for monitoring by the Commission of the Guarantee Fund and the professional indemnity arrangements. We see no good reason for these provisions as we are not aware of any deficiency or problem which has been identified to justify an additional level of regulation.

LEGAL AID
Summary of SCOLAG Response to Consultation Exercise on Publicly Funded Legal Assistance

SCOLAG supported the proposal that there was public funding of non-legally qualified advisers provided that there is proper quality assurance built into the delivery of these services. We also suggested that it will be necessary to carry out further community based research to achieve a more informed assessment of what unmet legal need might exist in different parts of the country and what problems are faced by those who do not, for many and varied reasons, make use of the existing provision of services. Without that information it will not be possible to identify what services are needed in Shetland or what might be required in Leith. This however also led us to query what the overall intended strategy was in seeking to fulfil the underlying aims and principles of a PFLA service. We believe that it is essential that there is a commitment to a Scottish wide provision of community based law centres which have management committees drawn from the locality they are based in. We also believe that there needs to be wider public involvement in the managing board of the proposed National Co-ordinating Body than currently exists in the case of the Scottish Legal Aid Board.

Comments on Proposals in Part 4
We support the proposals set out in Clause 44 of the Bill. Whilst we support in general the policy of the legislation in creating a system whereby non-legally qualified advisers can provide advice and assistance, we are concerned about the piecemeal way in which this is being done. We will have to wait to see whether the Scottish Legal Aid Board are able to deliver the appropriate level of quality assurance.

We would have wanted to see a more thorough going assessment of what was needed in the way of public funding of legal services in order to ensure delivery of increased access to justice throughout the whole country. The putting together of this proposal with the measures in Part 1 of the Bill highlights the different levels of supervision and costs between lawyers and non-lawyers in the provision of legal advice. We are concerned that an unintended consequence of the Bill will be to further discourage solicitors from doing social welfare law type cases. English experience shows that there is a beneficial difference of outcome for the client when lawyers are involved compared to when non-qualified advisers are used. We are concerned that without a thorough assessment of what is needed the funding of registered advisers will end up undermining access to justice through this type of work being undertaken almost entirely by registered advisers. We are concerned that there already exists a serious shortfall in access to legal advice services. We dislike the use of terms such as “Cinderella services” and “legal aid deserts” as being too simplistic and emotive. What is proposed is fine in so far as it goes, it’s just that what is proposed does not go very far in addressing actual needs.

In our view there are problems in understanding how aspects of the Bill as currently drafted fits in with existing employment legislation. The Bill does not give clear guidance
on whether the new professional profile of the "registered adviser" will be able to issue and advise on compromise agreements in the context of employment disputes [as per Section 203 of the Employment Rights Act, for example]. It would be desirable to see a clarification of the interaction between the definition of the "registered adviser" as per Section 45 of the Bill and the definition of "the relevant independent adviser" as per Section 203 Employment Rights Act 1996 and amendments (3A)(d). An indication of principle on whether the new professional profile will be able to draft and advise on compromise agreements without being in breach of ERA would be desirable. Furthermore, a registered adviser who in fact receives a financial payment from a client would presently be prohibited from being a relevant independent adviser under the 1996 Act.

The Bill as currently drafted does not offer clear guidance on whether Legal Aid for assistance by way or representation (ABWOR) [and not just "advice and assistance"] would extend to the new profile of the "registered adviser" or not. The registered adviser may recoup fees for "oral or written advice" but no unequivocal statement of whether he or she might recoup outlays for assistance by way of representation. Clause 45(5) suggests amendments to the 1986 Act. The position set out by these amendments is unclear. If it is intended that ABWOR as defined by Section 6(1) of the 1986 Act means AWBOR provided by a register adviser it should state it clearly. As the Bill is currently drafted we know that ABWOR as defined by Section 6 (1) of the 1986 Act as meaning at least "advice and assistance" by a registered adviser. Does it also mean ABWOR by a "registered adviser"?
POLICE, PUBLIC ORDER AND CRIMINAL JUSTICE (SCOTLAND) BILL: POLICE RETENTION OF DNA

I think it is important to write and clarify a point made during day 4 of the Stage 2 consideration of the Police, Public Order and Criminal Justice (Scotland) Bill on 28 March. That session included consideration of amendment 148, in the name of Paul Martin MSP, which would have enabled the police to keep the DNA which they take from persons who are either detained on suspicion of committing an imprisonable offence or who are arrested and in custody, whether or not those persons were later convicted of an offence. During that discussion, I commented on the amendment and also responded to points which had been made by members of the Committee.

In a response to a point made about ownership and control of DNA information taken in Scotland but held by the National DNA Database in Birmingham, I suggested that the information would be the property of the Scottish DNA Database and could only be used in a way that was authorised by them.

However, following updated advice from the Scottish DNA Database, I can advise that DNA profiles and samples are seen as the property of the police force which takes and develops them. The DNA samples are held by the Scottish DNA Database according to the instructions of that police force.

If the National DNA Database wanted to use DNA samples taken by the police in Scotland, it would certainly need to seek the permission of the Scottish DNA Database before that could be done.

On the other hand, regarding the DNA profiles which are exported to the National DNA Database, these profiles are routinely used to check against DNA profiles recovered from crime scenes and it would be impracticable for the National Database to seek Scottish permission every time this is done. Research uses of the profiles held by the National DNA Database must be approved by the National
DNA Database board, which includes Scottish representation in the person of Willie Bald, the Deputy Chief Constable of Tayside Police.

Deletion of Scottish DNA profiles on the National DNA Database is done on the instruction of the Scottish DNA Database and in accordance with Scottish legislation. These profiles are deleted when the person is acquitted or when it is decided not to pursue proceedings against the person.

I trust that this letter clarifies the matter. If you have further queries, my officials and I would be happy to provide more information.

Yours sincerely,

Hugh Henry

HUGH HENRY