INTRODUCTION

1. This document relates to the Legal Profession and Legal Aid (Scotland) Bill introduced in the Scottish Parliament on 1 March 2006. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 56–EN.

POLICY OBJECTIVES OF THE BILL – AN OVERVIEW

2. The Bill stems from two separate strands of policy development: a set of reforms intended to improve the system for the handling of complaints against lawyers and a programme (of which the Bill represents the first stage) intended to improve and better co-ordinate the delivery of all forms of publicly funded legal assistance (PFLA), provided by both lawyers and non-lawyers. Both follow on from earlier inquiries by the Justice 1 Committee of the previous Parliament, and subsequent policy development and consultation.

3. The Scottish Executive intends to establish a new statutory body, independent of the legal professional bodies, to handle complaints about the service provided by practitioners. Practitioners include solicitors, advocates, conveyancing or executry practitioners and persons exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. A firm of solicitors, an incorporated practice, and a limited liability partnership whose members are solicitors are also included within the definition of practitioner.

4. The policy of the Scottish Executive is that complaints from clients should be dealt with wherever possible by the law firm, lawyer or other practitioner who provided the service in question. The new body, the Scottish Legal Complaints Commission, will act as a gateway to receive those complaints about practitioners which cannot be resolved at source. The new body will take over the handling of complaints about inadequate professional service from the bodies which currently deal with them and will be independent from the legal professional bodies (the Law Society of Scotland and the Faculty of Advocates), the Scottish legal services ombudsman and the Scottish Solicitors Discipline Tribunal. The Commission will be able to enforce its recommendations. The Bill provides for the abolition of the office of the Scottish legal services ombudsman by order.
5. The legal professional bodies and their discipline tribunals will retain responsibility for professional discipline. The Commission will accordingly refer complaints about the conduct of lawyers to the professional bodies for investigation, but will have powers to oversee the way in which conduct complaints are handled. The Commission will be led by a board which will have a non-lawyer majority and a non-lawyer Chair. Commission decisions will be subject to internal review by the Commission appeals team. The proposed new complaints handling arrangements are intended to provide quicker outcomes for both complainers and practitioners. Any further appeal would be by way of judicial review.

6. The proposed arrangements are intended to recognise the feedback from the consultation of May to August 2005 on Reforming Complaints Handling, Building Consumer Confidence that there should be a complaints handling body independent of the legal professional bodies and that its powers should be vested in a board rather than a single officeholder. An analysis of the responses made to consultation was published on 26 October 2005. The new system aims to build public confidence in the system for handling complaints against lawyers while the Commission will also have the role of promoting good practice in complaints handling by law firms and practitioners. The Commission will be funded by the legal profession through a general levy on legal practitioners and a levy on complaints, with no fee being charged to the complainer for making a complaint. Vexatious or frivolous complaints will be sifted out and will not be the subject of a levy.

7. The Commission will oversee the effectiveness of the Law Society’s Guarantee Fund and Master Policy, and is expected in particular to monitor turnaround times in settling claims made. It will publish an annual report which Scottish Ministers will lay before the Scottish Parliament. The location of its offices will be subject to the approval of Scottish Ministers and is expected to be subject to a location review.

8. The Commission will publish an annual report which Scottish Ministers will lay before the Scottish Parliament.

9. On the delivery of publicly funded legal assistance, the Strategic Review of the Delivery of Legal Aid, Advice and Information reported to Scottish Ministers in June 2004. The Review made a number of recommendations for changes in the systems of legal aid and advice and in the related arrangements for the provision of a wide range of advice. The Review reported the need for a more strategic and co-ordinated approach to planning and delivery of publicly funded legal assistance; better integration between solicitors and non-legally qualified advisers; and the need for legal assistance to be developed in conjunction with planned changes in the justice system.

10. The measures included in the Bill form part of a wider programme, which will include secondary legislation made under existing powers and non-legislative work, and are intended to pave the way for wider, longer-term reform. The Executive’s consultation of June to September 2005 on Reforming Complaints Handling, Building Consumer Confidence can be viewed at http://www.scotland.gov.uk/Publications/2005/05/0910327/30369. The analysis of written consultation responses can be accessed at http://www.scotland.gov.uk/Publications/2005/10/24101803/18085. The full report on the Strategic Review can be viewed at http://www.scotland.gov.uk/library5/justice/srlam-00.asp.
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2005 on Advice for All: Publicly Funded Legal Assistance in Scotland made it clear that progress towards fully coordinated arrangements across all types of advice and information would be accomplished in at least 2 stages: initial changes aimed at introducing more flexibility in the current legal aid system paving the way for the subsequent establishment of a new coordinating body with powers to plan, co-ordinate and develop advice provision and, through match funding of advice providers, to steer the provision of different kinds of advice.

11. The proposed initial changes included in this Bill include transferring the power to grant legal aid in solemn cases from the courts to the Scottish Legal Aid Board (SLAB). It is the Executive’s intention that this should enable the consistency and transparency of the assessment of eligibility to be improved and will provide SLAB with more control over costs and fraud risks. Further powers are included for SLAB to fund non-legaly qualified advisors. While this will be done in situations where services would otherwise be unavailable (e.g. because the level of demand makes the provision not viable for a local funder) the power will enable SLAB to begin to be more proactive in ensuring provision of legal assistance through a mixed model of provision. The Bill also makes technical changes in the arrangements for contributions and payments out of property recovered in civil legally-aided cases.

CONSULTATION

Legal profession

12. The Executive published its consultation document Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland on 11 May 2005. Copies of the consultation paper were distributed to a wide range of suppliers and users of legal services in the private, public and voluntary sectors. The consultation paper set out options for reforming the handling of complaints against legal practitioners in Scotland by introducing a greater degree of independence and oversight into the system.

13. The launch of the consultation attracted media coverage in a number of Scottish newspapers. It was further publicised on the Scottish Executive website and the websites of organisations such as the Scottish Council for Voluntary Organisations, the Scottish Consumer Council, Which (the Consumers Association) and the Scottish legal services ombudsman (SLSO). Consultation papers were also issued to a selection of Citizens’ Advice Bureaux and public libraries across Scotland.

14. To widen the reach of the consultation and encourage responses from members of the public, a summary leaflet publicising the consultation was distributed in July, via the Law Society on behalf of the Scottish Executive, to people who had complained to the Law Society since 1 September 2003. Approximately 6,000 leaflets were issued in this way. Ten copies of the leaflet were also sent to each of the 1,400 solicitor’s firms in Scotland with a covering letter from the President of the Law Society inviting solicitors to bring the consultation to the attention of their clients. The leaflet was also sent by the Scottish Executive to all public libraries and Citizens’ Advice Bureaux in Scotland.

The consultation paper can be viewed at http://www.scotland.gov.uk/Publications/2005/06/16153135/31366
15. The main options for reforming the present structure highlighted in the consultation paper were:

- increasing the investigatory powers of the SLSO;
- making the office of the SLSO a “single gateway” to receive and sift all complaints where local resolution had not been possible, with wider powers to monitor the complaints handling processes of the professional bodies;
- turning the office of the SLSO into a single gateway which would itself investigate most complaints;
- creating a new independent complaints handling body, with a board led by a lay chair and with a lay majority.

16. By the final cut-off date for receipt of responses, 490 submissions had been made with 85% received from members of the public. Just below 5% of responses were submitted by solicitors. The remaining respondents represented a range of different sectors including consumer groups and local government. The majority of responses from members of the public were from people who had asked the Law Society to investigate their complaint against their solicitor. However, there were indications that a small minority of submissions from the public were from people who are currently or have been involved in the complaints handling process, for example, as lay representatives on a Law Society Committee, or as reporters for the Law Society. Other people declared their interest, including retired police officers, expert witnesses, and former Citizens Advice Bureaux staff. Thus, the overall experience of the members of the public who had responded to the consultation appeared to be broad with responses informed by a wide range of perspectives and involvement. An analysis of the written consultation responses was published on 26 October.

17. The outcome of the consultation showed strong support for the reform of the complaints handling system. In particular, the majority support was for a model where an independent complaints handling body would be set up and headed by a board with a non-lawyer chair and a non-lawyer majority. The new body would handle complaints of inadequate professional services itself and would oversee the investigation by the professional bodies of conduct complaints. The consultation paper also included a number of other issues which feature in the bill provisions, such as oversight of the Law Society’s Master Policy and Guarantee Fund and various measures requested by the Law Society such as additional powers relating to conduct.

Legal aid

18. The Executive published its consultation document *Advice for All: Publicly Funded Legal Assistance in Scotland - The Way Forward* on 17 June 2005. This document set out the Executive’s proposals for change in legal assistance that is paid for from the public purse. This covers advice provided by the legal profession as well as a wide range of other providers such as local authorities and the voluntary sector.

19. Over 300 copies of the consultation paper were distributed to a wide range of interested parties in the legal profession and the public and voluntary sectors, including organisations representing service users. The consultation period ran from 17 June 2005 until 9 September
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2005 although this closing date was subsequently extended until the beginning of October to allow for late responses

20. The consultation was also publicised on the websites of the Scottish Executive, the Scottish Legal Aid Board and the Law Society of Scotland and was supported by a debate in the Parliament on 23 June. Four consultation events were hosted by Scottish Executive officials across Scotland in early September aimed at allowing interested individuals and organisations to discuss and ask questions about particular issues raised by the consultation. In addition, Executive officials spoke at events organised by a Glasgow based Law Centre, Citizens Advice Scotland and CoSLA aimed at introducing advice providers to the consultation and its main themes and providing opportunities for formal discussions on the consultation.

21. The consultation paper highlighted far reaching options for reforming the present system including a new structure to allow more people to benefit from civil legal aid and assistance in Scotland. Other key proposals were:
   - providing people on moderate incomes, but earning more than the current threshold of eligibility for legal aid, with some financial support to pursue their cases;
   - providing the Scottish Legal Aid Board with additional powers to improve delivery of civil publicly funded legal assistance and to ensure adequate provision by a range of methods, including the ability to fund non-solicitors;
   - transferring the granting of solemn criminal legal aid from the courts to the Scottish Legal Aid Board to ensure better transparency and consistency and ensure better value for money for the public purse;
   - considering the introduction of means tested contributions in criminal publicly funded legal assistance with the aim of making sure that those who can afford to pay towards their own defence should do so.

22. Because of the relatively complex and often technical content of the consultation paper, a decision was taken to engage members of the public in consideration of the topics by way of focus groups. A series of 8 such groups was held across Scotland with a wide range of people. A separate report of the findings from these focus groups is available. An overview of the 2 studies is also available.

23. By the final cut-off date for receipt of responses, 65 submissions had been made. All responses were from professional bodies, organisations and individuals with none submitted by members of the public. Legal bodies comprised the largest respondent sector (34%) but voluntary sector organisations (31%) and local authorities (23%) respectively also contributed significant proportions of the overall submissions. An analysis of the written responses was published on 2 March 2006.

BILL PROVISIONS – LEGAL PROFESSION

24. The main purpose of the Bill is to establish a new statutory complaints handling body, the Scottish Legal Complaints Commission, that will be independent of the legal professional bodies. The functions of the Commission are explained more fully in the paragraphs below.

Proposed model

Policy objectives

25. Under the existing statutory system, complaints against legal practitioners are dealt with by the professional bodies, the Law Society of Scotland and the Faculty of Advocates. Statute provides for the Scottish Legal Services Ombudsman to review the way in which a professional body has handled a complaint but not the substance of the decision. In November 2002 the report of the former Justice 1 Committee acknowledged public concern about the principle of lawyers policing other lawyers and made a number of recommendations aimed at improving public confidence in the complaints handling system for the Scottish Executive and the professional bodies to follow up. Notwithstanding the measures taken by the professional bodies in the intervening period, there has remained a public demand for greater independence and oversight.

26. The proposed reforms of the system of complaints handling aim to put the users of legal services at the heart of regulatory arrangements. This would be achieved by introducing a greater degree of independence to the system and by increasing oversight functions.

27. The Bill is intended to create a Scottish Legal Complaints Commission (independent of the legal professional bodies) that would take over the handling of complaints about service from the legal professional bodies and the office of the Scottish legal services ombudsman (SLSO). The Commission would be headed up by a board composed of a non-lawyer chair and a non-lawyer majority. Appointments to the Board would be made by Scottish Ministers and subject to the public appointments procedures and the scrutiny of the Scottish Commissioner for Public Appointments.

28. The new arrangements will lay emphasis on the importance of complaints being resolved at local level by the practitioner or law firm wherever possible. The Commission would be a gateway to receive all complaints which had not been resolved locally, but would be required to pass on complaints about the conduct of a practitioner to the relevant professional body. Complaints about inadequate professional service would be investigated by the Commission itself. Such complaints could include an element of alleged negligence in respect of the services in question. The maximum amount of compensation for inadequate personal service complaints would be raised to £20,000. Although the professional bodies would retain responsibility for complaints about the conduct of legal practitioners, the Commission would take over the role of the SLSO in overseeing the way in which the professional bodies handle conduct complaints and would also have the power to enforce its recommendations. Appeals against the Commission’s decisions would be by internal review in the first instance and by judicial review thereafter.

29. There will also be a role for the Commission in providing guidance to the profession on good practice in complaints handling.
30. The Commission will also have an oversight role in connection with the Master Policy and the Guarantee Fund operated by the Law Society of Scotland. This oversight power responds to concerns expressed by the public about delays in receiving settlement under the two schemes. Those concerns featured in the report by the former Justice 1 Committee mentioned above.

Consultation/alternative approaches

31. A number of options for models of reform were set out in the consultation paper as follows:

- option A – tougher powers for the SLSO under the existing arrangements;
- option B – establishment of the SLSO’s office as a gateway to receive all complaints for onward transmission to the professional bodies for investigation;
- option C – the establishment of a single gateway to receive all complaints but with discretion to pass conduct complaints to the professional bodies;
- option D – similar to option c but headed by a board rather than by a single office holder.

32. Options A and B were seen by respondents as providing a greater degree of independence but not going far enough in providing objectivity, impartiality and independence. Option C received more support as it was seen to provide more independence and therefore more likely to improve public confidence. However, overall the consultative response favoured Option D with many respondents favouring a board rather than a single office holder. In particular, consultees saw a non-lawyer chair and non-lawyer majority on the board as beneficial in promoting public confidence. Therefore, the proposed arrangements set out above acknowledge a strong message from the consultation that extensive powers should be made available to an independent complaints handling body and that these powers should be vested in a board rather than a single statutory office holder.

33. The consultative response indicated some concern over the appointments to the board being made by Scottish Ministers as this might open up the process to political interference. However, scrutiny of the process by the Commissioner for Public Appointments is intended to ensure transparency and accountability.

Funding

Policy objectives

34. Under current complaints handling arrangements, the complaints handling function of the professional bodies is funded by their members through subscriptions. The office of the SLSO is funded by the Scottish Executive. It is intended that the profession should continue to fund complaints handling with the Executive funding the start-up costs of the new body. The estimated running costs of the Commission are set out in the Financial Memorandum.

35. The funding model of the Financial Ombudsman Service is seen to work well for the financial sector and it will be adopted by the new Commission. Funds for the new Commission will be obtained by two levies – one is an annual general levy on all practitioners and the other is a complaints levy which would be payable by practitioners in relation to eligible complaints,
excluding those which the Commission deemed to be frivolous or vexatious or otherwise ineligible in terms of its rules. The complaints levy would in effect be a charge for a dispute resolution service being provided by the Commission. It will be for the Commission to decide the proportion of funding that each type of levy will contribute and then to set the amount of each levy in each financial year. It will be for the professional bodies to collect the general levy from their members and pass it to the Commission. The Commission will be able to make rules in respect of arrangements concerning the levies.

36. The Commission will be required to consult the professional bodies and the profession every January ahead of setting its budget and the levies for the forthcoming financial year. This will allow the professional bodies and their members to scrutinise the Commission’s proposals and express a view on whether the levies proposed are reasonable.

37. Scottish Ministers will have a general power to provide grants or loans to the Commission. This is intended as a reserve power, rather than as any element of core funding, but it may be used to fund start-up costs.

Consultation/alternative approaches

38. The consultative response indicated a split between the public and the profession on the matter of funding, with the former being in favour of the profession funding the Commission and the latter presenting an opposite view preferring funding from public sources. The profession were concerned that they were being asked to fund a body which they could not control and for which they were not accountable. However, given that the profession currently fund the complaints handling process, it was considered appropriate for the profession to continue to do so. The requirement for the Commission to consult the professional bodies and their members on levies and budgets is considered by the Executive to be a reasonable check.

Rule-making power

Policy objectives

39. In most cases the Commission will have rule-making powers in relation to its practices and procedures for the handling of complaints. The Commission will be required to consult Scottish Ministers, the legal professional bodies and relevant consumer bodies before creating or varying such rules. The rules will include provisions regulating the making of complaints to the Commission; the handling of complaints by the Commission; the nature of evidence which may be required; the fixing of time limits; and arrangements for the review by the Commission of its own decisions and determinations. The rules will also enable the Commission to make different provision for different categories of complaint.

40. While stakeholders will therefore have an opportunity to contribute to the regulatory procedures of the Commission, it will be for the Commission itself to make final decisions.

Alternative approaches/consultation

41. The consultation paper did not address the specific details of the rule-making powers of the Commission. However, in the spirit of establishing a system which would be both workable
and acceptable to stakeholders, it was considered appropriate to involve stakeholders in the rule-making function.

**Annual reports and accounts**

**Policy objectives**

42. The Commission will be required to prepare a statement of accounts in respect of each financial year and to send the statement to Scottish Ministers who will then forward to the Auditor General for Scotland for auditing. At the end of each financial year, the Commission will also prepare a report on the discharge of its functions during that year and on actions the Commission proposes to take in the following year in pursuance of its functions. The Commission must publish the report and send a copy to Scottish Ministers who will then lay it before Parliament.

**Alternative approaches/consultation**

43. The reporting arrangements set out above are standard procedure for most Non-Departmental Public Bodies and therefore no consultation was considered necessary and no alternative approaches were considered.

**Legal profession: other matters**

**Policy objectives**

44. Part 3 of the Bill includes two measures which were proposed in the consultation document Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland.

45. The consultation paper sought views on:

- the recommendation made by the former Justice 1 Committee that the membership of the Scottish Solicitors’ Discipline Tribunal should be made up of 50% non-lawyers (instead of the existing proportions of not less than 10 and not more than 14 lawyer members and 8 non-lawyers). Strong support was expressed for such a change in the response. The Bill provides for the Tribunal to have a maximum of 28 members, consisting of equal numbers of solicitor and non-lawyer members.

- a proposal by the Law Society of Scotland that solicitors who are no longer practising as such should not be able to act as notaries public. The Bill requires solicitors who wish to practise as notaries public to have a current practising certificate. The purpose of this change is to protect members of the public from the risk which arises where notaries who are no longer practising as solicitors (and who do not have a current practising certificate) practise as a notary without being covered by the Society’s Master Policy for professional indemnity insurance or Guarantee Fund. The Bill removes this potential risk to the public.

46. Part 3 contains a measure which prepares the way for commencement of sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. These sections provide for rights of audience and rights to conduct litigation to be granted, with the approval of the Scottish
Ministers and the Lord President of the Court of Session, to members of professional or other bodies, subject to the approval in each case of a scheme prescribing safeguards in relation to such matters as the training requirements to be imposed on members, provision required for professional indemnity insurance and the arrangements for handling complaints against members. The Bill amends the Solicitors (Scotland) Act 1980 to remove a difficulty which would otherwise prevent the extension of rights to conduct litigation as envisaged by the 1990 Act. The difficulty is that the 1990 Act failed to amend section 32 of the Solicitors (Scotland) Act 1980 so that a person granted the new rights of audience would be able to draw up writs relating to court proceedings.

47. The Bill also includes a measure which is designed to safeguard the interests of clients of sole solicitors who have been has has been restricted from acting as a principal by the Scottish Solicitors’ Discipline Tribunal. The Bill provides for a client account held in the name of a solicitor or solicitor’s firm to vest in the Law Society of Scotland in such circumstances until such time as the Council have approved acceptable other arrangements in respect of the client account.

48. Lastly, this Part of the Bill increases the borrowing limit available to the Law Society of Scotland in respect of the Guarantee Fund from £20,000 to £1.25m. Under the Solicitors (Scotland) Act 1980 the Society may borrow money for the purposes of the Guarantee Fund in such manner and on such security as they may determine. The Society considers that the limit should be increased from its original level of £20,000 to the figure of £1.25m which is the sum it needs to be able to pay losses up to £2m from its own resources.

Alternative approaches

49. No alternative approaches were considered on these matters.

BILL PROVISIONS – LEGAL ASSISTANCE

Granting of legal aid in solemn cases

Policy objectives

50. The aim is to improve the consistency and transparency of the assessment of eligibility for legal aid and to provide more control over costs and fraud risk by transferring the power to grant legal aid in solemn cases from the courts to SLAB. The ability to terminate legal aid in solemn cases where appropriate and to recover costs from the applicant where there has been a false disclosure of means will also be transferred to SLAB via secondary legislation.

51. The Strategic Review considered that the test of undue hardship applied by the courts in solemn legal aid is essentially the same as that applied by SLAB in summary cases. It noted however, that the apparent lack of either guidance on how to apply the test or information on the number of applications refused on the basis of means made it difficult to assess whether the test is being applied properly and consistently. The review also noted concern that the present arrangements commit the Board to making payments of fees and outlays in solemn cases where it has no control over the assessment process and, moreover, where costs may be high. This concern is exacerbated by SLAB’s lack of power to withdraw or recover costs in the event of an applicant having been found to have made a false disclosure of income or capital; the court can
withdraw legal aid in such circumstances but has no powers of investigation in relation to legal aid.

52. The Executive considered that by removing the legal aid function from the court this would provide clear management information to SLAB on grant and refusal rates enabling consistency, transparency and the basis for decision-making to be monitored. The review did note the possible concern that any change may create delays in the assessment process, prejudicing early preparation of the case, but suggested that the availability of automatic criminal legal aid, the special urgency provisions of regulation 15 of the Criminal Legal Aid (Scotland) Regulations 1996 and SLAB’s consistent speedy turnaround of summary applications should prevent these concerns from being realised.

53. The review also addressed the question of legal aid where a person has not previously been sentenced to imprisonment or detention and the court is considering such a sentence in summary proceedings. The court grants legal aid in such circumstances under section 23(1)(b) of the Legal Aid (Scotland) Act 1986, applying the same undue hardship test as for solemn legal aid. It is the Executive’s opinion that, for consistency’s sake, responsibility for granting this form of legal aid should, in principle, be transferred to SLAB. As sentence is almost invariably deferred in such circumstances, the Executive considers it unlikely that consideration of means by SLAB would introduce undue delay or cause adjournments for legal aid to be sought. However, SLAB would have to determine whether the court was indeed considering a first custodial sentence and would, therefore, have to seek confirmation from the court, thus introducing a degree of double-handling and additional administrative complexity. For this reason, the review concluded that financial assessment in such cases should not be transferred to SLAB.

Consultation/alternative approaches

54. The Advice for All consultation paper asked whether responsibility for granting criminal legal aid in solemn cases should be transferred from the courts to SLAB. Twenty-four respondents addressed this question. The majority view was opposed to the transfer of responsibility for granting criminal legal aid in solemn cases from the courts to SLAB. However, this overall picture masked a difference between respondent sectors, with a clear majority of legal bodies opposing the proposal compared with a slight majority of other respondents favouring this transfer of responsibility. Those in favour argued that this would promote a consistency of approach and improve the detection and prevention of fraudulent applications and recommended that a fast-track process be established by SLAB to deal with applications speedily. Those who opposed argued that the courts had expertise in assessing financial circumstances and eligibility and that the proposal would result in delays in solemn proceedings which would be unacceptable in the context of serious cases. Others considered that the current system worked well and there did not appear to be any compelling evidence to suggest change was necessary while a few consultees disagreed that the transfer of responsibility would lead to greater consistency in decision-making or openness.

55. The consultation also asked whether there was an alternative way of improving the transparency, consistency and cost control of the solemn criminal legal aid system. Very few consultees addressed this question and only 5 provided any substantive contribution to the issue. Two suggested introducing a clear test of eligibility with training on its application, one
proposed that judges and sheriffs should minute the information on which they had based their decision, another suggested a fixed fee be introduced for certain aspects of preparation of cases and yet another recommended that courts are given powers to make expense orders, where they see fit, at the conclusion of proceedings, with these subject to the usual right of challenge. The Executive’s view is that the provision in the Bill is the preferred option as SLAB will be able to operate the new proposals effectively, together with existing provisions which ensure that accused persons have access to publicly funded legal assistance until their application for criminal legal aid has been decided by SLAB. On balance, the anticipated benefits in terms of improved consistency and transparency of decision making and greater control over both costs and fraud risk make this a desirable change.

56. The consultation also asked whether SLAB should be given powers in solemn cases to terminate legal aid where this is appropriate, as it currently can in summary cases. Eighteen respondents addressed this question with most agreeing to the proposal, regarding it as promoting consistency with the handling of summary cases. However, even amongst those who supported the proposition were warnings that this power should be used sparingly and only if justified beyond reasonable doubt. One consultee urged that the applicant should be allowed to make representations regarding the potential termination and arguments opposing the proposition focused on its potential to disrupt trials with knock-on effects across the system.

**Funding of non-legally qualified advisers**

*Policy objectives*

57. The aim is to help ensure that people receive advice from the advisor with the most appropriate skills, knowledge and experience by enabling SLAB to fund advisors other than solicitors to provide advice and assistance.

58. At present only solicitors (or, where appropriate, counsel) may provide advice and assistance under the Legal Aid (Scotland) Act 1986, and SLAB has no powers to pay other advisers for the provision of legal advice. A wide range of other, often non-legally qualified, advisers are, however, also engaged in the provision of publicly funded legal assistance in civil matters. To facilitate further integration of provision of legal advice by lawyers and non-lawyers the Executive believes that in the longer term a national co-ordinating body would need to be able to fund services delivered by non-legally qualified providers, in particular specialist advisers. The Strategic Review recognised that some of the work done by solicitors under advice and assistance is very similar in nature to work done by many non-legally qualified advisers who are currently excluded from the scheme and, therefore, supports in principle a removal of the current distinction in advice and assistance between legally qualified and non-legally qualified advisers.

59. The review envisaged that, generally, non-lawyers would not have access to the same case-by-case funding regime as solicitors. It argued that local authorities should retain primary responsibility for the planning, funding and/or provision of local non-lawyer services and that the grant funding mechanisms already in place are the most appropriate way of funding generalist advice provision. The review recommended that specialist services should be either grant-funded, be based on contracts or, in the longer term, be delivered by specialist advisers employed directly by the proposed national planning and co-ordinating body. It also
recommended that a specific fund should be established by the body for this purpose based on
the principles of match or joint funding, conditional on continued investment by the local
authority. These are issues that will be considered for implementation in the second stage of the
programme of improvements.

60. The review saw some scope for some specialist services to be funded on a case-by-case
basis, particularly where, for example, demand is unlikely to be sufficient to make specific grant
funding feasible and it is this ability to which the proposals in the Bill give effect. In order to
directly ensure control of the quality of provision of advice by non-lawyers, it is intended that SLAB be
required to maintain a register of advice providers who would have to abide by a Code of
Practice to be developed by SLAB. This is in line with the current arrangements for the
registration of providers of criminal legal assistance and can help to encourage the development
of quality systems for advice and advice providers where they do not already exist and ensure
that the organisation, or an individual within it, has the specialist skills necessary for the types of
case they take on. In addition, where cases are funded on an individual basis, the same criteria as
are currently applied by solicitors would have to be put into place, including financial eligibility.

Consultation/alternative approaches

61. The Advice For All consultation asked whether, in the short to medium term, SLAB
should be able to fund provision by non-legally qualified advisers as well as solicitors and
advocates. Forty-four of the 65 respondents addressed this question with the vast majority in
favour although the strength of support from non-legal bodies and individuals was far greater
than that expressed by legal bodies. Arguments in favour of the proposal included that non-
legally qualified practitioners were already making a significant contribution to the delivery of
legal advice and would continue to have much to offer, that the proposal would open up
consumer choice and that it could better serve the needs of specific groups. One consultee went
further to propose that SLAB be given powers to enter into contracts or grant funding
arrangements with non-legal agencies and many agreed that the scheme should be underpinned
by a robust system of quality assurance and accreditation of the non-legal advisers involved.
Several respondents expressed cautious support for the proposal provided that certain features
such as the provision of additional funds to pay for the scheme and clear definitions of the types
of advisors and advice topics were in place. The Executive considered both grant-funding and
case-by-case funding arrangements and concluded that, for the present, the development of a
case-by-case funding system, with the restricted areas of provision to be covered set out in
regulations, would be a useful preliminary step towards the longer term aim of establishing a
planned mixed model of advice provision and could assist in the development of quality
assurance arrangements for non-lawyer advisers. It was also considered that this delivery
method has the advantage of being based on the existing arrangements for the delivery of advice
and assistance and should ensure that provision is directed to areas of clear need.

62. Of the few respondents who opposed the proposal, 2 were opposed in principle to the
provision of advice on legal matters by advisers who were not legally qualified and concerns
were raised that the proposal could result in a confusion of roles and conflicts of interest and was
better dealt with by the proposed national co-ordinating body on a service rather than individual
case basis.
63. The question in the consultation on whether a national co-ordinating body should be able to fund provision by non-legally qualified providers as well as solicitors and advocates elicited similar responses with the majority in favour of the principle of the most appropriate advice provider but highlighting the need for a robust quality assurance framework. A further qualification was that it should be recognised that some cases, perhaps due to their complexity, would simply not be suitable for a non-legally qualified advisor to handle. A small number of concerns were expressed such as that cases which seem to be straightforward initially could become more contentious as they develop, necessitating a qualified legal input part way through their handling or that the taxpayer may end up paying twice for the same advice provision if both legally qualified and non-qualified advisers are involved. One recurring comment was that it is preferable to support non-legal organisations from public funds, rather than funding individual providers on a case-by-case basis.

**Reinstatement of section 17 of the Legal Aid (Scotland) Act 1986**

*Policy objectives*

64. The aim is to clarify the definition of net liability by specifying that this should include advice and assistance as well as civil legal aid, by reinstating the original terms of section 17(7) of the 1986 Act which provided for this (which was repealed in 1989). The effect of that repeal is that in a few cases recipients of civil legal aid may not receive the full benefits of the outcome of their case. While this issue was not covered in the *Advice for All* consultation it has been raised with SLAB by several solicitors.

**EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

**Effects on equal opportunities**

65. A wide range of equality organisations were contacted as part of the two consultations and the responses which were received broadly welcomed the long-term planning and coordination framework which the legal aid provisions will support. Appointments to the Scottish Legal Complaints Commission will be overseen by the Office of the Commissioner for Public Appointments to ensure the transparency and fairness of the process.

**Effects on island communities**

66. The proposals apply equally across Scotland, and as such have no specific implications for island communities. An increase in the provision of legal services through solicitors directly employed by SLAB (part of the PFLA agenda but not requiring primary legislative change) would have the potential to improve legal services in island communities.

**Effects on local government**

67. No additional duties will be placed on local government by this Bill. As funders and providers of legal advice services local authorities have a key interest in the long-term development of legal advice provision in Scotland, but the legal aid provisions in this Bill will not place any additional burdens on them. Likewise, the provisions relating to a Scottish Legal Complaints Commission will not impact on the work of local authorities.
Effects on sustainable development

68. The Bill has no implications for sustainable development.

Effects on human rights

69. The European Convention on Human Rights is engaged in several areas of the Bill:
   - the Commission;
   - annual general levy/complaints levy;
   - notaries public; and
   - the transfer of the assessment of criminal legal aid in solemn proceedings from the court to SLAB.

Each of these areas is discussed in more detail below.

The Commission

Article 6 of ECHR

70. Article 6 of the ECHR in general terms requires that any mechanism involving the determination of “civil rights and obligations” must provide a right to a fair trial, and lays down specific requirements. The Commission will be an administrative body acting in a judicial or quasi judicial capacity, and we consider that Article 6 will be engaged.

71. A second reason for thinking that Article 6 will be engaged is that in terms of section 10(2) of the Bill the submission of a complainant to the Commission’s jurisdiction does not preclude access to a court to determine a dispute. However, in the case of a practitioner as defined by section 34 of the Bill, the practitioner effectively loses his civil right of access to a court for most purposes and as regards his possessions, and accordingly Article 6 of the ECHR is engaged.

Independent and impartial judge

72. Given that Article 6 is engaged, there must be an independent and impartial judge to determine civil rights. The members of the Commission, who will be the main arbiters in the Commission, are to be appointed by the Scottish Ministers and will be a mix of laymen and lawyers. In terms of paragraph 4 of Schedule 1 to the Bill, the Scottish Ministers are under an obligation to appoint members with relevant experience. Secondly, the appointment system has to be subject to the public appointments legislation (see paragraph 5 of Schedule 4). This ensures that the appointees will be appointed on merit and impartially, so that the Scottish Ministers are really nominal appointers. We think that this will ensure the independence and impartiality of the Commission.

73. There is no stipulation in the constitution of the Commission as set out schedule 1 to the Bill, as to any determinate length of service of a member of the Commission. The only provision is that a member may not be appointed for a period exceeding five years at a time. We think that

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7 See Luordo v. Italy (2005) 41E.H.R.R. 26 at 83.
the question of security of tenure of the job of being a member of the Commission is not the same as the considerations that apply to temporary judges. Being a member of the Commission is not a stepping stone to becoming a full time member of the Commission, because the job by its nature is a part time job.

Other ECHR considerations in relation to the procedures of the Commission

74. The core structure of the complaints handling machinery of the Commission is set out in the Bill. However most of the machinery will be set out in rules made by the Commission itself. As a public body it will be under an obligation to make the machinery ECHR compatible.

75. Although the actual drafting of the rules would be left to the Commission, for ECHR purposes, certain safeguards are built into the rule making machinery so that certain rules have to be made (see section 23 and paragraph 1 of Schedule 3 to the Bill).

76. Paragraph 1(c) to (g) of Schedule 3 to the Bill sets out the most important provisions which must be in the rules. First in terms of paragraph 1(c), the Commission must “have regard to the Convention rights in deciding whether:

(i) to hold a hearing in relation to a complaint being dealt with by it under that Part;

(ii) such a hearing should be in public or private;”.

77. Secondly, the Commission must set up an appeals committee to hear appeals against determinations in relation to complaints and the steps to be taken following the upholding of a complaint and in relation to other important decisions.

78. Thirdly, it is made clear in terms of paragraph 1(e) of Schedule 3 to the Bill that reasons have to be given for various categories of its determinations, directions, decisions or recommendations, but that that is at the discretion of the Commission to be set out in its rules.

Judicial review

79. The Executive has described above the reasons why it thinks that the constitution and practices and procedures of the Commission are likely to be Article 6 compatible. However, if that were not the case, the ECHR jurisprudence is that even if there is some lack of impartiality or other flaw in the way a decision-making body operates, this is not to be treated as a fundamental flaw as far as compatibility with Article 6(1) is concerned, provided there is an adequate judicial control by a Tribunal to correct any flaw in the operation of the decision-making. In other words when the administrative machinery is taken with the judicial

8 In relation to the structure and powers of the Commission in key regards the model of the Financial Ombudsman Service as set up in terms of section 225 of and Schedule 17 to the Financial Services and Markets Act 2000, has been followed. The rules of the Financial Ombudsman Service were subject to careful scrutiny and, in order to make the ECHR compatible, it was considered important that, if there was no external appeal from a decision of that Ombudsman, there would have to be an internal appeal mechanism. Accordingly the mandatory rules provide for an internal appeal mechanism. Secondly, again following the Financial Ombudsman Service approach, it will be necessary for ECHR purposes that, where appropriate, the Commission would have to hold hearings. This would not be required on every occasion, but there would be occasions where for Article 6 purposes, this would be appropriate. Hence the mandatory rule to the effect that the Commission must provide in its rules that, in deciding whether to have a hearing in a particular case, regard must be had to ECHR considerations.
control the machinery as a whole operates in an ECHR compatible way. (See the main UK case which laid down this important point is R (Alconbury) v. The Secretary of State\textsuperscript{9}, followed in Scotland by County Properties v. The Scottish Ministers\textsuperscript{10}).

80. For these reasons we think that the appeal/judicial review mechanisms in place in the Bill in relation to complaints to the Commission are ECHR compatible.

**Annual general levy/complaints levy**

81. Sections 18 and 19 of the Bill provide for levies to be imposed on members of the legal profession to fund the Commission. The levy is divided into two parts. The first is a general levy on every member of the legal profession, and secondly a complaints levy which is paid where there is a complaint against a practitioner as defined in the Bill. The Executive considers that these levies which the practitioners (as defined in the Bill) must pay in terms of section 18(1) are best characterised as charges or taxes. They therefore would not engage Article 1 of Protocol 1.

**Notaries public**

82. Section 43 of the Bill amends the Solicitors (Scotland) Act 1980 to provide that notaries public must not only be solicitors, but have in force a practising certificate. Notaries public carry out a public function insofar as they authenticate in the public interest documents which are important for the proper functioning of trade and other important legal matters. The authentication of documents and the other work carried out by notaries public require a high degree of skill. The Executive’s view is that the public nature of much of the work carried out by notaries public means that the ECHR and in particular Article 11 of the ECHR are not engaged\textsuperscript{11}.

83. Notwithstanding the Executive’s view that Article 11 is not engaged by the Bill in relation to notaries public, the Executive nevertheless has analysed the provision on the basis that the Article is engaged.

84. In order to be justified, the provisions have to be prescribed by law and necessary in a democratic society for one of the aims listed in Article 11(2).

85. The provisions are in the Bill and thus, once law, will be prescribed by law.

86. They are made in order to ensure an effective regulatory framework for a profession to achieve consistency of operation, compliance with professional standards, independent, impartiality and development of sound educational and training measures. Merely to be an enrolled solicitor does not attract this level of regulation. Secondly, and perhaps more important,

\textsuperscript{9} 2001 2 All ER929.
\textsuperscript{10} 2001 S.L.D.1125.
\textsuperscript{11} Sigurdur A Sigurjonsson v. Iceland (1993) A264. That decision was based, among other things, on the fact that the association was entirely of a private nature, was autonomous and solely control of determining its own aims, organisation structure and procedure. In contrast the new Commission (unlike the case cited) is not an association of an entirely private nature etc, but a public body.
from the point of view of the public interest, having a practising certificate as a solicitor, means that a notary public has the full insurance cover of the master policy which gives a high level of insurance cover in the case of negligence by the notary public. There have been cases in recent history where the public have been seriously disadvantaged insofar as notaries public did not have adequate insurance cover and the public lost out in claiming compensation for this negligence.

87. For these reasons it is thought that the requirement that a notary public be both an enrolled solicitor and have a practising certificate is proportionate and justified in a democratic society.

The transfer of criminal legal aid assessment to the Scottish Legal Aid Board

88. It is accepted that the transferring of responsibility for the assessment of criminal legal aid for solemn proceedings to SLAB engages Article 6(3) of the Convention. We are satisfied that the new arrangement is ECHR compatible. SLAB is an independent and impartial body which in terms of section 4(1) of the 1986 Act is charged with the establishment and maintenance of the Scottish Legal Aid Fund (“the Fund”). Article 6(3)(c) of ECHR guarantees the right to legal assistance in criminal cases and the provisions in the 1986 Act concerning applications for criminal legal aid ensure these rights are afforded to applicants. As the 1986 Act gives SLAB the function of providing legal assistance, it will require to comply with the terms of Article 6(3)(c) in its consideration of applications for legal assistance in criminal cases which are being prosecuted under solemn criminal procedure. Section 44 makes provision for an internal review of a decision to refuse criminal legal aid in solemn cases. Although no provision is made in the section for an appeal to the Court of a refusal of criminal legal aid in solemn cases, judicial review is available as a means of challenging a refusal by SLAB to grant legal aid. The remedy of judicial review ensures external judicial control of SLAB’s decision making process. We consider that SLAB’s independence as the primary decision maker, combined with the availability of judicial review as a means of challenging flawed decisions, ensures overall compatibility with ECHR (see Alconbury supra).

89. We are also satisfied that there are no other measures in Part 4 of the Bill which would be outwith legislative competence in terms of section 29(2)(d) by reason of incompatibility with ECHR. The provisions in Part 4 of the Bill do not restrict the current availability of legal aid and accordingly we are of the view that no Article 6 issues arise as a result.
This document relates to the Legal Profession and Legal Aid (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 1 March 2006

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

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