JUSTICE 1 COMMITTEE

Tuesday 13 March 2001
(*Morning*)

£5.00

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JUSTICE 1 COMMITTEE
7th Meeting 2001, Session 1

CONVENER

*Alasdair Morgan (Galloway and Upper Nithsdale) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Phil Gallie (South of Scotland) (Con)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)
Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

WITNESSES

Liz Cameron (Citizens Advice Scotland)
Colin Campbell (Faculty of Advocates)
Martyn Evans (Scottish Consumer Council)
Iain Gray (Deputy Minister for Justice)
Peter Gray (Faculty of Advocates)
Susan McPhee (Citizens Advice Scotland)
Jim Melvin (Citizens Advice Scotland)
Angela O'Hagan (Equal Opportunities Commission)
Sarah O'Neill (Scottish Consumer Council)
Professor Alan Paterson (Citizens Advice Scotland)
Muriel Robison (Equal Opportunities Commission)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Hub

Scottish Parliament

Justice 1 Committee

Tuesday 13 March 2001

(*Morning*)

[THE CONVENER *opened the meeting at 09:46*]

The Convener (Alasdair Morgan): Good morning, ladies and gentlemen. I remind everyone that mobile phones should be turned off. I have forgotten mine, so that will not be a problem for me.

Members might like to note that the convention rights compliance report will be published tomorrow and the stage 1 debate will take place on the afternoon of Wednesday 21 March.

Agenda item 1 concerns whether the committee should take item 5 on the committee's future work programme in private. Are members agreed to do so?

Members *indicated agreement*.

Legal Aid Inquiry

The Convener: Agenda item 2 is the first stage of today's legal aid inquiry. The first witnesses are Martyn Evans, who is director of the Scottish Consumer Council, and Sarah O'Neill, who is the Scottish Consumer Council's legal officer.

Martyn Evans (Scottish Consumer Council): We are very pleased that we have been invited to give evidence to the committee and we warmly welcome the inquiry into legal aid and access to justice.

Our evidence concentrates on access to civil justice. There are some excellent civil legal aid lawyers in voluntary sector advice services in Scotland. Our comments on the system as a whole are meant as no criticism of the individual work and commitment of those lawyers.

We are interested in access to civil justice from the consumer perspective. Our broad conclusion is that, although the legal aid market has some demand-led characteristics, it is in fact almost entirely supply-led.

Supply-led services have a number of characteristics that disadvantage consumers, and legal aid services have some of those disadvantages. Services are offered according to the preferences and competences of providers, which leads to serious gaps in service provision geographically and in service types. Services generally lack quality assurance and quality control systems, with the result that there are widespread differences in service standards and effectiveness. Services tend to concentrate on process—in this case, individual casework—rather than outcomes or problem resolution, with the result that too many actions and decisions that cause problems are not resolved at their source.

Voluntary sector advice and information services are even more clearly supply-led and can share the characteristics that I have outlined. In addition, those services have to gate-keep their free services to keep supply and demand in some sort of reasonable balance. That gate keeping too often results in exclusion of those who cannot physically afford to wait.

The process of keeping people waiting to be seen appears to be a low-cost and effective mechanism of gate keeping. Those excluded because of their difficulty in waiting are often in vulnerable groups, for example, parents with young children, people with disabilities, elderly people and those in low-wage and insecure jobs.

The overall result is twofold. There is a lack of public confidence in the availability of civil justice and there is concern over the total cost to public

funds of civil legal advice and information services.

Our conclusion is not that a full demand-led legal advice and information service should be instituted. We argue for proper service planning, improved consumer representation on service standards matters, improved quality assurance and greater emphasis on preventive work.

The Convener: What areas of advice and representation that are currently beyond the scope of funding could usefully be brought within the scope of legal aid funding?

Sarah O'Neill (Scottish Consumer Council): There are a number of areas in which legal aid is not available at the moment, for example, for small claims and tribunals. Our main concern, however, is that many of the services that people need are not provided under the existing legal aid scheme because it funds solicitors only.

In the past, that has meant that the legal aid system has been very much geared towards traditional areas of work that solicitors deal with, such as divorce, access to and custody of children and personal injury. We are concerned that areas of social welfare law that cover employment, consumer and housing issues, for example, are not appropriately covered by legal aid. Such issues are generally dealt with by advice agencies rather than solicitors. However, such agencies are not adequately funded at the moment to deal with demand. We would like greater provision in those areas.

The Convener: Are you saying that more money within the legal aid budget should be available to allow people who are not legally qualified to give advice?

Martyn Evans: We are saying that the current system of legal aid will not address the problem unless that aid is broken up in a different way and unless there is a strategic overview of the supply of legal advice and information services and those problems of access to employment advice and social welfare law that were mentioned by Sarah O'Neill. Sometimes the appropriate agency is not a solicitor but a citizens advice bureau or other advice service.

Our argument is not that legal aid per se should be extended to those areas of social welfare—indeed, it is there already—or to employment law or other areas, but that the entire civil justice system should be reviewed and public finances reallocated, as appropriate, to problem solving. Problems can be solved through private solicitors who are paid for by some form of legal aid or equally through CABx and other forms of advice service.

The Convener: Do you have any idea of how many people who are not currently assisted can be assisted in that way?

Martyn Evans: We carried out some research in 1997 to try to gauge the extent of unmet legal need. That is a very difficult process and I do not think that it is possible to say how much unmet legal need there is. Such need is very difficult to assess but it is more than the present system copes with. If there is any evidence, I am sure that the CAB service will show how much demand is on its services and how much demand there is in excess of what it can cope with. It copes with around 600,000 inquiries a year but it is stowed out.

The Convener: Cost is obviously a significant consideration and is at the heart of any decision that would be taken by ministers or any other body that has taken a strategic overview. If we do not have a handle on how many people need assistance, it is very difficult to quantify the revenue implications of a change.

Martyn Evans: I think that Professor Alan Paterson's evidence was about the failure of unmet needs assessment to solve the problem that you raise. The cap to any budget cannot be defined by asking what latent demand is. Public policy must be decided in order to determine what will be funded. A strategic view about what will be funded and what services will be made available to people must be taken.

The area is service-led. If there is no local CAB or solicitor with a private practice willing to provide a particular type of legal aid, there is no mechanism for demand to be expressed. It is expressed when there is a CAB service and people are waiting for a very long time. However, I do not see that it is possible to do that on a demand-led basis, and evidence shows that that has not been possible in the past.

Phil Gallie (South of Scotland) (Con): In your opening remarks, you reeled off the names of a number of groups that you felt were disadvantaged under the present system and which found it difficult to obtain legal aid. In fact, those groups represent virtually 100 per cent of those who are eligible for legal aid. If those groups are disadvantaged, what about people who are just above the cut-off point?

Martyn Evans: First, let me make it clear that the disadvantaged groups that I mentioned, such as parents with young children and people with disabilities, are those who find it difficult to wait for free, CAB-type advice services. I made reference to them because of the difficulties that they experience in having to wait.

Mr Gallie also asked about those who are just above eligibility levels: people who are just above income support level or those with very modest levels of savings. The endemic problem with

means-tested services, which members know more about than I do, is that there is always an issue at the margins. However the margin is set, there will always be people who are just above it. Evidence to the committee shows that eligibility levels have been drastically reduced since 1993. I do not know what the Scottish Legal Aid Board's evidence was, but it seems that, when compared to, say, 20 years ago, very few people are eligible now for legal aid.

Phil Gallie: Let us look at this from the other side of the argument, by considering people who are facing court cases that are supported by legal aid. Those defendants are perhaps above the band levels, but if they win their case, they can claim no redress, as legal aid does not extend to paying defendants' costs. Should legal aid meet a defendant's costs when a defendant's case is upheld?

Martyn Evans: I do not think that we have given consideration to that issue.

Sarah O'Neill: That is the case. We should make clear that we cannot talk about the ins and outs of legal aid as it is at the moment. Our evidence is about the broader picture. We do not have evidence about what is happening in the legal aid system at the moment in terms of eligibility, contributions, clawback and so on, so we cannot answer that question.

Phil Gallie: Does that mean that you do not see those individuals as consumers?

Martyn Evans: We see them as consumers but, in logical terms, to create the level playing field that Mr Gallie is driving at, one has to try to make it as fair as possible. Those are matters of public policy, which require political decision making. I do not think that our evidence can be of help to the committee in that respect.

Phil Gallie: Going back to Mr Evans's earlier remarks, which partly covered this area, are there areas of the law that are neglected by the legal profession that come within the scope of legal aid funding?

Martyn Evans: As Sarah O'Neill mentioned, that is clearly the case. Social welfare law is covered by legal aid, but many solicitors do not feel competent or are not competent to deliver it. As I said earlier, some solicitors are excellent at that delivery, although in general, it is an area covered by legal aid that is not delivered very well. The committee has received other evidence, which shows that delivery in rural Scotland is even worse. That evidence showed that geographical issues are involved in delivery; some services are not available to people in certain areas of Scotland.

Phil Gallie: Mr Evans has already pointed out some of his preferences as to the way ahead for service delivery, given the shortfall that he has identified. How is that need met in those areas?

Martyn Evans: In the areas of shortfall?

Phil Gallie: In the geographic areas that you referred to where legal expertise is not available.

Martyn Evans: As there is no mechanism whereby legal need can be expressed as a form of demand, it cannot be seen in the system and problems go unresolved. The only visible expression of demand is the number of those who are forced to wait in free-advice voluntary sector centres. The measure of how crowded those centres are is an expression of demand.

The Convener: Are there people who qualify for legal aid under the legal aid tests, but are told by a solicitor, "This is not an area that I know anything about and, as the next solicitor is 100 miles away, you might as well not bother"?

10:00

Martyn Evans: That can happen, or the solicitor is more likely to say, "I will try to help but I have no real expertise in the area, as I am a generalist solicitor working in a rural practice and I have never come across this issue before." I do not doubt that those solicitors try to be helpful, but the system is not geared to give people's problems that kind of direction and support.

The Convener: Do you have people coming to you saying that, although they qualify, they have been unable to get legal assistance, as they cannot find anyone with sufficient expertise to handle their case?

Martyn Evans: Our organisation does not deal with individual complaints and inquiries. The CAB service will be able to answer that question much more clearly, but I am sure that that happens.

Sarah O'Neill: The point raised by the convener can be illustrated by the experience of the in-court advice project at Edinburgh sheriff court, which we jointly manage with Citizens Advice Scotland. The problem is that often, when people are facing court cases, they bury their heads in the sand and leave things until the last moment. They may not see a solicitor until the day before they are due in court, and then find that the solicitor cannot help them and they have to go elsewhere. The problem is that there is not time for them to be referred to the correct place.

The Convener: What kind of case would that example apply to?

Sarah O'Neill: Mainly housing eviction cases and other types of debt case. I am sure that the Equal Opportunities Commission can tell the committee more about whether the same thing

happens in some tribunal cases.

Phil Gallie: Can the lack of expertise be put down to the legal profession's lack of interest in certain areas of civil aid work that are not profitable or sufficiently rewarding?

Martyn Evans: The evidence appears to be that remuneration for legal work and civil legal aid work has not gone up for five or six years, but that costs have gone up. There is no clear incentive for solicitors to do that work, and the committee might like to look at that.

However, we would be reluctant to say that changing the nature of the incentive for private solicitors would change the delivery of the current system. A greater strategic overview is required, so as to better control and encourage supply. We do not suggest the introduction of higher levels of eligibility for legal aid. That would be a crude, demand-led mechanism, which would not lead to a better deal for consumers. There should be a strategic overview by an agency with wider powers than SLAB to direct and encourage the provision of services.

The short answer to Mr Gallie's question is no, as simply upping the remuneration rates for solicitors will not necessarily drive a better service for consumers.

Phil Gallie: Could you please expand on what you have just said about an agency above SLAB? One of the constant issues for all the political parties in Scotland is our attack on quangos, but you seem to be suggesting the establishment of another quango.

Martyn Evans: I am not suggesting that SLAB should not continue to undertake its distribution of legal aid in public policy terms. We are suggesting a wider view of the public financing of legal services. An agency with that wider view could also incorporate the distribution of central Government public finance. We are not suggesting an additional quango, but a strategic national agency that would be above SLAB and which could incorporate the current SLAB duties—as SLAB has much expertise and could contribute to it. We are not suggesting that the new agency could be a non-departmental public body, as it may be some other form of agency, such as a partnership group within the Executive. However, a body that holds strategic control is required, otherwise a demand-led system has to be constructed, and that would have serious problems in terms of public budgeting.

The Convener: I presume that a legal services commission would have a budget?

Martyn Evans: Yes, it would have a budget. Professor Alan Paterson, in his recent evidence to the committee, talked about such a commission having a soft-cap or a hard-cap expenditure system. I am rather persuaded by the idea of a soft-cap system.

The Convener: You talked about the need for advice to be available outwith the legal profession. It is not just about getting a solicitor; other advice agencies need to be funded. Ms O'Neill talked about people who ask for advice the day they go to court. It strikes me that there is a legal case against such people and that simply to provide non-professionally qualified legal advice would not necessarily address the problem. There is more than one gap here, is there not?

Sarah O'Neill: There are several issues. First, many of the people I talked about are involved in small claims cases for which no legal aid is available. A solicitor would be unable to help people in that situation unless they paid which, given the amounts that we are talking about, is not really worth while.

Another important point is that much of the work of advice agencies is preventive. The evidence shows that if someone's initial debt is not dealt with, things escalate and they get into more difficulty; for example, their marriage might break down or they might lose their house. If problems were dealt with by advice agencies at an earlier stage, they would not become legal problems in the first place. We see that as an important part of the way in which publicly funded legal services should go. Better public legal education and more preventive work would save money in the long run.

Maureen Macmillan (Highlands and Islands) (Lab): I am picking up all sorts of reasons why people might fail to be represented through the legal aid system. You have talked about the geographical reason—I represent the Highlands and Islands, so I am very aware of that, especially in relation to the far north. For example, there are solicitors in Thurso who—possibly for financial reasons—will not do court work. Solicitors come up from Inverness to do the work, which is not ideal. What is the reason for the lack of expertise? Surely solicitors must be trained in that area. Are the cases especially complex or is it that solicitors decide not to practise in that area of the law?

Martyn Evans: Sarah O'Neill used to be in private practice, so I will let her answer that question.

Sarah O'Neill: I do not know the answer. I suspect that one of the reasons many solicitors do not do it is that it is not especially well remunerated. People have to decide which areas they will deal with; obviously, people cannot deal with everything. The expertise has built up in the advice sector rather than in the legal profession. As Citizens Advice Scotland would tell you, the advice sector tends to consider things more

holistically. It tends to consider someone's overall problems—their debt and so on. It tries to resolve the whole thing, rather than regard matters in a specifically legal way and consider legal remedies.

Maureen Macmillan: So rather than contest a case, the advice sector considers the background to how a person got into difficulty.

Sarah O'Neill: Yes.

Maureen Macmillan: I am interested in something that the Executive flagged up about the availability of legal aid. Are there any areas—matrimonial work, interdicts and so on—that are currently dealt with in the sheriff court by solicitors which you feel should be dealt with by advice agencies?

Martyn Evans: The evidence is that, because of the adversarial nature of court, advice agencies find it difficult to persuade the volunteers they use to be court representatives. If solicitors are engaged in any areas, it is in court work—it is difficult to see how that could be taken away from them. However, we could find different ways of resolving problems—mediation and so on. We could consider the bigger picture and say, "Base problem solving not on courts, but on less adversarial systems." The evidence is that lay representatives feel more confident about that. However, there is also evidence that people who have problems are reluctant to use that rather innovative forum to resolve their disputes.

Maureen Macmillan: What about the filling in of legal aid applications and the preparatory work before court which, at the moment, a solicitor will do? Could that be transferred to advice agencies? That appears to be one of the ways the Executive is considering keeping down legal aid bills.

Sarah O'Neill: Do you mean that advice agencies would fill in the forms then pass the cases on to us?

Maureen Macmillan: I am not sure exactly what is in the Executive's mind—the idea is being examined at the moment. However, it seems that what is on offer is that preliminary work would be done by an advice agency; it is possible that only the court appearance would be made by a solicitor.

Sarah O'Neill: There are certainly other solutions, which would fit into our vision of an integrated network of legal services. People would be referred to the most appropriate place at the start of the dispute and, if things became more complicated, they could be referred to someone who could, for example, represent them in court. I am not sure whether filling in legal aid forms would be the way to do it, but we would envisage advice agencies dealing with things as far as they were able to which, in many cases, would mean for the whole case. If the case was complicated and someone needed representation, they could be referred to the most appropriate place, whether it was a solicitor or a lay advice worker.

Martyn Evans: Piecemeal reform is not the way forward—tinkering with the current system would add complexity to an already complex system. One of the results of that would be uncertainty about eligibility or ability to take on a case—we would be reluctant to add further complexity. We suggest a review of civil justice and the use of the public funds that are currently available for legal aid to fund the strategic delivery of service. That would include private solicitors and the current advice services in a way that is significantly more joined up than what happens at present. The evidence from research at the Scottish Executive is that CABx are fairly reluctant to refer to solicitors and vice versa.

Maureen Macmillan: What sort of relationship do you have with solicitors and the Law Society of Scotland? Do you have a close working relationship or does it vary from town to town, depending on the local solicitor and advice centre?

Martyn Evans: We have a reasonably informal relationship with the Law Society. Our chairman meets its president reasonably regularly, although the presidents change annually. Sarah O'Neill is on the Law Society committee.

Sarah O'Neill: Yes—the consumer law committee.

Martyn Evans: From time to time, I meet the officers of the Law Society to discuss matters of consumer interest. At the moment, our primary concern with the Law Society is the complaints system that it operates. We have recently carried out research, with its co-operation, on complaints against solicitors.

Maureen Macmillan: To pick up what you said about volunteers not being terribly happy to go in certain directions, if the role of advice centres were to be enhanced, there would be training implications. There is also the implication that, if bad advice were given, you would be liable. What are your thoughts on that?

Martyn Evans: As I understand it, the CABx and the Federation of Information and Advice Centres require that any agency that gives advice be insured. There is insurance against poor advice, which is the long-stop position. However, as you indicated, the best insurance is to have adequately trained lay and professional paid advisers. I was the chief executive of the CAB service for five years and I have every reason to believe that the CAB staff—paid and unpaid—are capable of delivering a wide range of services. The key is that they are paid appropriately for whatever service is provided. They should not be

given more duties for the same money. If we consider the wider perspective, investment in that type of service—not just CABx, but FIAC and so on—needs to be geared to the service standard that the funder requires, then tested against quality assurance. The quid quo pro for better funding is a greater requirement to be accountable for the services that are provided to the funder.

10:15

Maureen Macmillan: So an enhanced service has financial implications.

Martyn Evans: Indeed. Our proposals would probably mean a net increase. There are efficiencies to be found in the current system, which would help. However, I am sure that you are aware that the costs of failure do not appear in the civil legal aid budget or the civil justice budget, but in the wider social budgets. There is much evidence that investment at an early stage can prevent a whole range of costs—marriage break-up, debt and job loss—that appear elsewhere in the accounts. The investment must be judged against the potential losses elsewhere.

Michael Matheson (Central Scotland) (SNP): I apologise for being late. To some extent, I think, you have touched on community legal services. I want to know what your vision of community legal services is. How would it be an improvement on the advice and representation services that we have under the present legal aid system?

Martyn Evans: We are on the working party on this, but we have our own view, which we are willing to modify in the light of the working party's evidence.

We need to examine the context. The courts system in relation to civil justice is complex and ad hoc. We would like the context to be reviewed, as Lord Wolfe has done in England, to make it more modern, accessible and understandable to the population. That is an important aspect of civil justice. If that could be done, our broad vision for community legal services would be a reception service of lay advisers and paid advisers who could refer problems appropriately or, if they were able to, deal with them. In addition, there would be a range of linked specialist services. If the problem was one that had to be resolved through the court, that would be done by professional legal solicitors. However, it could well be housing advisers from Shelter or employment advisers who try to resolve the problem.

The idea is to have a clear point of access—which we do not have at the moment—and clear referral services. Services do not refer adequately to one another at the moment. They should be well resourced, in that they are resourced to do the job—they should not be overly resourced, but if we ask people to do a job, we should give them the money to meet service standards. There is also work within a strategic framework. By that we mean that an authority that was responsible for the disbursement of public funds would say, "That makes sense," or, "There appears to be a lack of a service in that area—we will fund that service." That combination very simply captures our vision.

Sarah O'Neill: As Martyn Evans said, we are very much in favour of encouraging publicly funded alternative means of resolving disputes, such as mediation. Our research has found that many people who have been to court would have preferred to use mediation if it had been available. It is not available widely at the moment, outside the family sphere.

Another important point is that some people do not need as much help as others. Our research showed that about one in five of those who had a problem did not seek advice; 40 per cent of them said that it was because they did not feel that they needed help and thought that they could deal with the problem themselves. Some people might need only a certain amount of information initially, then are able to take the problem away and deal with it themselves. Others will need more help. That is what is important about the intake and referral system at the start. We envisage that some people will deal with things themselves and will not need further help, but others do need further help and need to be referred elsewhere. They need to be advised about what methods of resolving their problems are available, then referred to the most appropriate place, whether it is court or another means.

Martyn Evans: I want to add one more thing on our vision. It is difficult for the users and consumers of services to be effective in their impact on service standard improvements. We would encourage the funding of service user forums. For example, we run the Scottish accessible information forum—or SAIF—for people with disabilities to influence the provision of advice and information services to others with disabilities. That very important forum is funded by the Scottish Executive. Although it has only one full-time equivalent member of staff, it brings together a mixture of service providers and service users and has formulated its own national standards and other ways to develop service provision from the consumer's perspective. Such service user forums are not expensive and our evidence has shown that they are very effective.

Michael Matheson: On the point about reception services or intake referral services, I understand the need for a screening process to prioritise cases or to filter out cases that might require only to be redirected to another service. However, would funding for such services be

based on individuals contacting them for advice—which would mean an application for legal aid—or would it come directly from the legal aid budget?

Martyn Evans: We would prefer not to knock out the existing funding, much of which currently comes from local authorities. It would be a mistake to substitute central Government funding for local authority funding. We use the term "legal aid", because that is where the current budget comes from; however, we want central Government funding for reception services to complement local government funding, and that will require a lot of partnership work. It would be rather silly for us to suggest that we tell local authorities that they will no longer fund such services and then take several million pounds out of their funding. Instead, we want value to be added by creating services where they are currently lacking, or by making services more effective through, for example, allocating money for weekend or evening opening.

Michael Matheson: Funding for reception services would then be based on the general service. However, would someone apply for legal aid if a case went to court and legal representation was required, or would that still form part of the overall budget for the reception service?

Martyn Evans: We have not considered non-means testing for legal representation. At some point, there must be a means-test system for the private solicitor service provision, which is why we have suggested the soft-cap mechanism. We understand the argument that a fully demand-led system would mean no budget constraints whatever. However, the current system is supply led in an unplanned way that disadvantages a range of people. The detriment to consumers would be less and the cost to the public purse controlled if the system were supply led in a more planned way through the soft-cap mechanism.

Michael Matheson: At the moment, we are in effect spreading the current finances thinner across a range of services instead of increasing them overall. Will public expenditure have to increase to make services effective?

Martyn Evans: There should be an increase in public expenditure in this area, but we do not yet have a clear idea how great that net increase should be because we can make savings through having efficient and effective services. Furthermore, any net increase must be balanced against other costs to public expenditure, such as the result of not dealing with problems that escalate. For example, failing to deal with eviction properly often leads to homelessness. Although such costs are difficult to balance in public accounting, we believe that a net increase in public expenditure for access to civil justice—which is something that we accept—can be justified on the basis that the social and real costs elsewhere might well be mitigated. So I am afraid that the short answer is that there will be increased costs.

Michael Matheson: Will those increased costs come from increased investment for advice through reception services, from an increased level of representation in court, or from both?

Martyn Evans: It is inevitable that the reception services will mean increased costs; they are currently underfunded and the demand can be controlled only by rather crude mechanisms. We need other access mechanisms that are not physical, the most important of which is telephone access. At the moment, I do not know whether, in a planned system, there should be an increase in the millions that are spent on private sector solicitors.

The Convener: Just in case we do not all have the same grasp of the idea, could you briefly run through the operation of the soft-cap mechanism?

Martyn Evans: We have suggested the creation of a strategic agency that plans the delivery of publicly funded legal and advice services. We feel that such services are supply led, not demand led. The agency could plan to increase the supply in a particular area or change the nature of the supply, which would incur a cost. However, the agency would have some control over that and would be able to decide the areas in which supply would not increase. That would act in effect as a cap on its operation.

Because we have accepted that there will be some form of means-testing, the complexity of the system means that increasing supply might unexpectedly increase demand, so the level of the cap will increase. We do not think that there will be a huge unexpected increase in demand because the services are limited by what has been physically planned, for example, in terms of the capacity or the willingness of people to deliver a means-tested legal representation service or an advice and information service that is free at the point of delivery.

The Convener: Can we draw an analogy with the health service? Some might argue that it is supply led; for example, waiting lists create rationing.

Martyn Evans: The health service is quite clearly supply led and people are trying to understand, mitigate or control the complex mechanisms that are used to gate-keep that supply. Those mechanisms are just as complex in the area that we are discussing as they are in the health service, which is definitely not demand led. Demand for a service does not necessarily result in its supply; instead, if a service is demand led, it will be supplied by somebody, because the price

will increase and make it worth while for another agency to supply it. However, that does not happen.

Michael Matheson: Will there be means-testing for the reception service? If so, will there be any further financial assessment if you reach the stage of considering representation in court for people and applying for legal aid?

Martyn Evans: We do not envisage that situation. The reception services are made up of partnership organisations that bring significant worth in terms of volunteer time and energy to the partnership and they would not accept means-testing. Part of the quid pro quo will be making the service free at the point of delivery. People might take unfair advantage of the situation, but that is a matter of public policy. The balance is difficult to strike, but we expect that people will not take advantage in that way, because our research shows that people with problems who are able—and are confident enough—to go to solicitors go there directly instead of contacting reception agencies.

10:30

The Convener: Thank you very much. Your evidence has been very helpful.

Our next witnesses are from Citizens Advice Scotland. Susan McPhee is the head of social policy and public affairs; Professor Alan Paterson, who is already familiar to us, is the chair of the legal service committee; and Liz Cameron and Jim Melvin are bureau managers.

I will start with the same question that I asked the previous witnesses. What main areas of advice and representation that are currently beyond the scope of the legal aid system could be usefully brought within its scope?

Susan McPhee (Citizens Advice Scotland): Most of the queries raised with CABx relate to social welfare law. About a third of our inquiries are about benefits; we also cover areas such as housing and consumer debt. The legal aid statistics show that those areas are not generally covered by legal aid, even though some aid is available under advice and assistance. However, only about a quarter of advice and assistance relates to social welfare law. There should therefore be more emphasis on those areas.

The Convener: Do you have any statistics on how many cases a year we might be talking about? Furthermore, how much will it cost?

Susan McPhee: We see about 400,000 cases a year, which is about one in 14 of the Scottish population. However, that is the tip of the iceberg. We do not know how many clients try but fail to contact us, but we know anecdotally that it is a great number. Some bureaux have told us that 90 per cent of telephone calls cannot be answered because of the pressures on them.

Professor Alan Paterson (Citizens Advice Scotland): It might help if I gave the committee some figures. More than 1,000 solicitors' offices or outlets in Scotland offer advice and assistance compared with about 60 CABx. In a typical year, bureaux will do four times as much debt work as the 1,000 solicitors' outlets; five times as much employment work; four times as much housing work; and 11 times as much benefit work. Not every case that comes to CABx is eligible for advice and assistance, but many would be.

Susan McPhee: Furthermore, page 8 of my submission highlights the fact that, for every person whose benefit issue is dealt with by a solicitor, 100 people visit a CAB.

The Convener: You said that about 19 per cent of calls went unanswered.

Susan McPhee: I said 90 per cent.

The Convener: Ninety per cent?

Susan McPhee: Yes, in some bureaux.

The Convener: Is there also a geographical problem? Are any areas of the country not covered or inadequately covered by your service?

Susan McPhee: Do you mean in terms of having CABx in those locations?

The Convener: Yes.

Susan McPhee: There are 57 CABx and about 150 outlets covering most areas of Scotland. Areas such as Fife have other advice services that are not CABx.

Phil Gallie: Are there established links between CABx and various legal aid solicitors' practices?

Susan McPhee: We do make referrals. Last year, we referred about 6,000 cases to solicitors.

Jim Melvin (Citizens Advice Scotland): Links with solicitors are local and ad hoc and some are better organised than others. At one stage, I wrote to all the local solicitors' firms in my area to find out whether they would be prepared to undertake benefit tribunal work. The only firm that replied took the view that it would not be able to make any money out of that work and did not want to do it.

It can be difficult, particularly outside the cities, to find solicitors with the necessary specialist experience for certain cases. All bureaux have a problem when trying to identify the right legal help for their clients.

Phil Gallie: What area do you represent?

Jim Melvin: Coatbridge and North Lanarkshire.

Phil Gallie: Coatbridge is right in the centre of the central belt, where one would have expected to find levels of expertise. Is the situation even harder in the outlying areas?

Jim Melvin: I have spoken to my colleagues and—anecdotally—it seems to be much harder in those areas. I know people who work in the north of Scotland who find it extremely difficult to locate specialists. However, that is also difficult in Coatbridge.

One of my recent clients had a public law problem, but although his problem was not complicated, I had to phone more than 20 firms before I was able to find someone who would represent him. The fact that he was going to be reliant on legal aid was important to those firms. They were not interested in doing the work because he was getting legal aid and the work was advice and assistance work.

Phil Gallie: What is the disincentive? A case is a case. If someone is involved in the law—

Jim Melvin: I am sorry to interrupt, but you would have to ask the solicitors that question. It is difficult to know the answer, but I think that they have presumptions about the profitability of such work.

Susan McPhee: I would like to add to that answer. A number of bureaux run legal clinics that use local solicitors. We set up clinics with solicitors who offer to do evening work and we can refer clients who might not qualify for legal aid to those clinics for initial advice. Even so, such referrals tend to be in the traditional areas of the law, such as family and matrimonial law, reparation cases and wills.

Professor Paterson: One of the long-standing problems that CAS faces is identification of solicitors who are skilled and expert in specific areas of social welfare law. We have tried to wrestle with that major problem, as has the Law Society of Scotland, but we have not made as much progress as I would like. One hopes that a feature of community legal services will be effective referral systems. We must find a mechanism through which referrals to appropriately qualified experts, including solicitors who specialise in social welfare law, will be possible.

Phil Gallie: Given your involvement in the provision of advice on civil law, do many defenders complain to you in cases where the pursuer has obtained legal aid, but the defender must fund their own case? Ultimately, if the case was unjustified and the decision was in favour of the defender, that individual would not be able to claim back legal expenses.

Susan McPhee: Such cases are not recorded in our statistics.

Jim Melvin: I have had no experience of such situations in my bureau, but such a complaint was made by the solicitors who acted for the other party when I worked as a clerk in a legal aid practice in England.

Phil Gallie: Professor Paterson may wish to comment on that. Do you think that such situations are unfair?

Professor Paterson: I wonder why you asked me that question, Mr Gallie.

I agree that there is an issue about equality of arms. Having said that, technically an award can be made against an assisted party. When the assisted party is the pursuer and loses the case, the judge has the discretion to modify the award of expenses. However, judges do not have to, and do not always, do so. In certain circumstances, the defender can get an award from SLAB if they can prove grave financial hardship, but that does not happen often.

The Convener: You seem to be saying that there are two reasons why people cannot get assistance from a solicitor. First, there might be no solicitor who feels adequately qualified in a particular area. Secondly, solicitors do not think that they can make enough money from certain types of cases. How important, relatively, are those two factors?

Jim Melvin: I cannot answer that question.

Gordon Jackson (Glasgow Govan) (Lab): I am not here to give evidence, but do you agree that those two factors might be linked? A solicitor who does not have expertise in a specific area cannot make money out of that area, because it would take him three times as long to do the work. There is a correlation between lack of expertise and inability to make money, but if one has expertise in an area, one can do the work quickly.

Susan McPhee: Let me give an example. Solicitors cannot receive legal aid for appearing before a benefits tribunal, which means that there is no incentive for them to do that work. CABx have occasional experience of solicitors advising clients under advice and assistance, starting to prepare a case, and then referring the clients to a CAB at the last minute. That makes matters worse, because we are brought in at the very end to represent the client, despite not having done the preparatory work.

Professor Paterson: I will pick up Gordon Jackson's point, which made one of the arguments for contracting in this area.

Giving contracts to private practitioners, the not-for-profit sector or salaried lawyers—which allows them to do a certain amount of work in, for

example, social welfare law—means that solicitors will gain the necessary expertise, because they will do that work day and daily. That is the reasoning behind the English development.

When I began to research who does legal aid work in Scotland, I was interested to note that 80 per cent of the work is done by 20 per cent of the practitioners; the work is concentrated. That is particularly true of criminal work. Civil work is slightly more diverse, although 75 per cent of it is probably done by 25 per cent of the profession. That means that the remaining 75 per cent of the profession is doing relatively small bits of work. That is good for coverage, because it means that 1,000 outlets can do the work, but it might not be good for expertise. That was Gordon Jackson's point.

Maureen Macmillan: Does the problem of the lack of expertise in social welfare law go back to the universities and to the way in which law students are introduced to that area of law and what it is about? How are courses on social welfare law weighted against courses on conveyancing? Is the problem to do with what the legal profession considers to be important or unimportant?

Professor Paterson: That is a valid point. If Maureen Macmillan is asking whether law schools provide courses in social welfare law, the answer is yes. Some law schools do more than others. For example, my law school at the University of Strathclyde provides those courses and has done so for a long time. However, it is fair to say that such courses may not hold the same attraction as conveyancing courses, or rather, as conveyancing courses held in the past—the statistics suggest that conveyancing is declining as a source of income–because students are not yet convinced that significant careers can be made in areas such as social welfare law.

Susan McPhee: We tried to liaise with the Law Society on putting legal trainees into advice agencies, but it was not interested in developing that project.

Maureen Macmillan: That sounds like an interesting project. Perhaps you could try again to interest the Law Society in it.

There is a fundamental point about whether disputes are court based or not. That is where there is a great division. Do you think that you are not competent to deal with some of the areas that are dealt with by solicitors in court and for which legal aid has been granted? I am thinking of examples such as interdicts and matrimonial work.

Susan McPhee: Yes. Matrimonial cases make up most of the referrals that we make.

Maureen Macmillan: How far does a CAB go in giving advice and helping to fill in legal aid forms? In other words, how much work could you take away from solicitors in legal aid cases?

Susan McPhee: We do not want to be involved in the completion of legal aid forms on a case-by-case basis. One of our basic principles is that our services are free to everyone. That principle must stand.

Rather than concentrating on whether to take work away from solicitors, it is more important to recognise the quite sophisticated work that we do already, particularly on debt. We know that about one third of our queries are about complicated cases and we know that simply because of the way in which we record our statistics.

Maureen Macmillan: I appreciate the fact that you are making progress on debt, such as the debt advice project that is run at Edinburgh sheriff court. I heard the evidence about that project that was given to the Social Inclusion, Housing and Voluntary Sector Committee. That project is relevant to the problems that people face. Could you do other court-based work?

10:45

Liz Cameron (Citizens Advice Scotland): I will comment on that—I manage the in-court advice project at Edinburgh sheriff court, where there is also a CAB outlet. We are able to deal with people who have not seen a solicitor about their court case and to advise them on whether they should see a solicitor. We analyse the merits of a case and consider whether it should be referred on.

In many cases, people do not need detailed legal advice—they might need only procedural advice. We can be of most help with small-claims cases, about which—as others have said—there is little point in getting legal advice, because people cannot get legal aid, even if they are eligible for it. The cost of the claim is such that they would have to pay more for legal advice than they would gain from the case if they won, or than they would lose if they lost the case.

We are allowed to help in summary cause cases—which currently involve between £750 and £1,500—only to the extent of the preliminary stage. Lay representatives are not allowed to help with proofs, but almost no proofs go ahead. If the two sides have involved lawyers, cases are usually sorted out between the lawyers, although we do not know whether that is to everybody's advantage. It is interesting to compare the number of cases that are called at the preliminary stage, of which there are quite a number each week, with the number—perhaps only one or even none—that go ahead at a later stage.

I have another hat—I am the mediation co-

ordinator. I help people to consider alternative approaches. We are able to help people by suggesting other ways in which they might resolve their problems.

Gordon Jackson: Jim Melvin mentioned the problems that CABx have when referring cases, in that they cannot get solicitors to do the work, but there are complex reasons for that. Do solicitors ever work on CAB premises, so that people can be told, "Go next door and see the solicitor"?

Jim Melvin: Most bureaux in Scotland have brief advice sessions although, for historical reasons, my bureau does not. Those sessions allow clients and solicitors to identify whether a problem requires action. If action is required, the usual arrangement is that, with the agreement of the client, the solicitor takes the matter away and deals with it privately.

Susan McPhee will be able to tell you about the arrangement at the Bathgate bureau.

Susan McPhee: Yes. There was a law centre upstairs from that bureau.

We are submitting a bid to SLAB under part V of the Legal Aid (Scotland) Act 1986 for a project that we are developing to put in place solicitors to support six bureaux, not to deal with casework but, if necessary, to support the bureau workers to provide the best possible advice before cases are referred on.

Gordon Jackson: I would be interested to hear your views on whether there is an advantage in developing close liaisons between advice centres and solicitors. I know of an advice centre—not a CAB, but another publicly funded centre—that brought in a solicitor on most days and which also made proper financial arrangements, which could be varied. Another example is that of linking law centres semi-formally to a CAB. Do you think that there is an advantage in developing such one-stop approaches, given the difficulty of finding solicitors to whom to refer work? To be frank, I suspect that that difficulty will not, for a variety of reasons, become any easier.

Susan McPhee: You might find it interesting to learn that we are in the process of setting up a CAB in Pollok in Glasgow, in which a law centre could be established. There will be such links. What we see as the way forward, however, is having solicitors who support the bureaux in providing the best advice. We do not want a duplication of work, or work that could be carried out by an advice agency being carried out by a solicitor. We want to provide the best advice that we can to the appropriate level.

Gordon Jackson: Is the project in Pollok an experiment or pilot scheme?

Susan McPhee: Yes. We have never had that kind of formal arrangement before.

Gordon Jackson: I do not know what the time scale is for that project, but the committee would be interested to know how it worked in delivering legal aid. I would be very interested to know how the project works.

Professor Paterson: I add, as a mild corrective, that the experiment was tried in three different localities in England and Wales about 20 years ago. It was also tried in Castlemilk—which is how Castlemilk Law Centre was set up, with the CAB on one level of the centre and the law centre on the level above. Paddington Law Centre was one of the experiments in England and Wales.

All those experiments have encountered management problems. The issue of the management of the solicitor and the management of the CAB must be resolved. It is like a multidisciplinary partnership or practice, and there are management issues. If those are tackled head on, it might be possible to make the project work, but several of the previous experiments have faltered at the management level.

Gordon Jackson: I understand that Glasgow City Council is interested in exploring the business of integrating law centres and advice centres. We are interested to know how any such experiment works, as it might be a way forward, despite the management problem.

Susan McPhee: One of our other concerns is the volume of clients. No law centre could cope with the volume of clients that we see, which is why there is a need to build up expertise within the bureaux.

Gordon Jackson: Yes—there must be a balance.

Michael Matheson: I would like to turn to the idea of a community legal service, of which the CABx are supportive. What would be your vision of a community legal service? How would that improve the provision of advice and representation over the current legal aid system?

Susan McPhee: Like the Scottish Consumer Council, we are on the working group. I shall give the CAB view, which is not necessarily that of the working group. We support what the SCC says about taking a strategic overview—that is fundamental. If there were a strategic overview, there would not be the shortfall that currently exists in social welfare law.

In our vision of such a service, when somebody accessed the community legal service—whether by an intake and referral scheme or by using existing providers—there would be some kind of assessment and formal referral mechanism, and the client would receive advice at an appropriate level. Although all CABx provide general advice,

there is a variety of expertise and some CABx have specialist expertise within them which could be part of the community legal service. The referral could be within the CAB network, but we might have to refer it out of the network. It is a matter of having a formal structure in place to ensure that clients get the best and most appropriate advice.

Michael Matheson: So, you would like funding to come centrally from the Scottish Executive to allow you to provide that kind of legal advice–which you do not provide specifically at the moment—under your general funding.

Susan McPhee: Yes, but we would like to do that in partnership with our existing funding. I agree with what Martyn Evans said; we do not want to lose our existing funding.

Michael Matheson: If, when a case has been considered, there is a requirement to go to court and representation is needed, how would a local CAB provide that type of legal representation under that system?

Susan McPhee: I do not think that it would, but it would depend on the circumstances. If the case was at the small-claim level and we were confident enough to carry out representation at that CAB—a lot of CABx do not provide court representation—we would provide that assistance within the confines of the CAB. It would be appropriate to refer anything beyond that to an expert in the specific area.

Michael Matheson: Would you consider a referral to a solicitor to conduct that representation?

Susan McPhee: That would depend. If it was a housing case, we might refer it to Shelter, which is what we do at present under the Scottish Homelessness Advisory Service project.

Michael Matheson: Would you refer it to an agency that could provide legal representation, if that was required.

Susan McPhee: Yes.

Michael Matheson: Would somebody who required that type of legal representation have to go through the normal process of applying for legal aid?

Susan McPhee: I do not know, but they probably would. However, at our level we would not carry out means testing. Our basic principle is that there should be free advice for everybody. We would expect that to continue, at our level, under community legal services. There would be no means testing at that stage.

Michael Matheson: You seem to be saying that a community legal service would be about expanding the range of advice services that you provide, for which you would receive additional funding. However, when legal representation is required, you might still have to approach a solicitor and apply for legal aid. I can understand how that might increase access to civil representation and advice, but a client might still have to approach a lawyer to get legal representation.

Susan McPhee: Our work is initially preventive—we try to quash any issue before it reaches the stage of needing representation—and our ethos is about empowerment. We would like a civil justice review to make the law more accessible to people. Our philosophy is about empowering people to do as much as possible for themselves, but—obviously—we must negotiate on behalf of certain clients who are unable to negotiate for themselves. The difficulty is that the existing system is so complex that people often need lawyers to translate it for them.

Michael Matheson: If people have a problem about which they need advice, are they more inclined to resolve matters through some form of mediation or to have the issue resolved legally?

Liz Cameron: The problem is that people do not have that choice; the opportunities for mediation in Scotland are few. The only project that offers civil, non-family mediation is the one that I run in the Edinburgh sheriff court. There is a much wider application of mediation in family problems, and people come to the bureau asking for mediation when they would not have done five or 10 years ago, because they would not have heard of it. Although mediation as a concept is spreading, the opportunities for mediation still do not exist.

Many of the people I see in court who are already involved in a case, are very keen to try mediation. They are especially keen to do so if they have been in court once and do not want to return for another hearing because they have found the court extremely stressful and intimidating. People who have had previous experience of court will also be more interested in mediation at that stage.

Michael Matheson: I do not know whether that is an indictment of our criminal system or of our justice system.

Liz Cameron: I am not talking about the criminal system, but purely—

Michael Matheson: Sorry, I meant to say our justice system. Once people have had an experience of the courts, they do not want to go back again.

Phil Gallie: You need only look at Gordon Jackson and ask whether you would like to face him in court.

11:00

Maureen Macmillan: I am interested in your vision of a community legal service and the wide range of expertise and services that you hope to provide in a much wider field than just social welfare law. I wonder what will change for rural areas and where those areas will get the wide range of experts from. One of the complaints that the committee heard was that geography is often the basis for neglect. How would the new community legal service help in rural areas?

Susan McPhee: I would like different methods of provision in the community legal service, including examples of innovation. CABx have established many innovative measures, such as in-court advisers. A community legal service could consider use of the internet, DIY help booths and other systems of providing information that do not currently exist.

Maureen Macmillan: So, access could be provided through a community IT centre and interactive websites.

Susan McPhee: Yes. Also, if regional commissions were established under the legal services commission, or whatever you want to call it, they could consider what was needed in each area and contract accordingly to ensure appropriate provision. It is a matter of taking a strategic overview and determining what is needed in an area.

Maureen Macmillan: Yes—it is all about people being able to access the advice in their communities. There is now a network of IT centres in rural areas, which might be used for that sort of service.

Gordon Jackson: We are interested in cost-effective access to justice, in which context the issue of mediation interests me. In some jurisdictions, whenever a civil case—matrimonial or otherwise—goes before the judge, the judge just tells the parties to go into a room with a mediator. The mediator might be paid or voluntary, but mediation is part of the justice system. It is not separate. Does Citizens Advice Scotland have a view on that? Have you come across it?

Susan McPhee: The in-court advice project was developed because Citizens Advice Scotland tried to run a mediation project outwith the courts, using the CAB network, but it did not get off the ground—we simply did not get referrals to the service. We then set up the in-court advice project in Edinburgh and the mediation that is linked with that project, because referrals were coming as people reached the court stage and seemed more willing to participate in, or had greater access to, mediation.

Liz Cameron: Occasionally, we carry out mediation in the way that Gordon Jackson suggests. If a sheriff is faced with several proofs that are going to go ahead, he will say to the parties who have to wait that they can speak to me. Occasionally, cases have been resolved before they have been called. That is not the regular procedure, because we do not have proper funding for the mediators and I cannot spend all my time carrying out mediations—I have other things to do. Nevertheless, it has worked that way and, if we received more funding, it could work that way again.

We find that people are also happy to meet a mediator away from the court. I set up half-day hearings at which people meet the mediator, possibly before their case is resolved in court. Many people are happier with that forum, which is not as oppressive as a court building and is not linked to the courts. We offer a variety of options, and different options suit different people. Several sheriffs refer directly to mediation, but not all do. We could not cope if all the sheriffs referred all the time—we do not have enough manpower or womanpower.

Gordon Jackson: We should perhaps think about increasing funding to extend the legal process prior to a court hearing.

Liz Cameron: I agree. That would be effective and would save a great deal of shrieval time.

Gordon Jackson: And money.

Professor Paterson: Again, I add a corrective comment. That idea has been explored in other jurisdictions, particularly in England and Wales. Mediation used to be regarded as an alternative dispute resolution, but it is now called appropriate dispute resolution, which is a better phrase for it. Mediation is not the answer to every problem and neither is adjudication; there are horses for courses. We have not yet got to the stage of deciding when it is appropriate to mediate and when it is appropriate for a case to go to adjudication. In some disputes—for example, certain domestic violence cases—mediation will not do much good. There have been allegations that mediation does not help when there is a significant power imbalance between the parties.

As to whether mediation will save money, the more studies that have been done on it, the harder it has become to say that it saves money. When it works, it is a more effective method of handling cases, but it is not necessarily cheaper.

The Convener: I will ask you about the part of your submission in which you suggest publishing league tables of the number of actions carried out by each firm of solicitors in a specific area of the law. How confident are you in that suggestion? I am thinking about the controversy that is associated with league tables of schools. I notice

that you do not suggest including information about the success that the firms had in those actions.

Susan McPhee: We have been negotiating with the Law Society for years to try to find a method of determining an area of expertise of a solicitor—it must be about 10 years.

Professor Paterson: More.

Susan McPhee: We have been trying to produce indicators so that CAB can refer a client to a solicitor who has experience in a specific area of law, but we have got nowhere with that.

The Convener: Why is that?

Susan McPhee: Cost.

Professor Paterson: Cost is part of the reason. There is a directory system in England and Wales. We used to have a directory system in Scotland. Solicitors listed their expertise or at least their experience. It is a fair comment that the problem with the system was that solicitors had to pay for it and only 60 per cent of the profession wanted to do so. Secondly, the system was based on self-report, so some solicitors appeared to have an amazing knowledge of everything and could handle every legal matter under the sun while others appeared to be more careful and stated that they had expertise only in several areas. The Law Society questioned whether that directory was worth while.

CAS thought that it was 60 per cent better than nothing, which is what we currently have. Some solicitors claimed to be expert in everything or, to be accurate, claimed that they normally handled everything—the phrase used was, "Which areas do you normally handle?" If a solicitor ticked every box, a client could see that—at least the CAS could see it—and could conclude that the solicitor is a polymath; equally, it may be that the solicitor does not usually handle every aspect of work. The issue was partly the cost of the directory and partly that the Law Society was not convinced of its efficacy. We have consistently said that this is a problem that faces community legal services and it must be dealt with.

Gordon Jackson: In practice, does Jim Melvin in Coatbridge, for example, not have in his head a local directory of who can do what? Do you not quickly pick up knowledge of which firms are up to much?

Jim Melvin: The problem is that local solicitors do not handle all sorts of matters, because there is not a mass of clients for them to develop that expertise. You could predict that most local solicitors do a lot of family work. We need a directory because often much more specialised matters must be handled. The Law Society's accreditation process is not very useful. I rang the Law Society yesterday to try to find a solicitor in Glasgow who dealt with medical negligence. It listed three solicitors in Scotland who deal with medical negligence, all of whom are based in Edinburgh, which is no use.

Susan McPhee: The issue about league tables is that, because the Scottish Legal Aid Board already publishes the 20 top earners, it could publish information about which firms of solicitors have applied for legal aid certificates in which areas of work. Although it would be no measure of quality, it would let us know that a firm had dealt with at least one case in that area of law. We suggested that to the Law Society in December, and it said that it had no objection to that proposal.

Professor Paterson: I quoted statistics earlier about how much work in employment, housing and so on CABx did compared to what was done by solicitors. I referred to private solicitors doing advice and assistance work. The counter-argument to that is that they do a lot of employment work or a certain amount of housing work that is not on advice and assistance. If league tables were only to show the legal aid work that a solicitor does, the tables would not show the amount of work that they do in employment law. Nevertheless, we can go back to the argument that at least people could see which solicitors were doing some legal aid work.

The Convener: We must move on. I thank the witnesses from Citizens Advice Scotland.

Our next witnesses are from the Equal Opportunities Commission. We have Muriel Robison, although I see that her name has been transposed to Robinson on her name-plate.

Muriel Robison (Equal Opportunities Commission): That is incorrect. It is Muriel Robison.

The Convener: Muriel Robison is the principal legal officer at the EOC and Angela O'Hagan is the senior policy officer.

Your submission states that research over the years has indicated that one of the most important factors in whether a sex discrimination claim is successful is whether the claimant is able to get good-quality advice and representation. Could you expand on that? It seems to me that that would be a most important factor in any claim—sex discrimination or otherwise.

Muriel Robison: That may well be right. Our focus is on sex discrimination claims. We have carried out research on that issue, which has shown that the likelihood of success is greatly enhanced by specialist representation.

Our expertise is in the narrow area of sex discrimination, unlike that of the previous witnesses who have a much broader remit.

The Convener: Yes. It just occurred to me that that did not necessarily tell us very much, as it is self-evident that if someone is dealing with a specialist area of the law, they will have problems if they do not get good advice. What would prevent people from getting that advice?

Muriel Robison: There is a lack of expertise in this area among solicitors in Scotland. That is largely because of the absence of legal aid, as has been discussed. The result is that we have to refer clients to organisations such as CABx. We can give individuals who come to us a good deal of assistance with their claims. The difficulty is that we can only fund representation in a very small proportion of those claims. We therefore find ourselves seeking assistance for representation for individuals who require to take their claim to the employment tribunal when the claim has not been settled, with our assistance, before it reaches that stage.

The Convener: When you say that you can only fund representation in a certain number of cases, is that because of budget constraints?

Muriel Robison: That is correct. We have a very limited legal budget. My written evidence shows that we have only a £375,000 legal budget in Great Britain for any one year. Scotland has no specific allocation, but on average approximately 10 per cent of the GB legal budget will be spent on legal cases in Scotland. As a result, we can only fund cases that we see as being of strategic importance to us—test cases where the outcome will benefit a large number of people—so, in a sense, the individual circumstances are not a priority for us. People whose cases do not fall within our areas of strategic importance require to seek representation elsewhere.

Michael Matheson: I will pick up on the lack of expertise in this sector that you mentioned within the legal profession. You say that you think that is due to a lack of availability of legal aid. Is that the primary reason for this lack of development of expertise within the legal profession?

Muriel Robison: The absence of legal aid means that solicitors have not made any attempt to build up expertise in this area.

I was interested in Gordon Jackson's point about the link between the lack of expertise and the inability to make money. Anecdotally, I would say that solicitors in Scotland who specialise in this area of discrimination law are few and far between and, interestingly, very few of them do legal aid. That belies that suggested link.

11:15

Michael Matheson: Is it the case that, because of the limitations of legal aid, access to expert advice is affordable only to defendants as opposed to those who seek redress?

Muriel Robison: That is right.

An important point is that specialisms, especially in a complex area of law, come at a premium. It is the respondent, the employer or defender that can afford advice from specialist employment lawyers.

Michael Matheson: That is helpful. Thank you.

Phil Gallie: No doubt many big employers can afford that specialist advice, but many small employers cannot. It could be said that they are discriminated against when legal aid is provided. How do you feel about that?

Muriel Robison: The issue of bargaining power has been mentioned. The applicant is an employee with relatively little bargaining power finding themselves up against their employer. In the employment tribunal, small employers sometimes go in themselves—their personnel managers go into the tribunal to represent them. The corollary of what we said earlier is that the applicant is at less of a disadvantage when a small employer is not legally represented, but the statistics show that, in the main, employers tend to be represented.

Phil Gallie: Could you expand on your comment about the EOC's narrow area of involvement? Is your involvement in sex discrimination principally on cases within the workplace?

Muriel Robison: It is, but in a sense by default. The Sex Discrimination Act 1975 covers discrimination in society more generally, for example, in the provision of goods, facilities and services in education, but the vast majority of complaints that we receive are in the employment context.

Very few people are aware of their rights to challenge their treatment in society at large, perhaps in the high street, so we get very few cases in that area. It is important to say that those cases are pursued in the sheriff court, where legal aid is available to pursue claims. One of the problems with sex discrimination claims is that the awards tend to be very low. I sense that the Legal Aid Board is reluctant to spend a lot of money on a case that might only attract an award of £1,000 because the important point has been the principle—for example, the principle that someone has been refused a mortgage because they are pregnant. That is the kind of case that would go to sheriff court.

This comes back to Mr Gallie's earlier point. An individual who is employed would perhaps be reluctant to go to the sheriff court, expecting an award of £1,000, with the fear of a costs award against them if they were to lose. They are reluctant to go into the sheriff court because of

that fear. The expectation would be that we at the Equal Opportunities Commission would fund those principle-based cases, but unfortunately we cannot do so to a large extent.

Phil Gallie: Without labouring the point, the situation with regard to equal opportunities poses a problem for small employers who, even if they go to court and win, are not allowed to make a claim against a complainant who has been given legal aid. Is that not the case?

Muriel Robison: There has only recently been an extension of advice and assistance for representation in the employment context. The Westminster Government has proposed an increase in the levels of awards of costs against the frivolous, vexatious or unreasonable applicant. Some people argue that that will deter applicants, particularly when the ruling might not work if the situation were reversed.

Phil Gallie: Just out of interest, I would like to know how often a complaint is made by a male rather than a female. What percentage would that make up?

Muriel Robison: Males account for a small percentage of the cases that we deal with, although complaints are increasing in the area of recruitment and selection, where men find that they are being rejected for jobs that are traditionally seen as being women's jobs. There is also an increasing number of inquiries from men who, in an attempt to get more involved in the care of their children, try to secure part-time work or job sharing work. We are pursuing a test case on that issue at the moment.

Gordon Jackson: You have raised the problem of the lack of legal expertise and the availability of lawyers to deal with work in this area. Might that be because a lot of sex discrimination work is done in-house? I have friends in Unison who spend their lives dealing with nothing else but sex discrimination work and who have acquired a lot of relevant expertise, although they are not lawyers. People who are involved in sex discrimination cases have the backing of unions and other organisations. How many people who take cases to the tribunal are represented by their Unison representative or some other in-house person?

Muriel Robison: Unions are a big source of advice in this area. The Equal Opportunities Commission expects union members to go, in the first instance, to their unions.

Of the 200 or so complaints, rather than inquiries, that we deal with each year, 10 per cent can be funded by us. For the other 90 per cent, we need to find somebody to help us. In the main, solicitors are not prepared or able to do the work, which involves complex issues of indirect discrimination and European law. We have to refer people to organisations such as CAB, which has built up a lot of expertise. Our difficulty is that many of those organisations have ad hoc funding such as lottery funding, and might have to close down after three years or so if they lose that funding. In such cases, that expertise is lost. There are few solicitors to whom we can refer cases.

Gordon Jackson: I am not defending the legal profession, but I should point out that it is difficult to build up expertise without volume. Expertise cannot be built up in a vacuum.

Roughly how much of the work is available to the private sector and how much is taken up, quite properly, by in-house representation? Is there the volume that would enable people to acquire the expertise?

Muriel Robison: As I said, we are looking for people to whom we can refer 90 per cent of the 200 or so cases that we deal with. However, I suppose that, given that we are talking about the whole of Scotland, that number is quite low.

Gordon Jackson: Countrywide, it is too small to allow expertise to be built up, unless one firm got all the work.

Muriel Robison: We support the concept of community legal services and would like a strategic overview to be taken that builds on the expertise that is already building up in CABx and the advice services sector. The trouble is that if funding is pulled away, all the expertise that has been built up over the three-year project will be lost. We would like it to be properly funded.

Gordon Jackson: Are you saying that a strategic overview to focus expertise is needed, otherwise it will never get organised?

Muriel Robison: That is right. A strategic overview would also ensure access to a specialist service throughout Scotland. For example, the commission had a complaint from someone who was living in Shetland. Our commissioners chose not to fund the case. The CAB did not do representation work on employment tribunals. The case was quite complex. The man involved found himself having to go to the tribunal himself. People do not feel that they have the courage to go to employment tribunals on their own; they do not therefore get the access to justice that we would like to ensure they have.

Maureen Macmillan: You mentioned that high levels of contributions can affect women in particular, who are more likely to be low paid and have dependants. In particular areas of law—family and matrimonial law—women have particular problems. Has the Equal Opportunities Commission come to a view on what would be realistic thresholds and contributions?

Muriel Robison: We have not. My colleague, Angela O'Hagan, can say why we are concerned about that in general, but we have not looked at that kind of detail.

Angela O'Hagan (Equal Opportunities Commission): As yet, the commission has not, as far as I know, done any research of that kind. Our starting point would be to look at women's income levels. It would be within our remit to look at equal pay. We draw more widely, however, on the research of other organisations such as the Scottish poverty information unit and look for the dynamics of women's income.

We know from our own statistics that women's entire income from earnings, benefits, investments and pensions is 51 per cent of men's. We know that there is a pay gap of 19 per cent on average in Scotland and that women are the majority recipients of benefits such as the working families tax credit and income support.

We do not know in detail from our research the dynamic of that income in terms of the family budget. Through more global work and anecdotally, we know that it is unreasonable to assume that women are in control of the family budget or that women are treated equally within the family budget. We cannot therefore assume that women's income would support women's access to justice because a woman's income that comes into a family may not be equally disbursed back to the woman or used to support the woman's needs. We also know that women's spending within the family budget is more directed towards the welfare of and provision for children than on themselves and other aspects of the family.

We therefore have a number of dynamics that look at women's pay and income levels and another set of dynamics that look at what would be classified not as disposable income but income that would support women's access to justice. We know that women have less access to other financial securities and services such as bank accounts, savings and household insurance.

In setting thresholds, we would encourage the committee and others to look at the propensity for disparate impact. What would the impact be on women and groups of women? We must bear in mind differential income levels in earnings and benefits between black and ethnic minority women and white women, women with disabilities, women who are active in the labour market and women who are outwith the labour market. Those are all figures for women in traceable employment, although many women in the work force are still earning below the lower earnings limit and are not visible in the statistics that show the level of pay inequality.

11:30

Maureen Macmillan: Are you aware that some women deny themselves access to justice although they are entitled to legal aid? They decide that they cannot afford the contribution that they would have to make because their families would suffer, so they do not return to their solicitor or go to court.

Angela O'Hagan: It would be reasonable to count that as a factor. We know that women are reluctant to put themselves forward when they are still in employment and are pursuing a case against their employer. The risk of dismissal compounds any other financial contribution that they would have to make to pursue their case. Victimisation or dismissal is a fairly regular feature of an applicant's pursuing a case of sex discrimination.

Maureen Macmillan: Let us return to the need for quality standards to ensure that the public receive proper advice. Are such quality standards necessary only in discrimination law, or are there other areas in which we need quality control? If so, how might that be delivered?

Muriel Robison: We would like that issue to be addressed by community legal services. There is no question but that quality accreditation standards are needed. Lack of knowledge about a solicitor's expertise has been mentioned. As advice and assistance is extended to cover solicitors, solicitors who lack the appropriate expertise might be allowed to start to work in discrimination law. We would like to think that there are people in the not-for-profit advice sector who are capable and can meet the required standards. Lay representatives can represent people in employment tribunals and many such individuals have built up expertise in court that is superior to that of a solicitor who has little expertise in the employment tribunal context.

Maureen Macmillan: It is a chicken-and-egg situation, though. Solicitors have to start somewhere. If they do not get any work in the area because they have no experience in it, they will not develop their expertise.

Muriel Robison: Part of my remit is to deliver education and training to everyone who gives advice and information about sex discrimination, including the legal profession. We are talking about working in partnership with, for example, the Disability Rights Commission, to deliver training to solicitors who might be interested in undertaking more employment tribunal work since the introduction of advice and assistance for those tribunals. We are conscious of the need for that expertise.

Maureen Macmillan: I asked the representatives of CAS whether they think there is

adequate provision in universities for training in social welfare law and whether courses in such areas of law are given equal weighting with conveyancing courses. How do you feel about the way discrimination law is dealt with in university law courses?

Muriel Robison: Increasingly, it is becoming possible to take a course in employment law at university. Once solicitors are in private practice, we can and do offer training; we would not debar solicitors from the courses that we provide throughout Scotland. However, those courses must be provided either free or at very low cost, to ensure that people attend them and because CAS has a limited budget. Solicitors who are interested may attend the courses, which we would like to think are of a good quality.

Paul Martin (Glasgow Springburn) (Lab): In your evidence, you suggest that a legal services commission should be set up. The commission would have two main purposes. First, it would have a strategic overview of the provision of legal services. Secondly, it would ensure access to those services regardless of geographical location. How do you envisage such a commission operating?

Muriel Robison: Reference has been made to regional and local partnerships. It is important to note that we would not necessarily expect there to be high levels of specialism in every locale, but a community legal service, which would have a strategic overview, should be able to ensure that there is at least one specialist referral agency in the region, to which individuals can be sent and where they can get the appropriate quality of advice.

The Convener: Thank you for your evidence.

Subordinate Legislation

The Convener: We now move on to item 3. I welcome Iain Gray, the Deputy Minister for Justice. There are two motions before us, which will be moved and disposed of separately. I call the minister to move motion S1M-1702 on the Advice and Assistance (Financial Conditions) (Scotland) Regulations 2001.

The Deputy Minister for Justice (Iain Gray): The financial conditions regulations are part of a regular cycle of review of the qualifying limits in the legal aid regulations and are entirely technical. The proposed upratings that we are considering today would take effect from Monday 9 April 2001.

The Advice and Assistance (Financial Conditions) (Scotland) Regulations 2001 provide for the uprating of financial eligibility limits in relation to advice and assistance, which are increased annually in line with contributory benefits. The Secretary of State for Social Security announced on 9 November that contributory benefits will rise in line with the retail prices index, which this year stood at 3.3 per cent.

One important element of advice and assistance is to enable a solicitor to make a simple and quick assessment of an applicant's means so that the advice can be given there and then. To simplify the calculations that require to be undertaken, no deductions are made by solicitors for rent and council tax, for example. Instead, the limits for advice and assistance contain built-in averaged allowances for such costs, to simplify the means assessment. It is therefore appropriate that advice and assistance limits should be uprated by the RPI, which includes housing costs.

We therefore propose that from 9 April 2001 the lower weekly disposable income limit be raised from £76 to £79 and the upper limit be raised from £180 to £186. As a result of the upratings, the regulations also revise the contribution bands that determine the level of contribution paid by applicants who receive advice and assistance.

I move,

That the Justice 1 Committee recommends that the draft Advice and Assistance (Financial Conditions) (Scotland) Regulations 2001 be approved.

Phil Gallie: Such a well-argued case can only be supported. Perhaps it puts Iain Gray in line to become the fisheries minister.

The Convener: We will pass over that comment. The question is, that motion S1M-1702 be agreed to.

Motion agreed to.

The Convener: We will now consider motion

S1M-1703, on the Draft Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2001.

Iain Gray: The regulations are concerned with uprating the financial eligibility limits for civil legal aid. The annual upratings are directly linked to increases in the level of income-related social security benefits. As was announced by the Secretary of State for Social Security in November, these benefits have been uprated by the Rossi index, which stood at 1.6 per cent. The Rossi index is based on the retail prices index minus housing costs.

The instrument raises both the lower disposable income limit, below which civil legal aid is available without contribution, from £2,723 to £2,767 a year and the upper limit, above which civil legal aid is not available, from £8,891 to £9,034 a year. Like advice and assistance, the uprating matches social security benefit increases, which are a matter for the UK Government.

Furthermore, dependants' allowances, which are taken into account in the means assessment calculation, are increased in line with the increase in income support personal allowances. I believe that the changes are straightforward; it is up to the committee to decide how well argued they are.

I am happy to move,

That the Justice 1 Committee recommends that the draft Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2001 be approved.

The Convener: If no other member wishes to make a relevant contribution, I will put the question. The question is, that motion S1M-1703 be agreed to.

Motion agreed to.

The Convener: The committee is now required to report to the Parliament on these affirmative instruments. As usual, the report will be short and formulaic and I intend to circulate it by e-mail. If no member disagrees, that will be the report. Is that agreed?

Members *indicated agreement*.

Legal Aid Inquiry

The Convener: We now move to the fourth item on the agenda. For the next evidence session in the legal aid inquiry, I welcome witnesses from the Faculty of Advocates. Colin Campbell QC is vice dean of the faculty and he is accompanied by Peter Gray and Eugene Creally.

I want to start by considering your written evidence to the committee. Paragraph 6 of your submission mentions that access to justice for some who have good claims is inhibited by the means-testing criteria. Can you expand on those concerns?

Colin Campbell (Faculty of Advocates): I would happy to do that. However, perhaps I can just say that the faculty has been very glad to be asked to assist the committee and hopes to be able to do so in future on this and other matters.

In relation to your question, the faculty has little direct experience of the operation of the financial criteria in particular cases. However, it is aware of—and to an extent shares—a concern that the eligibility criteria are currently inhibiting access to justice because they are set too low. In the absence of any significant contribution, one almost has to be on income support or benefits of some nature before a claim is allowed. That might be entirely unnecessary, because aside from matrimonial legal aid, legal aid is largely self-financing for the reasons that we set out in the paper in what we hope is a reasonably clear way.

Experience shows, particularly with personal injury cases, that the vast majority of cases are successful; either there is a settlement or the claim succeeds, in which case there is a recovery of expenses from the other side. The paper sets out many other benefits to the public purse. In such circumstances, there might be a case for relaxing the financial criteria that would otherwise prevent an individual from prosecuting a good claim.

We are aware that there are other potential methods of funding civil litigation, particularly those used in England, where there has been a move towards replacing large swathes of the civil legal aid system with other methods. Those other methods have a part to play, but the faculty is strongly supportive of—and would urge upon the committee—the need to retain, in the public interest, a strong, healthy and vigorous legal aid system.

The Convener: When you talk about the limits being set too low, how far do you see them needing to be raised from current levels? How far out of line do you think they are?

Colin Campbell: I do not mean to duck the

question, but I do not think that I can usefully elaborate on that point of detail as I do not have sufficient access to particular case figures. I would rather raise this matter as a general concern. I suspect that others would be better placed to comment on what the specific changes ought to be.

11:45

The Convener: Correct me if I am wrong, but you seem to be suggesting that the extent to which limits would be raised would not matter, as the system is to be self-financing. That sounds almost too good to be true.

Colin Campbell: Please do not misunderstand me; there will always be cases that will be lost. The point that I am making would not apply to matrimonial legal aid, but would apply to personal injury cases and to civil litigation, which is a very important part of the overall scheme.

The Convener: You mentioned certain measures that are being introduced in England. You did not rule them out, but said that you thought that they should not necessarily be applied in the areas where they were introduced. Could you expand on that, to say what those measures are, and where they might be relevant north of the border?

Colin Campbell: I am thinking about conditional fee arrangements and legal insurance schemes and the like, all of which have a part to play. The Faculty of Advocates is concerned that there are various disadvantages to those schemes, which persuade us, at least, that it would be wrong to see them as a substitute for a legal aid system. An example would be a legal insurance scheme, where there remains the question of the premium. Legal insurance schemes are unlikely to cover complicated, difficult cases where the prospects of success are, perhaps, less certain, and they are still largely untried and untested.

The Faculty of Advocates' principal concern about conditional fee arrangements, commonly called no-win-no-fee arrangements, is that inevitably the case lawyer has to have a personal financial interest in the outcome of the litigation. That can be justified in certain circumstances where, otherwise, access to justice would be prevented. As a generality, however, it is an undesirable element in any case.

Phil Gallie: From your experience, is it the case that no-win-no-fee cases are taken on only when solicitors or others recognise the certainty of the case that they are projecting?

Colin Campbell: That is a fair observation. Our concern is for cases where, for example, someone has a difficult medical negligence case to pursue as their child has been born in circumstances that at least give rise to concern about the quality of care. Quite rightly, those are traditionally difficult cases to pursue and to win. In the absence of any certainty of success, it is unlikely—although not impossible—for that person to find a solicitor ready and willing to take the risk of the substantial financial outlay for running a case of that nature. It is not obvious to the Faculty of Advocates why the lawyer should gain a double fee—if I can put it that way—from winning, whereas the lawyer who loses gets nothing. Usually, the success or failure of a case does not depend on the lawyer's competency or efficiency. A very well-organised case can be lost for many reasons.

Phil Gallie: Paragraph 8 of your evidence invites us to reject as representing access to justice the situation whereby a successful defender against a legally aided action is unlikely to be awarded costs. Will you expand on that?

Colin Campbell: Views may differ about that situation, which is not black and white. There is a concern that defenders are often unfairly treated. For example, suppose that a litigation was raised against one of us—private individuals with the means to finance an action or at least sufficient funds not to allow us to recover legal aid. We face a legally aided pursuer, who, because of that benefit, faces no financial risk in the action and can afford to pursue the case. In such circumstances, insurers or defenders will often settle a claim, not because they recognise that the claim is good or justified, but because they want to avoid the risk of legal and other expenses.

Do not get me wrong—I am not suggesting that although the financial eligibility criteria should be expanded, legal aid claims should be strangled by reference to a merits test. The legal profession must be given some credit. When acting for legally aided clients, we keep a close eye throughout on whether it remains reasonable for a case to be prosecuted. If it does not, we alert the Scottish Legal Aid Board.

In the submission, we recognise that it is not easy to address the issue. There is no easy answer. However, we suggest one or two simple and practical solutions that might be introduced and which would achieve some improvement.

Phil Gallie: You commented on access to justice, and I accept what you just said. Given that, would it be fair for the layman to suggest that civil law is open to the very poor and the very rich and that those in between are virtually excluded?

Colin Campbell: There is concern that the present costs and uncertainties of litigation make it difficult for the people whom you mentioned to contemplate it. Often, people are forced into litigation. Those who are defending an action may

have no choice. However, one must balance against that the public interest in vindicating good claims and the need not to prejudice the public interest by the factors that we discussed.

Phil Gallie: If we follow your line and try to compensate by allowing a successful defender to draw against legal aid funds, for example, the funds will be squeezed. What priority would you give to such a claim?

Colin Campbell: My personal view is that it should not have the highest priority. We try to recognise that in our submission. We recognise the fact that there may be difficulties. That is why we discuss other possibilities for addressing the issue.

Gordon Jackson: You raise the possibility of successful defenders recovering money from the fund, but you also suggest that the fund is self-financing at the moment and that we could open up the criteria. You also say that cases settle for the somewhat cynical and pragmatic reason of expense. I find it difficult to square all that. If you allowed defenders to have a claim on the fund, the pragmatic settling would not happen and the system would not be self-financing. In other words, your original argument cannot fit with allowing defenders to get their money back out of the fund. Is it fair to say that?

Colin Campbell: I do not suggest that this is an easy matter; it is an attempt to flag up for the committee a concern that is shared by many—although not all—that the current system can operate unfairly for defenders.

Gordon Jackson: Did the Faculty of Advocates see any workable case for allowing successful defenders to get their expenses back out of the fund—regardless of their wealth—without destroying the structure of the legal aid budget?

Colin Campbell: In limited circumstances, it can be done already. The Legal Aid (Scotland) Act 1986 allows it in cases that are just and equitable and in which there would otherwise be substantial hardship. I take on board the point that you are making, however. I would not want to argue that there is only one way to proceed. The Faculty of Advocates is trying to bring the issue to the committee's attention.

Maureen Macmillan: With regard to the hardship element, I assume that a successful defender could end up bankrupt because of the court costs. You have answered the question that I was going to ask by saying that the act allows for such people to get their expenses out of the fund. How often is that done?

Colin Campbell: My impression is that it is not done often.

Maureen Macmillan: Is that because there is often no need for it or because people do not know about it?

Colin Campbell: In the past, the courts have taken a fairly restrictive approach to the matter, no doubt partly because of the considerations that Gordon Jackson mentioned a moment ago.

Paul Martin: You raised the issue of the failure to increase the legal aid fees in respect of criminal work. Could you give details of the negative impact that that is having?

Colin Campbell: The background is that criminal legal aid rates have not changed since 1992. Civil legal aid rates underwent a 3 per cent increase in 1995, but have not been changed since. The impact is manyfold, but I will try to summarise the main features.

A widening gap has developed between the scale rates that are recoverable under the regulations and the level of remuneration that counsel can obtain for privately funded work, particularly in civil matters. The result of that is that, over time, there has been a growing disincentive for experienced, well-qualified counsel to take on criminal work. That has been mitigated, to an extent, by the ability to seek enhanced fees from the Legal Aid Board. The lesson of history, however, is that that has created additional difficulties, aggravation, delay and expense. There have been a variety of problems, not just for counsel, but for the Legal Aid Board.

We are concerned that, unless the matter is addressed now, there will come a time when the public interest in the administration of justice in our criminal courts, particularly in serious criminal cases in which appropriate skilled representation is vital, will be harmed. The Faculty of Advocates is addressing that problem in partnership with the Legal Aid Board and the Scottish Executive. I should be happy to talk about that in a moment if you want.

While I know that this sort of thing is often said to be about lawyers being concerned about their fees, I can only ask you to accept it when I say that the Faculty of Advocates is very concerned that the situation is causing real harm, considering the fact that counsel who have a lifetime's experience of practice in the criminal courts are giving that up to do other things, because of the difficulties that they have in obtaining reasonable remuneration for what is very important work.

12:00

Paul Martin: What evidence do you have that criminal bar members are moving to other areas?

Colin Campbell: We are a relatively small body of people—about 400 people practise out of the courts just down the road from here. We all know

each other. We live together and talk together. I simply know about what is happening from my own observation and experience.

Paul Martin: Has the annual income of experienced members declined over the past decade?

Colin Campbell: Generally, throughout the Faculty of Advocates?

Paul Martin: Yes.

Colin Campbell: I do not know the figures for the average income of members of the faculty over that period, nor whether average income has declined. The income of the bar as a whole has increased quite considerably over the past 10 years, but so has the size of the bar. I am afraid that I do not have the figures to answer your question.

The Convener: You seem to be saying that, because you are a close-knit community, you know that people are moving into other areas of work. However, you do not discuss among one another your total remuneration. Does nobody say, "Things are getting hard," or, "We're having a really good year," or anything like that?

Colin Campbell: From talking to colleagues, I know that people have been suffering real hardship as a result not just of the low rates, but of the difficulties in obtaining payment from the Legal Aid Board that have existed in the past. The matters relating to the board are, I am pleased to say, beginning to be addressed and mitigated.

I do not want to over-egg this particular pudding, but I equally do not want to leave the committee thinking that the issue is not of significance. If people are leaving the bar for the shrieval bench or are not going into criminal legally aided work, that, in time, will cause real harm. In fact, it is causing harm now.

Paul Martin: I am sure that I can expect extensive correspondence from my constituents, who will be concerned about the fact that your annual income has not increased.

How many advocates have qualified to the criminal bar recently—particularly over the past 10 years—compared with a decade ago?

Colin Campbell: I do not have the figures on that, but I am happy to go away and think about it. My impression is that, these days, people come to the bar more and more to do civil work, not to work in the criminal courts. That is not to say that there are not people coming to the bar who are going into the criminal courts—do not get me wrong. I do not have precise numbers to give you, and it may be that there are still the same number of people overall, but I am concerned about our ensuring that there will be an appropriate level of skilled counsel at all levels of seniority in the future, doing what is important work.

The Convener: Why do you think the fees have remained unchanged? We have just dealt with a couple of statutory instruments, as you heard, which involved annual uprating. Some people might argue that the same case could be made for the annual uprating of your fees. Is there somebody in Government or the civil service who thinks that you are getting paid too much? What is the motivation?

Colin Campbell: That is a very good question. I am not certain that I know the answer.

To an extent, the situation has worked simply because counsel has the ability, in an appropriate case, to seek what is called an uplift on the fee. As the scale rates have become ever more historic, so, for obvious reasons, the number of attempts to seek uplifts has increased.

To be fair, the Legal Aid Board finds itself in a somewhat difficult position, because it is expected to operate in a slightly artificial world where the scale rate remains the appropriate rate for a case of normal complexity and difficulty, but increasing numbers of requests are received for cases that fall outwith that description. Allied to that, counsel has the right to go to an independent auditor, who can look at the case to assess what a reasonable fee would be. Over the years, that assessment has become more and more divorced—for reasons that I hope are obvious—from the scale rates.

Over successive years, the requests that have been made for increases have fallen on deaf ears. Life has continued in the way that I have described—which, it must be said, is fairly unsatisfactory for counsel and for the Legal Aid Board. We have now reached the stage where something really has to be done.

The faculty commissioned an independent expert to develop a graduated fees scheme for legal aid, which I would be happy to talk about if the committee wishes. The scheme is now before the board and we are having discussions about it. The general idea is that a graduated fees scheme will provide an up-to-date, objectively fair and reasonable solution to the problem in future. Also, since we understand that Government has a legitimate need to have some idea of what the future budget will be, the scheme will enable Government to predict and assess the future budget for counsel's fees with a degree of confidence that it may not have at the moment.

Having said that, let me stress that the absence of a cap on the budget for legal aid in Scotland is an extremely good feature of the system—the reasons for which, I hope, should be obvious. Assuming that our discussions with the board are

successful, we hope that the graduated fees scheme for criminal legal aid will be attractive to the Scottish Executive.

Phil Gallie: I have a quick question. Do you think that QCs are the victims of public perception? When the Government considers QCs, it recognises that if their salary levels were retained at a certain level, the public would not be too upset. The Government might simply ask why their salary levels should increase.

Colin Campbell: I have no doubt that we would not receive the same sympathy as, for example, the nurses.

The Convener: Perhaps we can move on to civil matters—

Peter Gray (Faculty of Advocates): May I add something? Paul Martin asked how many people are leaving the criminal bar, for whatever reason, and what effect that has.

As someone who practises solely in the criminal courts, I would say—and I think that Gordon Jackson could confirm—that a substantial proportion of people from a senior level in the criminal bar have left in the past five years. I do not have the precise figures, but I would put the figure for those who have left the criminal bar at something in the region of 40 per cent of the more experienced junior counsel and senior counsel.

In a small jurisdiction, that has a huge effect on the administration of justice. If, over a five-year period, 40 per cent of people in the medical profession were to leave, one can easily envisage the difficulties that would arise. The consequence of those people leaving is that the administration of justice suffers. Repeatedly, there will be serious cases—such as murders—that will not be able to proceed at the appropriate time because no appropriately qualified counsel are available to conduct the case.

Maureen Macmillan: I have been trying to find out from Gordon Jackson how much he earns, but he will not tell me. He just says, "It's no enough."

Gordon Jackson: Put it this way, Maureen, I became an MSP for the money.

Maureen Macmillan: As you said, people are leaving the criminal bar and some are moving into civil work. Your submission says:

"There is now a wide divergence between the scale rates and fees considered appropriate for privately funded work."

Can you give us some figures? Can you make comparisons within the same field—perhaps between rates for divorce cases, for matrimonial work and for reparation?

Colin Campbell: There is no scale rate, as such, for civil work. However, recent auditors' reports suggest that a junior counsel who appears in Glasgow sheriff court on a matrimonial matter might expect to receive a gross fee—the top figure from which a lot of expenses must be deducted before one even gets to the taxable fee—for the day, including all preparation for the case, in the region of £650 to £700. Decisions vary from auditor to auditor; some will be higher, some lower. The scale rate for a junior counsel conducting a criminal trial in Edinburgh is just under £250. For a senior counsel conducting a criminal trial in Edinburgh, the rate is £315.

Maureen Macmillan: Is that £700 legal aided?

Colin Campbell: Yes.

Maureen Macmillan: That is the difference between the rates for civil and criminal cases. What if an action is not legal aided? How much could be charged? I am trying to establish the difference between what an advocate would get from a private client and what they would get from someone claiming legal aid.

Colin Campbell: It is hard to generalise. Much will depend on the client and the complexity of the case. It might be fair to think in terms of a factor of two and a half to three, in relation to the scale rates.

Maureen Macmillan: Okay. Would those advocates who take legal aid cases—such as the junior counsel whom you talked about—specialise in legal aid cases in civil matters, or would they typically have a mix of clients?

Colin Campbell: We have talked at length about criminal legal aid; I emphasise that because the criminal bar depends to a substantial extent on legal aided work. If one specialises in civil work, there is greater scope for privately funded work. Having said that, there are counsel who work at what one might call the matrimonial bar, who rely to a substantial extent on legal-aided work in the civil courts.

In any event, the bar is committed to serving the public through the civil legal aid system. I will conduct legal aid cases, as will most advocates. However, unless there is some recognition of the problem, the number of people who are prepared to undertake such cases will diminish over time. Nonetheless, we are committed to the civil legal aid system as well as to the criminal legal aid system.

Maureen Macmillan: Do people specialise in the matrimonial bar all their lives, or does a junior counsel undertake that work before moving on to other, perhaps more remunerative, work?

Colin Campbell: Most people at the civil bar tend to have a mixed practice. Some specialise in matrimonial work, and may do so all their days, but they will also do other things. There are others

who will do matrimonial work for a period in their practice, then through natural evolution, without a particular desire on their part, will move into other areas.

Maureen Macmillan: At the level of senior counsel, is there any evidence of a decline in the willingness of experienced advocates to take legal aid clients? Are they moving away from legal aid clients to self-funded cases, or is the mix as it always was?

Colin Campbell: It is difficult to say. I suspect that it is more difficult now than it was 10 or 15 years ago. When I started at the bar more than 20 years ago, there was, in effect, no difference between the legal aid rates and what one generally would charge for privately funded cases—the latter may have been slightly greater. The thinking in those days was that the legal aid rate would be 90 per cent of what one might call the market rate, to allow for certainty of payment, through not having bad-debt worries or anything of that nature. The bar is not saying that we should go back to a figure of 90 per cent of the market rate, but the gap now is far too wide.

12:15

Maureen Macmillan: Is there any evidence that recently qualified advocates are unwilling to take legal aid clients, or will they just take what they can get when they are starting out?

Colin Campbell: I am not aware of any evidence to that effect. It would be quite hard to come across it, in any event.

Maureen Macmillan: I would imagine that, if someone was starting out, they would take whatever cases came to them, unless they had a considerable source of private income.

Colin Campbell: That is likely.

Michael Matheson: In your evidence, you refer to the fact that there is inadequate financial provision for the instruction of expert witnesses or expert advisers in legal aid cases. How extensive is that problem?

Colin Campbell: Peter Gray, because of his particular expertise in criminal work, has some experience in that area.

Peter Gray: The problem with the instruction of expertise in criminal legal aided cases is, first, that as a matter of practice, the Scottish Legal Aid Board is slow to process applications. If sanction is granted for the instruction of an expert, it is not uncommon for it to be granted at 5 minutes to 5 the night before a High Court trial is due to start, with the result that it affects the administration of justice, and causes distress to complainers and inconvenience to everyone. Once sanction is granted, the Legal Aid Board puts stringent limits on the amount of money that is available to instruct an expert. It is not uncommon to find that even when sanction is granted, it is difficult to find an appropriate expert, because when he or she is told the amount of funding that is available, they simply decline to carry out the work.

The other difficulty that arises is that even if sufficient funding is provided to instruct an expert at the beginning, an expert will often do a preliminary report, carry out a preliminary investigation, and then say, "I need to carry out X or Y in order to complete my report." The solicitor then has to go back to the Scottish Legal Aid Board and make a fresh application for further funding for the expert to complete their report. That causes further delay, and the administration of justice suffers as a result. It is a problem. In theory, legal aid is available, but in practice, funding is often insufficient and delayed.

Michael Matheson: It sounds like the problem stems from both the authorisation procedure and the limited funding that is available to pay for expert advisers. What action would you want to be taken to address the problem? Have discussions taken place with SLAB to speed up the authorisation procedure?

Peter Gray: On the second question, the court has made it clear on a number of occasions that it is, at the very least, unsatisfactory that cases are delayed because SLAB has failed to deal with an application for an expert.

I am not sure that the situation can be improved without further funds. I do not know what the experts' rates are in different sectors, but the amount of money that SLAB considers to be appropriate frequently does not meet the reasonable expenditure that the expert expects.

Michael Matheson: I would have thought that a reasonable course of action would be for SLAB to try to improve its procedural process—that should not be too costly. How extensive is the problem?

Peter Gray: The Law Society would be in a better position to give evidence on how to improve authorisation procedures, because the solicitors are the ones who are involved in the telephone calls and correspondence with SLAB to get sanction in the first place.

With the benefit of the forensic scientific skills that are now available, expert evidence has become increasingly important in criminal trials. Having done exclusively defence work and, before that, having prosecuted for three years in the Crown Office, I would say that about 25 per cent of cases could involve expert evidence. That figure is off the top of my head, although I can say that expert evidence is involved in more than a minimal number of cases but not in every other case.

Michael Matheson: That suggests that the problem is fairly large and increasing.

Peter Gray: Yes.

Gordon Jackson: In page 5 of your submission, you make your views fairly clear on several miscellaneous matters, but it might be helpful to have those views on the public record. You mention the need to consider greater legal representation of families in fatal accident inquiries. Can you elaborate on that?

Colin Campbell: I should indicate that, contrary to what paragraph 19 of our submission might suggest, legal aid can be awarded for representation of families in fatal accident inquiries. I apologise for that slight inaccuracy.

Having considered the matter further, I understand that it is still difficult, in practice, for families to persuade SLAB to grant representation. I gather that representation is automatic if there is a death in police custody, but in other cases the board requires to be persuaded, or satisfied, that the family's interest will not be adequately protected by the procurator fiscal. It may be thought that the presumption should be the other way round, so that as a generality legal aid is available for families in such difficult situations.

Gordon Jackson: You also mention employment tribunals. You point out that that is an extremely complicated area of the law, which even lawyers find difficult. Could you comment on what you see as the unmet need in that area? I have to say, in passing, that other witnesses have suggested in their evidence that the lack of interest in that area is not because of the system, but because lawyers have never taken an interest in it. Could you comment on that?

Colin Campbell: Again, since the submission was written in December, there have been some changes. Legal aid is now available for industrial tribunals and employment tribunals, although the comments that I made a moment ago in the context of fatal accident inquiries again apply.

I do not specialise in employment law, but I have acted before industrial tribunals and employment appeal tribunals. That area of the law is supposed to be user friendly; members of the public are encouraged to come along without a lawyer and plead their case.

However, the law is unbelievably complicated and difficult to follow and it is getting worse with every passing year. The practical effect is that, leaving aside any other issues, the tribunal is put in a difficult situation. It is required somehow to balance the interests of the unrepresented individual by, in a sense, representing and pleading the case before itself and then adjudicating the case. The same issues arise in social security tribunals and in relation to criminal injuries compensation. I expect that the committee will consider the position in relation to a much broader area than employment tribunals alone.

Gordon Jackson: Our evidence suggests that a case could be made for legal aid not just to be given to individuals but to be extended to small businesses or even to other representative bodies. Does the faculty have a view on that suggestion?

Colin Campbell: The faculty's view is summarised in the final paragraph of its written evidence.

Historically, it is interesting to note that the Cameron report, which was published just after the war, appeared to anticipate that small businesses would be eligible for legal aid in appropriate cases.

We believe that a case could be made for extending the availability of legal aid to representative bodies, particularly given the growth of administrative law and the increase in judicial review-type challenges.

Phil Gallie: Earlier, Mr Gray responded to a question on the delayed clearance by SLAB of applications for expert witnesses. Those delays could lead to the adjournment of court hearings and a build-up of additional costs, which would be added to the judicial procedure.

Peter Gray: That is exactly what happens. SLAB regularly causes delay. The defence will turn up for the trial, with the Crown having served an expert report on the defence solicitor. That solicitor will have applied to SLAB for sanction to instruct an expert, but either that sanction is not forthcoming or it is insufficiently funded. Nevertheless, the case is called and it is inevitable that there will be delay and expense. As I said, enormous distress is often caused to complainers and prosecution witnesses who have been waiting to give their evidence.

Maureen Macmillan: How often do such situations arise? You say that they are a regular occurrence, but do they account for one in every three cases, one in every six cases or one in every 10 cases?

Peter Gray: I think that up to 25 per cent of cases are affected. Inevitably, that figure is off the top of my head, but the number of occurrences is more than minimal.

Colin Campbell: I understand that SLAB recognises the problem and is discussing the situation with the Crown Office. The faculty would be pleased to participate in those discussions. We have regular meetings with SLAB—in fact, I am to meet SLAB's chief executive this afternoon. This is certainly the sort of issue that we would wish to raise with SLAB.

The Convener: Finally, I will ask about the continuing discussions on community legal services and how they should be funded. It has been suggested that those services should be funded by diverting money from existing expenditure, on the basis that they represent better value for money, as people do not get into expensive court procedures. What are your views on those services?

Colin Campbell: The faculty considered community legal services a year or two ago, in the context of an earlier consultation document on access to justice. We realise that the subject has come up again.

Two or three years ago, we had concerns about the apparent intention to create a community legal service of solicitors or paralegals who would be publicly employed, either by SLAB or by another organisation. Members may know far more about the current consultation than I do, but I understand that the desire is to integrate or co-ordinate existing agencies, to advise them and to encourage communication and dialogue among the disparate bodies, such as advice bureaux and law centres. No one would quarrel with that approach, which, if done properly, could only be a good thing.

However, the faculty is concerned about the financial implications of community legal services and about the diversion of money away from other needy areas of the legal services regime. In particular, we are concerned about money being diverted from the higher courts or other areas of independent legal practice. While that approach might cure one ill, it would do so at the expense of another area.

Does that response directly answer your point, convener? I am conscious that I may not have caught the comments that you made at the end of your question.

The Convener: You may not be able to answer the question, but some people take the view that agencies that are more community based might provide better value for money, in terms of the number of people who are helped or cases that are cleared up. Problems could be sorted before they got to the higher courts, which are seen as being more expensive.

Colin Campbell: I understand that absolutely. I know that all solicitors and counsel believe that an important part of their function is to resolve disputes by settling them, in order to avoid the expense of court proceedings and the like. A logical extension of that is for people who have housing difficulties or social security problems to have access to appropriately skilled advice in their local area, which would be a good thing.

The Convener: As there are no further questions, I thank the witnesses from the Faculty of Advocates for attending. We will certainly take up their offer to appear before the committee again during future inquiries.

We will take item 5 in private.

12:32

Meeting continued in private until 12:43.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178