# JUSTICE 1 COMMITTEE

Tuesday 8 May 2001
(*Morning*)

Session 1

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## Tuesday 8 May 2001



## JUSTICE 1 COMMITTEE
**13th 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)
*Nora Radcliffe (Gordon) (LD)

*attended

**THE FOLLOWING ALSO ATTENDED:**

Iain Gray (Deputy Minister for Justice)

**WITNESSES**

Jean Couper (Scottish Legal Aid Board)
Colin Lancaster (Scottish Legal Aid Board)
Lindsay Montgomery (Scottish Legal Aid Board)
Tom Murray (Scottish Legal Aid Board)

**CLERK TO THE COMMITTEE**

Lynn Tullis

**SENIOR ASSISTANT CLERK**

Alison Taylor

**ASSISTANT CLERK**

Jenny Goldsmith

**LOCATION**

Committee Room 1

# Scottish Parliament

## Justice 1 Committee

*Tuesday 8 May 2001*

(*Morning*)

[THE CONVENER *opened the meeting at 9:16*]

## Interests

**The Convener (Alasdair Morgan):** I open this meeting of the committee. I welcome Nora Radcliffe to her first committee meeting and ask her whether she has any relevant interests to declare.

**Nora Radcliffe (Gordon) (LD):** I have nothing to declare.

## Item in Private

**The Convener:** Item 2 is to decide whether to take item 5 in private. It is conventional, before draft legislation is published, for the documents to remain confidential. It does not make much sense to discuss draft legislation in public if the documents are not available. Is that agreed?

**Members** *indicated agreement*.

## Legal Aid Inquiry

**The Convener:** Item 3 is further evidence in our legal aid inquiry. I welcome the representatives of the Scottish Legal Aid Board. We have with us, in no particular order: Lindsay Montgomery, the chief executive; Jean Couper, the chairman; Tom Murray, the director of legal services; and Colin Lancaster, the head of the policy unit.

I understand that you would like to make a short opening statement. Is that correct?

**Jean Couper (Scottish Legal Aid Board):** Yes. Several of the issues I want to touch on are of concern to the committee.

**The Convener:** I ask you to keep your opening statement short. You will be able to come in again at the end of the evidence session, once we have asked all our questions, if you feel that anything has been missed.

**Jean Couper:** Thank you very much.

We are grateful for the opportunity to give evidence. I want to touch on several points that are of specific interest to the committee.

It is important to recognise that legal aid is of benefit to a great many people in Scotland. Last year, civil and criminal legal assistance was granted in more than 450,000 instances. Although the system works, we believe that there is both scope and a need to improve and develop it, to better meet people's needs now and in the future.

I will touch on some issues with which we are trying to deal within the existing legislation and mention others, which we believe need to be addressed, that would require changes in legislation or regulations.

Let me start with the issues that we are trying to address now. First, we are concerned about the possible disincentive that the way in which the contributions system operates creates for applicants. In 1999-2000, 73 per cent of those who were offered civil legal aid had no contribution to pay. Of the remaining 27 per cent, almost one third did not accept the offer.

We cannot assume that cost is always the reason for a person not accepting an offer. It is interesting that the level of rejection of offers is not getting worse; in fact, the proportion of people who fail to take up offers of legal aid is lower now than it has been at any point in the past eight years. Nevertheless, we are considering how we might change the contributions system to reduce the problem further. To do that, we will survey applicants who have rejected an offer of legal aid to find out why they did not accept the offer and what they did without legal aid. We believe that the

research will help us to understand better the scale and nature of the problem and, I hope, to suggest potential improvements.

Members may be aware that in July 2000 we introduced a system of extended repayment periods—of either 15 or 20 months—for larger contributions. I am not suggesting that that has solved the problem, but I think that it is helping, as we have seen an increase in take-up, particularly among those whose contributions are between £500 and £1,000. We are currently considering various options and their implications. For example, we are looking at the possibility of introducing more flexibility to the instalment arrangements, either by extending the scope of the longer instalment period or by relating instalments to key stages in a case or to the likely cost of the case. We must think through any such changes carefully, as well as assess their financial implications, but we hope to be ready to consult on proposed changes by the end of the summer.

We know that applicants in particular circumstances can have difficulty in accessing the system—the committee has heard about the difficulties faced by victims or potential victims of domestic abuse. It is difficult for us to isolate the statistics on applications in relation to interdicts, exclusion orders and non-harassment orders, as they are often combined with other craves in actions for divorce, contact or residence, but we know that we have granted legal aid in more than 1,100 cases that were recorded simply as interdicts where the applicant was a female pursuer. In 1999-2000, such cases had a grant rate of 72 per cent, which was higher than the rate for civil cases in general, which was 67 per cent.

In many cases, urgent action is necessary. Legislation—termed the special urgency provisions—allows solicitors to take a wide range of steps without having to await a decision by the board. In 1999-2000, more than 10,000 cases—almost 45 per cent of all civil legal aid applications—featured some work done under the special urgency provisions. About a quarter of that urgent work related to interim orders for custody or interdict.

We are reviewing the special urgency provisions, in particular how the contributions system applies in such cases. We are concerned about the current arrangements under which, if a solicitor is taking special urgency steps and considers that his client is likely to have to pay a contribution towards legal aid, he may seek a substantial sum from the client up front, based on his assessment of the likely contribution. That is what is called a notional contribution. Many clients in that situation will not have the cash to pay up front. Solicitors ask for it because the board will deduct the notional contribution when paying the solicitor's account, on the assumption that the client has paid the contribution to the solicitor. If the client has not paid the contribution, the solicitor could be out of pocket.

Over the next month, researchers commissioned by SLAB will conduct focus groups with solicitors who are experienced in that area of the law. That will give us a clearer insight into the nature and extent of the problems and will help us to develop effective solutions. Again, we hope to be in a position to consult on proposed changes by the end of the summer.

We have identified the granting of sanctions and the employment of counsel or expert witnesses as being affected by and having an impact on other parts of the justice system. We need to work with the profession and the courts to ensure that those parts of the system operate smoothly and that the board receives the information that it needs to make decisions quickly and consistently. The vast majority of sanction requests are dealt with very quickly, but there are issues such as the restriction in legislation to pay Crown rates for experts in criminal cases, which can cause difficulty.

We have reviewed our procedures for dealing with sanction requests for counsel and we are about to consult the Law Society for Scotland and the Faculty of Advocates on the subject. We plan shortly to conduct a similar review in relation to sanctions for expert witnesses.

I want to address a few issues concerning the wider justice system. Sanctions, which I have just mentioned, are one example of why legal aid has to be seen as part of the wider justice system. We at SLAB, like others, want the system to work in a co-ordinated and cohesive fashion. By strengthening our links with other bodies, we are trying to appreciate more clearly the impact of legal aid on the system, so that we can explain to others how legal aid operates and contribute to developing improvements in the operation of the wider justice system.

We have also continued our programme of consultation meetings with the public, local faculties of solicitors and voluntary organisations. That helps us to address issues as they arise, rather than once they have become entrenched problems.

SLAB has a role to play in helping the profession to operate the legal aid system as effectively as possible. Some aspects of the legislation on legal aid are complex and difficult, for example property recovered and preserved, which is often referred to as clawback. We will provide more guidance and information to assist the profession on that and other issues.

The Justice 1 Committee is aware that we are examining why there has been a drop in the

number of applications for civil legal aid. It seems unlikely that there will be any simple explanations or conclusive answers, but we are investigating a range of possible contributory factors. The start of the decline in the number of applications can be traced back to a step change in eligibility that was made in 1993. We have commissioned an academic economist to assess whether eligibility has fallen further since then, as a result of economic growth that has not been reflected in the annual uprating of eligibility limits. We hope to have the initial results of that work by the end of June.

Like me, members of the committee will have heard anecdotal evidence that there are fewer lawyers providing a civil legal aid service and that that could be a barrier to access to the legal aid system. Our evidence suggests that there is an extensive and widespread network of outlets offering a civil legal aid or advice and assistance service. Indeed, more outlets were available in 1999 than were operating in 1992.

It may also be that the demand for legal aid services is changing. It is clear from the courts that there has been an overall reduction in the amount of litigation over recent years. Specifically, there has been a 30 per cent reduction in fault-based divorces between 1994 and 1999. Such actions account for a high proportion of civil legal aid applications, so it seems inevitable that a reduction in one would lead to a reduction in the other.

While the number of applications for civil legal aid has fallen, there has been a large increase in the volume of advice and assistance, which covers a wide range of matters, including areas such as social and welfare law. That suggests that there is still great and increasing demand for lawyers' services, but that less of it relates to the traditional work of lawyers and court-based solutions.

We recognise, along with many others, that the legal aid regulations are complex, in some respects inconsistent, and that the system can appear overly bureaucratic. We feel that a concerted review of our governing legislation and regulations is needed to address those issues.

The complexity of the system means that it is often difficult to explain it adequately to applicants, particularly matters such as clawback. Clear information is needed to ensure that applicants understand what they may have to pay at the end of their case and why. We are working on that and will publish a series of revised information leaflets, the first of which should be out in early autumn.

The inconsistency in the regulations can be bewildering for applicants and professionals alike. An example is the treatment of working families tax credit, which varies depending on whether one is applying for advice and assistance or civil legal aid. Issues such as that need to be considered in the context of a well-thought-out review of not only the treatment of benefits, but the availability of dependants' allowances.

Bureaucracy also needs to be addressed. We are doing what we can, including a review of the legal aid forms and the development of e-commerce, but we have to operate within the existing regulatory and legislative framework.

Any review should also consider the need to address some of the figures in the regulations, which have not changed for a number of years. For example, the lower capital limit for civil legal aid has not changed since 1983 and the £2,500 of property that is exempted from recovery in matrimonial cases has not changed since 1987. Clearly, the figures that are in place cannot be achieving what they were designed to achieve many years ago. The failure to keep pace with economic growth is in danger of affecting access to justice.

09:30

We share concerns about the stagnation of fee levels for solicitors and advocates and are pleased to be working through the tripartite group and separately with the Faculty of Advocates to address the issue.

As the committee knows, SLAB is part of the community legal service group, which is considering how to ensure that appropriate services are provided to those who need them. We reiterate our strong support for the group's work.

The working group is considering two issues that are of wider relevance. The first is quality assurance, which is of central importance, not just to community legal services, but to all providers of legal services. The second is the need for improved planning of the legal aid system. The board's powers in that respect are limited. Our responsibilities are to administer legal aid and to advise ministers on its operation. We think that there is a need for a strategic role to help the planning and development of supply of legal aid and advice provision. That would encourage and enable best use of the available resources.

In conclusion, much is right with the system, but much could and should be done better to meet the needs of the public. We are tackling some of the issues where we can; we would very much welcome the opportunity to do more with others.

We will be happy to provide the committee with any further information or assistance that it would find helpful or which might clarify some of the technical aspects of the system that it has

discussed.

**The Convener:** I want to consider the criminal justice system more broadly. Paragraph 41 of your written evidence says:

"there is scope for improvement in the efficiency and effectiveness of the system. This could be achieved by better understanding of the impact of changes in policy or process in other parts of the system, better fora for identifying and resolving issues etc".

Would you expand on that? What did you have in mind?

**Lindsay Montgomery (Scottish Legal Aid Board):** The evidence refers to how we work and how other parts of the system work together. For example, Jean Couper mentioned sanctions. One thing we find is that where different players provide different information, there are different perceptions of why sanctions do or do not work.

We want to get much closer to the various components of the system. We want to sit down and identify what does not work and put it right. We do not think that there are enough forums for doing so yet. We are pleased that we have been invited on to Lord Bonomy's group, which is considering High Court operation—there is also the drug pilot group—but we think that parts of the system need to work together more closely.

Different parts of the system can change how the system operates. The courts may make a change in a part of Scotland that we do not know about. That can affect how solicitors in that area operate. We might find out too late how we can improve the system to fit in with what the courts do.

**The Convener:** Can you give the committee an example?

**Lindsay Montgomery:** If a court decides to change how it operates intermediate diets, for example, that will affect the time scales to which solicitors must work. Information must be passed round the whole system.

Other parts of the system may change how court administration operates. It is a question of receiving information about what others are doing and passing on information about the changes that we make in consultation with others. That could make quite a lot of difference to the overall efficiency of the system.

**The Convener:** Are you saying that such changes happen routinely and that you do not find out about them except by default?

**Lindsay Montgomery:** I would not put it as starkly as that. There could be more effective consultation at an earlier stage and discussion of the impact of changes in one area on other aspects—not just the budgetary situation, but on the way that we process cases. That would help matters.

**The Convener:** One of our witnesses, Professor Paterson, suggested that a Scottish legal services commission should be set up to give that kind of strategic overview to the system. Could that be one of the solutions?

**Jean Couper:** We certainly see the advantage in the authority that the Legal Services Commission in England has. Its role is to identify needs and to plan how best to address them. That is missing from the system in Scotland, so it would be helpful to have that kind of planning process, which would impact on the issues that Lindsay Montgomery mentioned.

**Lindsay Montgomery:** Such a process would not solve all the problems that we are talking about. The Legal Services Commission deals with legal aid and associated areas, but it must still work alongside the rest of the justice system, so such an organisation in Scotland would not remove the need for greater consultation and working together.

**The Convener:** The previous section of your written evidence refers to the register of firms and solicitors who provide criminal legal assistance, and the code of conduct that solicitors must comply with to be registered. What benefits have come from having that register and the code of conduct?

**Lindsay Montgomery:** The key benefit is that we are able to ensure, with the profession, that all criminal practitioners are administering the system in the same way. When we do audits—we have done many—we give the solicitor a questionnaire to determine what they thought of the audit. It is interesting that a very high proportion say that they found the audits useful and that they helped them to get their processes and procedures to operate effectively. In addition, the audits have not been as intrusive as it was feared they might be at the outset. They have helped the quality of the administration of the process, but they do not necessarily tackle the quality of the product; that is a separate issue, which the system does not yet deal with.

**The Convener:** I note that you say in your evidence that

"Over 85% felt that the audit caused them minimal disruption"

but on a half-empty, half-full basis. That means that 15 per cent felt that it caused them significant disruption.

**Lindsay Montgomery:** Some solicitors were less happy than others, but to have introduced a system like that—which means going round other people's offices and looking at what is being

done—and to have that level of satisfaction is quite surprising in some respects, and quite positive.

**The Convener:** Have you been able to examine why the 15 per cent were unhappy and felt that there was disruption? Were they justified in taking that view? Have you taken any steps to ensure that they will in future be happier?

**Lindsay Montgomery:** Some people do not like the idea of the Scottish Legal Aid Board having access to their files and offices. No matter what we do, I am not sure that we can remove their concerns. We have learned from the process. We get back the questionnaires and the comments, and we examine how we operate. During the two and a half years in which we have been operating the system, we have gradually improved the process to make visits as brief and unobtrusive as possible.

**The Convener:** Paragraph 43 of your written evidence refers to new guidance for solicitors on applications to instruct counsel or engage expert witnesses, which you touched on in your opening remarks. Are you making progress on the development of that guidance?

**Jean Couper:** Yes, we are.

**Lindsay Montgomery:** SLAB has had a working group over recent months that is made up of a wide range of board members, and which examines sanction for counsel. We are at the stage of speaking to the Faculty of Advocates and the Law Society of Scotland on the outcomes and we are providing draft guidance, which we will put out to the profession, to make the system operate better. We want solicitors to give us the information that will allow us to take a decision quickly and effectively, and we want to reduce the number of times that we must go back to solicitors to say, "We are not clear why you need two seniors." The work that we are doing will make a difference to that.

The other key area is sanction for experts, on which I have a couple of things to say. As Jean Couper said, we are restricted by legislation to applying Crown rates when paying experts. Those rates had not changed for a good number of years, but were finally increased in April this year. The Crown generally operates by those rates. When we apply the rates to solicitors, they are sometimes unable to obtain an expert for those rates. A solicitor is not in the same bargaining position as is the Crown, which employs many experts.

We are trying to clarify with the Executive the extent to which we are tied to applying those rates. If the link is as clear as we think it is, we would like the Executive to consider changing the regulation to make it less restrictive, because it can cause problems. We tell solicitors that that amount is all that the Crown pays, and solicitors tell us that they cannot obtain an expert for that amount—we must resolve that. We will consider that issue quickly.

**The Convener:** Am I being a bit naive? You say that you are trying to clarify the issue with the Executive. I would have thought that that question could be answered simply with a yes or no.

**Lindsay Montgomery:** The issue is not that simple. There are questions about the meaning of the legislation. If the Executive takes the view that there is scope for greater discretion than SLAB has used, or than is understood to exist, that will help us to adapt more. If the Executive says that there is no discretion, we will want the regulation to be changed to solve the problem.

**Phil Gallie (South of Scotland) (Con):** I will pick up on your reference to the forums that are required for greater communication and consultation. Will not that just involve more bodies? Will not that place extra burdens on busy people? Will it incur extra costs? Is not the solicitor the conduit for passing back change that might occur in a court? Would it be simpler to adopt a fast-track approach, using the information that comes from solicitors?

**Jean Couper:** Information that is fed back from solicitors is ad hoc and anecdotal. We see advantage in capturing that information, which we obtain and try to make the best use of. However, there remains a need for a more concerted approach to working with other relevant parties. The idea would not just involve more bodies. The bodies that exist should meet and work more closely in consultation with one another. That would have great advantage, because closer contact, better understanding of the issues for different parties, and joint working to decide how best to proceed could bring about incremental improvement. We do not ignore solicitors, but often their information is anecdotal, rather than being factual and figure-based evidence on which we can agree with other relevant bodies in the system.

**Lindsay Montgomery:** Solicitors have an important place in the process. We value the information that we obtain from solicitors, which is one of the reasons why we have made many visits to local faculties of solicitors in the past year or so, to find out what they think of the process. That allows us to feed views back to the justice department or elsewhere. We want to continue that process, but that does not allow us to start meeting the other drivers of the system to discuss how we can make the system work better.

**Phil Gallie:** Your evidence explains that 70 per cent of criminal legal aid accounts are now covered by the fixed-fees regime. You also

suggest that solicitors and their clients have had fewer problems than were predicted. Will you explain how you reached that judgment?

**Lindsay Montgomery:** When the introduction of fixed fees was proposed, the profession's substantial reaction was that the system would not work and that it would be grossly unfair. Issues about fixed fees need to be resolved, particularly for expensive cases. I hope that the Convention Rights (Compliance) (Scotland) Bill will deal with those issues.

Many solicitors have told us that the system provides a quick and easy way of obtaining their money, which is important, but there are aspects of that with which individual firms are unhappy and which they will want to address. Overall, when we have spoken to many solicitors around the country, we have found that that issue has not been near the top of their agenda; they think that other issues are more significant. There are issues relating to fixed fees that still need to be sorted out, but the system has generally worked well. The most recent figures suggest that almost 90 per cent of summary work last year was done under fixed fees and we have been able to pay those fees quickly and effectively.

09:45

**Phil Gallie:** There is a view that opting for fixed fees has led to a lower level of service being provided. Inevitably, when solicitors are involved in cases for which a fixed payment is made, it is in their interests to minimise the time that they give to clients and the time that they spend in court. Do you think that the quality of service has been affected? I refer you to the much-publicised case in which a couple of solicitors refused to defend an individual and a question of rights under the European convention on human rights arose.

**Lindsay Montgomery:** In very complex cases and in cases that have many precognitions, the solicitor will be under an extreme burden under fixed payments. That matter is being addressed by the changes in legislation. It is difficult for us to see the impact that fixed fees have on outcomes in court. The tripartite group involving the Scottish Legal Aid Board, the Scottish Executive and the Law Society for Scotland, which is monitoring fixed payments—there is some way to go on that—has received no suggestion that the system has had an impact on the quality of work that solicitors do.

**Phil Gallie:** Some solicitors have suggested that that is because they subsidise such cases to their own cost. Is that a fair observation?

**Lindsay Montgomery:** There are some cases in which the amount that is paid will be more than is necessary to reimburse solicitors reasonably, but there are others in which it will be less. There are swings and roundabouts, but the question is where we strike the balance. I think that it is recognised that in very expensive cases the balance is not fair to the solicitor. That needs to be sorted out.

**Phil Gallie:** Finally, no compensation is paid for idle time that is the result of cases being held up in court. Do you have any information on the costs that solicitors incur because of suspension of cases and loss of time in court?

**Lindsay Montgomery:** That issue arises if the start of a trial is delayed. If there is delay after the trial has started, the solicitor is paid for each subsequent day. The initial delay is the problem, but our systems cannot pick that up. It should be possible to get that information from the courts. We know that that issue causes great concern to the Glasgow Bar Association, which we visited and had a useful discussion with several days ago. Substantial delays mean that that association's members are unable to make money. Under the previous legal aid system, the board would have paid for the solicitors' time. It is in everybody's interests to make the system as efficient as possible, so that nobody is sitting around waiting for proceedings to start.

**Maureen Macmillan (Highlands and Islands) (Lab):** I declare that my husband is a solicitor who does both civil and criminal legal aid work.

I recollect that we took evidence to the effect that some solicitors were unhappy about having to declare at the start of a case that it would be a complicated case—in which there would be many precognitions—so that they could be paid for such a case, because they could not always tell at the start that it would be such a case. The process might be a wee bit further down the line before they realise that they should have applied for special arrangements, rather than for a fixed fee. Will you comment on that?

**Lindsay Montgomery:** The line that we have generally taken on the Convention Rights (Compliance) (Scotland) Bill, which addresses the fixed payments issue, has been that to account properly for the work that is done on a case, it is important that somebody who is claiming on a time-and-line basis should have reasonable records to support their claim, which could be very substantial. We recognise that the Law Society of Scotland's view is that that is quite difficult to do. We have offered to sit down with representatives of the Law Society of Scotland and of the Executive to work out how we can bring those two positions together, so that we do not have an unfair situation for solicitors. However, we need early warning, and solicitors need to keep the records that are necessary to support what could be a substantial claim on the taxpayer.

**Michael Matheson (Central Scotland) (SNP):** I turn to what you say about fee levels for solicitors and advocates in paragraphs 62 and 63 of your written evidence. I note that you highlight the static nature of those fees and your concern about the gap between legal-aid fee work and private-fee work. Some of the evidence that we have heard has suggested that it is becoming increasingly difficult for solicitors and advocates to do legal aid work. Have you undertaken any assessment of the impact that the static nature of the fees has had on the availability of legal aid work, on both the criminal and civil sides? I know that you said that you believe that there is still an extensive network on the civil side, but have you undertaken any assessment to see whether there has been an impact?

**Lindsay Montgomery:** We have done some work to map where the legal aid outlets are; Colin Lancaster has been leading on that. That is where we get the information that there has been an increase over the piece in the number of people who are able to offer advice and assistance services or civil legal aid. What the work does not really tell us yet—we might get this information in the future—is what that means for a firm. If somebody does one or two applications in a year, that is not a huge provision in a particular area of Scotland. We would like to see a fuller view of all the providers of legal aid and of the advice and information sector; that might begin to happen with the community legal service work. That would give us a better picture than we have at the moment.

On the criminal side, we issued our most up-to-date register at the end of last year, after we had submitted our written evidence to the committee. When we published that register, quite a large number of firms wrote to us saying that they had forgotten to tell us about people who had left their firms. As well as a small reduction in the number of firms that do criminal work, there has been a 7 per cent reduction in the number of solicitors who do that work, which we had not previously been aware of. That could be an indication of some rationalisation; it is not only a function of what we pay, but of the volume of business that is going through the courts. However, that is something that should perhaps be examined.

**Michael Matheson:** Some of the evidence that we have received suggests that, in practices that have continued to provide legal aid work, that work is often passed on to more junior staff, rather than to senior solicitors. I take on board your point about the apparent increase in the number of outlets that are making services available, but I think that we must ask a serious question about the quantity of the service that is being provided. Is it just one or two cases a year? Is more work being done overall, or is it just a case of more practices being available to provide legal aid?

**Lindsay Montgomery:** There has been quite a substantial increase in the volume of advice and assistance that has been provided in recent years. We know that, at the same time, there has been a reduction in the number of full civil legal aid applications, so there is some relationship between those trends.

The point about juniorisation has been put to us, and I would be very surprised if that had not happened. If we are paying about half the private rate, somebody who is running a small business—that is what a solicitor is—will have to consider that; it would be unreasonable to expect them to do otherwise. Although there might have been a smallish increase in the number of outlets, we must ensure that there is a quality service wherever one goes in Scotland, and that the people who provide that service feel that they are rewarded reasonably for that work. Paying rates that have not changed for a number of years does not seem to be a sensible way in which to deal with the problem.

**Michael Matheson:** What stage have you reached in assessing that specific area of difficulty and finding out exactly what is going on?

**Lindsay Montgomery:** Some of the work on that will come through the work on community legal services. We are on the steering group that is considering the extent of provision across the country. SLAB, the Law Society and the Executive should consider the qualitative aspect through the tripartite group, especially on legal aid as opposed to community legal services more widely.

**Michael Matheson:** Given the impact that the level of fees has had on the level of service that is available under legal aid, do you have a view on the level at which the fees should be set to address that?

**Jean Couper:** No; we are not at that stage yet. We want discussion on that matter to come through the tripartite group and we want to discuss it separately with the Faculty of Advocates to establish its view on what the level of fees should be. We will formulate our view after those discussions have taken place.

**Michael Matheson:** What is the time frame for that process?

**Jean Couper:** We are currently working with the Faculty of Advocates. We are engaged in discussions and there is documentation to help those discussions along. In relation to solicitors, I believe the Law Society is issuing a document to the Scottish Executive, outlining its views on the current fee rates. We hope that that will be produced for discussion shortly.

**Michael Matheson:** You have outlined several factors in your evidence today, such as the fact

that some parts of the regulations have not been changed since 1987.

**Jean Couper:** 1983.

**Michael Matheson:** It goes that far back. Should SLAB have the powers to change such things when it recognises that there is a need to do so? Would you welcome those additional powers if they were on offer?

**Lindsay Montgomery:** We would welcome a more proactive role in suggesting where amounts need to be uprated and changed. The changes are matters for Parliament; that is in no way a bad thing. We uprate benefits each year. I do not see why other amounts could not be uprated regularly in line with specific indices.

**Michael Matheson:** I understand the need to uprate in the same way as benefits are uprated and I know that it is a matter for Parliament, but the inquiry is considering how the system has been operating. You have identified real problems in the way the regulations are set. It is clear that the limits have been allowed to remain at their current level for more than a decade, without any detailed scrutiny as to whether the system is working effectively. Part of the process is to ensure that that does not happen again. The question is whether it is appropriate for the matter to come back to the Justice 1 Committee or to the Parliament every time, or whether there should be a mechanism in the system to allow changes to occur automatically. Could SLAB have a role in making those changes?

**Jean Couper:** There is an opportunity to introduce a mechanism to uprate those amounts, similar to the uprating of wider eligibility levels. Beyond that, we have identified and agreed that there is a need for a more strategic approach. We believe that that would be very helpful and would be the way forward. We would be happy to play a role in that.

**Lindsay Montgomery:** Our equivalent in England, the Legal Services Commission, has much wider powers in these areas, under the Lord Chancellor's Department. Those powers have grown over recent years to allow it to have greater control over where provision exists in England. That is left almost wholly to the market in Scotland. That is the sort of matter that might be worth considering.

**Michael Matheson:** Does the Legal Services Commission have powers to uprate?

**Lindsay Montgomery:** It is able to influence what is provided and where. It does that through a range of mechanisms. It gets agreement on what people are paid, although the Lord Chancellor's Department sets the rates initially.

**Phil Gallie:** I understand that a public defenders project has been running recently. Could you comment on that project? What would the benefits be of extending that scheme? Could you give us an overall idea of the average savings made through fixed fees and of the savings that you would expect to make through the use of public defenders?

**Jean Couper:** The Public Defence Solicitors Office is the subject of independent research that has been commissioned by the Scottish Executive. Until that report is published—it is due in October of this year—we do not know the answers to the questions that Mr Gallie asks. I am loth to make predictions; it would be wrong for me to do so.

From an operational point of view, we have a management responsibility over the PDSO and I am content that it is working well and that it has a good team of high-quality, hard-working individuals. It would be inappropriate for us to try to predict the outcomes of the research that is to be presented to Parliament in October.

10:00

**Phil Gallie:** It would be unfair of me to press you on that matter, but could I press you on the overall savings you expect to have made from the introduction of fixed fees?

**Jean Couper:** At the outset, the aim of the legislation that introduced fixed fees was to achieve a saving of £10 million a year. Fixed fees were introduced at the same time as other measures, so it is difficult to know what causes each cost or saving. The general level of payment has decreased a bit, but it is too early to say whether the full saving of £10 million has been achieved.

**The Convener:** We are considering the budget in our joint meeting with the Justice 2 Committee later this morning. I notice that the budget for legal aid for the next three years is exactly flat. Does that mean that nothing is changing or that, by happy chance, changes up the way are matched exactly by changes down the way?

**Jean Couper:** On the grant-in-aid side of that question, we published our corporate plan last week—all members have a copy of it. The plan lays out our aims and targets for the next two years. We have made it clear that if we are to achieve those objectives, we need additional resources, which we have asked for, to pay for additional staff and new systems. We hope that we will hear from the Executive soon on the matter of our grant in aid for the next couple of years and I am hopeful that we will receive those additional resources, so that we can move forward.

**Lindsay Montgomery:** I will take the point about the flat line of the overall provision. From

our point of view, legal aid is not a budget—it is not cash-limited. Next year, if we have a huge increase in cases, ministers will have to find the money.

It is probably quite difficult for the Executive to say exactly what the pluses and minuses are over the next two years. While the impact of the ECHR may not be as great as we first feared, changes are being made in relation to the extension of legal aid into areas such as employment tribunals and we are considering the other tribunals for which legal aid may be provided in future. It is probably not unreasonable to record the provision as a flat figure, but we would be surprised if it did not change during the two years.

**Paul Martin (Glasgow Springburn) (Lab):** Your written evidence talks about the declining number of applications for civil legal aid. Have you made any progress in identifying the reasons for that trend?

**Jean Couper:** As I said in my opening statement, there has been a downward trend in the number of legal aid applications. We are considering that decline and research is being undertaken to try to identify the reasons for it. We do not expect a clear-cut answer in terms of cause and effect, but I hope that that research will help us to clarify whether there are changes in demand and how much of the decline is to do with eligibility levels and with the contributions that are asked of individual applicants.

**Paul Martin:** Paragraph 24 of your evidence mentions the increasing proportion of applications that are rejected on the merits test. Why is the proportion rising?

**Tom Murray (Scottish Legal Aid Board):** The proportion of applications for legal aid that we are granting is currently around the 67 per cent mark. On refusals of applications, we are very much in the hands of the information that we get in support of an application. We have said that there is a need to open up the dialogue and to ensure that the profession and others know exactly what we require in terms of the statutory tests to be able to grant applications.

We have done an awful lot of work over the past few years and we are issuing more guidelines. We are moving to a position in which exactly the same set of criteria will be made known to the profession as is used for any internal decision that we take or for any guidelines or policies that we apply in arriving at a decision to grant or refuse a civil legal aid application. Members of the profession may not agree with our approach to all cases, but at least they have the opportunity to challenge us if they think we are taking the wrong line in a case, so that we can adjust what we are doing accordingly.

We have recently published a whole raft of guidelines, which we use internally for the granting and refusing of increases under the advice and assistance scheme. We propose to extend that over the coming months to include more detailed information on how applications for civil legal aid in family law cases in particular should be approached. We have already produced guidelines for reparation cases, and that is the way we see the future going. We will produce more and more internal guidelines and make them available to the profession generally. In that way, we will ensure that we get the quality of information that we need to support applications.

**Paul Martin:** Forty-two per cent of refusals were reviewed and granted in 1999-2000. Do you think that you could have been applying the merits test too severely? Forty-two per cent is quite a high figure.

**Tom Murray:** You have to bear in mind that the review process opens up the application for the applicant to provide further and more detailed information. Many of the applications for review that we see contain more detailed information than we had in the first instance. It may be that, with the passage of time, the agents are able to get more information for the review application, or it may be that we have identified a lack in the original application that the profession has the opportunity to address at the review stage.

**Lindsay Montgomery:** We have introduced another change over the past year that will affect the figures. In the past, if we did not get the necessary information, we could just refuse, because it is the solicitor's job to provide that information. We have now tried to speed up and help the process by continuing cases and sending them back to the solicitor for an explanation of certain points. We give them that opportunity to come back to us before we determine the application. That change should be quite helpful to solicitors, as an applicant will not be using up their opportunity to review when we should be able to get the information from them relatively easily.

**Paul Martin:** Do you have any idea of the percentage of those who take up civil legal aid who win their cases?

**Lindsay Montgomery:** It is a very high percentage.

**Colin Lancaster (Scottish Legal Aid Board):** We do not have the numbers at the moment. We used to publish those details in the annual report, but we ceased to do so about five years ago. However, we still collect that information, so we can certainly provide it to the committee if that would be helpful.

**The Convener:** That would be helpful.

**Paul Martin:** What progress has been made in reviewing the treatment of property that is recovered and preserved with respect to contributions?

**Lindsay Montgomery:** There are two separate issues there. Property being preserved is one of the most tortuous areas of legislation in this area and one that gives solicitors and their clients difficulty. We have done quite a lot of work on that. We now want to clarify exactly what the legislation means, and we will get an updated counsel's opinion in the near future to get as clear a view as possible as to what the legislation means, how we can interpret it and where our areas of discretion are.

It is clear from the discussions that we have had with local faculties that they are very keen to have additional guidance and advice from us on this area, as it is the one that gives us the biggest problem with clients. Clients can get very upset afterwards if they find that we have taken their money—as they see it. I expect that we will have produced further guidance over the next few months.

**Michael Matheson:** You mentioned research into the decline of applications for civil legal aid. What is the time scale for that research?

**Lindsay Montgomery:** We will have the results on the effect of eligibility levels—the economic effect—from the researchers towards the end of June. We will examine those results over the summer, but we want to make them public as early as we can.

**Michael Matheson:** By when do expect them to be made public?

**Lindsay Montgomery:** I hope that we will have had the first report and examined it by some time in the middle of the summer—for example, the end of July.

**Michael Matheson:** I am conscious that the research might be quite helpful to our inquiry. Could we receive a copy of it?

**Jean Couper:** We will furnish the committee with a copy as soon as we can.

**Paul Martin:** We have already touched on costs. Paragraph 16 of your submission suggests that, even when an applicant is required to make a contribution, they benefit from being an assisted person because they will not usually be liable for the other party's costs. Some witnesses have suggested to us that that is unjust. Why should successful defenders be denied costs if SLAB funds an action but be able to get costs if the action is privately funded?

**Lindsay Montgomery:** One of the fundamental benefits of being an assisted person is a fair degree of protection from having one's resources taken away if one loses. That is part of the benefit of being granted legal aid. It has to be balanced by the interests of the assisted person's opponent if the opponent does not have legal aid.

The courts do not deal with that situation frequently. Our legislation allows the unassisted person, if they win, to go to court and ask for costs. Our figures indicate that that happens only 20 or 30 times in a year, which surprises us because it is limited. We need to inform solicitors and opponents of assisted persons that they may be able to apply for costs.

The test for opponents is harsh. They have to show severe financial hardship. It is interesting that the criterion in England has been changed recently to financial hardship. It was recognised that if someone has raised an action against a person and that person has defended themselves and won, they could still be largely out of pocket. That needs to be examined.

I did not really answer the question about contributions that you raised earlier in connection with the treatment of property that is recovered and preserved. We are doing some active fieldwork over the next month on contributions that are associated with special urgency, which is covered by regulation 18 of the Civil Legal Aid (Scotland) Regulations 1996. We expect that that fieldwork will allow us, by the end of the summer, to begin consultation on proposals to change and improve regulation 18 and the contribution system.

**Maureen Macmillan:** I want to go back to applications that have been rejected on merits tests. We have had evidence of people applying for civil legal aid for matrimonial interdicts with powers of arrest and being turned down on the ground that it is a criminal matter and should be dealt with by the police. I think that the evidence we heard was from Scottish Women's Aid and the Law Society of Scotland or the Glasgow Bar Association. I have also heard anecdotal evidence privately from the Family Law Association.

I am trying to get to the bottom of whether the situation that I described actually occurred. If it did, how often did it occur? Has it been fixed now? Is it a training issue?

**Tom Murray:** The topic of matrimonial interdicts and the involvement of the police seems to have developed a life of its own. As you will appreciate, when we consider an application, we have to consider two merits tests. One is probable cause, which is a low threshold test.

The second test has a higher threshold for establishing whether it is reasonable to grant civil legal aid. That has an effect when we are considering a matrimonial interdict, especially the involvement of police. We have to take a view, on

the information that comes from the applicant, on whether there has been police involvement in the case. If there has not, we have to ask, if the matter is serious, why the applicant has not sought the assistance of the police in resolving the matter.

If the applicant has involved the police, we have to consider the consequences of that and whether the police have been able to do something effective to prevent the violence happening. We have to decide whether it is reasonable to expend public funds. If they have not involved the police, that suggests that the matter may not be so serious. If they have involved the police, there may be a bail requirement that means that the person should not approach the person who has suffered the violence. If that is the case, we have to ask whether there is a need for a civil remedy to be in place.

10:15

None of this is set in concrete. We take a flexible approach to the reasonableness test. We will take into account that the applicant involved the police but the police were not getting actively involved or that there had been a serious assault. However, even if the police become involved and there is a bail order, there are situations when the violence is so bad that a belt-and-braces job is needed, the police helping on one side and a civil remedy on the other. We are flexible in our approach to police involvement, but we still have to ask questions to be satisfied that it is reasonable ultimately to make legal aid available.

**Lindsay Montgomery:** I have one or two figures that may help. We cannot separate matrimonial interdicts in our system, but with regard to interdicts generally, in 1999-2000 1,201 female pursuers were granted legal aid for interdicts, at a grant rate of 72 per cent—higher than our normal civil legal aid grant rate. There were also 229 applications to defend interdicts—men or women, which was a grant rate of 43 per cent. It worries us that there is a bit of a myth that we will say "No" or "Go to the police." It is not like that. That is an area where we will undertake to provide much better information to the profession on what it is able to do. I have seen evidence of people having said that it is not worth applying. I am sorry, but it is worth applying and we will grant, based on getting useful information.

**Maureen Macmillan:** Solicitors seem to be especially concerned that the board is not doing what it ought to be doing and is using the dual nature of this kind of legislation as an excuse.

**Lindsay Montgomery:** No. Some evidence suggests that we do what we do to save money. That is not the case. If we have a decent case for granting, we are perfectly happy to grant. It is a question of ensuring that we get the information that allows us to do that. I mentioned going for continuations earlier—that might help.

The other side of it, which has not come up on some of the occasions when this subject has been discussed, is that we have special urgency—or regulation 18—arrangements. There is a range of issues, including this sort of activity, where a solicitor does not have to come to us first. They can go to court to protect their client's interest, then tell us. There are issues about how that system works, because of the notional contribution. For example, the solicitor may say to the client, "I need some money from you up front because if legal aid is not granted we will pay, but we will deduct a notional contribution." The solicitor could be out of pocket if legal aid is not granted. That system is used frequently. A high proportion of civil legal aid cases have special urgency for that sort of activity. The figures show clearly that it is used a lot. That said, if we can use information to make it work better we will do so.

**Phil Gallie:** You will probably be aware that many people think that civil legal aid is available for the very poor and the very rich, but Paul Martin touched on the comment about the right of successful defenders to pull back on their costs.

Have you any evidence of how often the awarding of civil legal aid to an individual results in the person who was intent on defending pulling out because they cannot afford to proceed?

**Lindsay Montgomery:** We have no way of telling that. If someone is not an assisted person, we simply will not hear any more.

**Tom Murray:** That raises a further issue. I accept the point that a legal aid certificate is a powerful weapon in the hands of a pursuer who is legally assisted. The onus shifts to ensure that we make available as much information as possible to the opponent, so that they know exactly what their rights are, for example in making representations against any application for legal aid that is coming in. We have to ensure that the focus is equally split, between information to the applicant on how he goes about getting legal aid and information to the opponent on how they can successfully resist, or rather make appropriate representations against, somebody who applies for legal aid.

There is also the matter of expenses taken from the legal aid fund. There is a need to ensure that the opponent and their solicitor have enough information about how the system operates. The system is fairly codified and the system whereby a motion for payment out of the fund is served before the courts under section 19 of the Legal Aid (Scotland) Act 1986 is fairly strict. We have to make certain that opponents and the solicitors who act for them know precisely what is involved.

We can take them through the system stage by stage, to ensure that, when appropriate, they have the opportunity to have their client's case heard.

**Phil Gallie:** That is fine, but civil legal aid cases are often for relatively small amounts of money. I am thinking of cases where small businesspeople, perhaps sole traders, are involved. Even the cost of using solicitors can be an off-putting factor.

I think that you commented, Mr Murray, on the use of civil legal aid awards as a weapon. That seems to vindicate my point.

**Tom Murray:** People have to be in a position to make decisions on the basis of proper information on what their rights are. You mentioned the small businessman, Mr Gallie. Technically, there is nothing in legislation that would prevent a small businessman applying for civil legal aid. The difficulty with legislation in this area is that it is very specific about who can apply for legal aid. The definition in the 1986 act limits it to an individual—a natural person. If someone is involved in partnerships, limited companies or small businesses, they are clearly outside the scope of the definition. Because the sole practitioner is an individual and not in a partnership, they could come under the civil legal aid system if they meet the eligibility criteria.

**Maureen Macmillan:** I would like to move on to discuss those eligibility criteria for civil legal aid. In your written evidence, and indeed in your opening statement, you noted the difference between the criteria for civil legal aid and those for advice and assistance. A number of witnesses have suggested that the different treatment of the working families tax credit in particular is anomalous.

At paragraph 51 of your written submission, you say:

"there is some logic behind the differing treatment of benefits such as these".

Can you explain that logic? It is beyond me.

**Lindsay Montgomery:** By that, we are referring to the nature of the total calculations that are carried out and the way in which advice and assistance eligibility and civil legal aid eligibility as applied are different. There are different deductions for various things. In civil legal aid, we apply deductions for housing costs, among other things; in the case of advice and assistance, we do not. That is why it would sometimes be too simplistic to say that we will just make the benefits the same in both cases.

We think that the Executive needs to consider the results in both cases and to find out whether there is a way of evening them out. At present, it is thoroughly confusing for someone to qualify for legal aid but not for advice and assistance—or for the other people, who qualify for advice and assistance but not for legal aid. The logic was in the way the calculations were constructed; we do not think that the present result is the right one.

**Maureen Macmillan:** Is that because the different eligibility regulations grew like Topsy and have not been properly examined?

**Lindsay Montgomery:** If you go back to a long time ago, when legal aid and advice and assistance were set up, they were trying to do slightly different things, but they have changed in various ways over the years, which is why it would be a good time to revisit the fundamentals of eligibility and ask whether the right people are getting legal aid or advice and assistance.

**Maureen Macmillan:** Some witnesses have suggested that the working families tax credit should become a passported benefit for civil legal aid—if you receive the benefit, you ought to receive civil legal aid. Do you have a feel for the implications of that for civil legal aid, for example the effect of the reduction in the number of applicants who would have to make a contribution?

**Lindsay Montgomery:** We cannot say. We can consider it and see whether we can estimate the effect.

**Maureen Macmillan:** So you could estimate the financial effect on the legal aid fund.

You suggest in your evidence that the legal aid regulations are in need of review. Could you expand on the regulations that you feel need to be overhauled?

**Jean Couper:** We come at this from a number of different angles. First, there are inconsistencies in the regulations, one of which we have just discussed. Secondly, as was mentioned, there are figures in the regulations that have not been uprated for a long time, so it is hard to see how the result that was intended back in 1983 or 1987 can be achieved. Thirdly, there is the sheer complexity of the system and the bureaucracy that surrounds it.

Rather than advocating a piecemeal approach to plaster over the cracks, we see a need to examine the fundamentals of the system, with a view to resolving the issues and providing a set of regulations that are appropriate to the needs of today and the coming years, as opposed to being a reflection of what has built up over a period of time.

**Lindsay Montgomery:** The committee may be aware that we recently made public the fact that for a number of years the board was aggregating advice and assistance and civil legal aid accounts. Having taken the opinion of several counsel, we worked out that we should not have done that. It

happened because of conflicts and difficulties between various parts of our legislation on advice and assistance and civil legal aid. That is the kind of thing that we and the Law Society of Scotland would like to sit down and tackle with the Executive, to provide something that is easier to understand. As Jean Couper said, in the legislation there are 10 or 14 figures that have not changed for many years. We would be happy to list those for you if that would be useful.

**Maureen Macmillan:** There seem to be two issues. First, there is the fact that the regulations are complicated and should be simplified, although I do not know how long it would take to review them. Secondly, because the regulations are now so complex and bureaucratic, they have to be explained more to the public. There are two issues that have to be addressed to make the system simpler for the public to understand.

**Jean Couper:** I agree. One of the things that we are doing is producing a revised set of information leaflets for the public, which can be used by solicitors to inform their clients of the position in a number of complex areas. Frankly, they are difficult for solicitors to understand, let alone explain to their clients. We expect the first of the leaflets to come out in the autumn.

**Maureen Macmillan:** Perhaps we can move on to discuss quality assurance. Your evidence suggests that there is a need for more quality assurance mechanisms in the legal aid system. What sort of mechanisms do you have in mind?

**Jean Couper:** We are conscious that at the moment there are in place what might be called input quality measures, in terms of the training solicitors undergo before taking up office or as part of their continuing professional development, but there are no processes to measure the quality of the delivery of legal aid services. All we have a role in and responsibility for is the payment of the account at the end of the case.

We check that accounts payment work is done, but there is no mechanism for us to take a view on the quality of the work that has been delivered to the applicant. That is the kind of issue that is raised frequently with us when we hold meetings with the public or voluntary organisations. They cite circumstances and issues of quality about what has been delivered to the applicant. At the moment, we have no role to play in quality assurance and no quality control mechanisms are laid down by the Law Society for its individual members at that stage.

10:30

**Lindsay Montgomery:** We are pleased that quality assurance is one of the major subjects being considered by the community legal service group. Regardless of which part of the process is being considered, quality assurance needs to be embedded, to give the public confidence in the overall system.

There is another aspect to the issue: quality assurance will have a cost. If that cost is to the provider, there is a read-across to the rates at which they are paid for doing the job. Those factors will have to be considered in any quality assurance system.

**Maureen Macmillan:** Although you cannot measure quality at the moment, do you have a feel for whether there are firms that are not offering a good service?

**Jean Couper:** We have insight only through anecdotal evidence from individual applicants or groups that are working with applicants. It would be unfair and inappropriate of us to reach conclusions on that basis. Inevitably, there will be individuals who feel either that the service has not been good enough or that it was not what they expected.

You asked what types of measures might be appropriate. One of the routes to quality assurance that has been discussed to some degree—we would like it to be discussed further—is peer review.

**Maureen Macmillan:** Do you think that, as the Law Society suggests, sufficient safeguards exist through its practice rules?

**Lindsay Montgomery:** Those are the input controls. There is a lot of good guidance in them, but they are not a quality assurance system.

**Maureen Macmillan:** So you are looking for a different kind of standard from that which the Law Society requires of its members.

**Jean Couper:** Yes.

**Maureen Macmillan:** Another witness suggested that clients would benefit from knowing the number of cases in the various areas of civil law that solicitors had dealt with. The idea would be for you to indicate at least a firm's experience in an area of law through the publication of league tables. Would that be feasible, using your data on how many cases of a particular kind a firm had dealt with? Would it be useful?

**Lindsay Montgomery:** The organisation that suggested that idea has a valid point. It wants to know what firms have expertise in specific, specialist areas of law. That information is sometimes difficult to provide, although we would like it to be made available. However, the Law Society has an important role in providing information on its members' services, and there could be difficulties if we published information only on the firms that happened to have done

something specific. Moreover, that could not be a guarantee.

**Maureen Macmillan:** There must also be quality control mechanisms.

**Lindsay Montgomery:** Yes.

There is an important issue to be resolved. How does a member of the public know where to get information and advice on social welfare, for example? That question needs to be addressed. I do not think that we have the solution to it, but we would be happy to work with the Law Society—in fact, we have discussed the matter with the Law Society—to find better ways of getting information out of the system.

**Jean Couper:** The danger is that, if we published the frequency with which individual solicitors dealt with specific issues, people might read across from frequency to expertise and quality. The figures would not necessarily provide that information.

**Maureen Macmillan:** Yes. Solicitors would argue that, in matters of law, even if they had not taken on a specific type of case before, they would still be competent to deal with it. The question is one of perception.

If we provided information on the number of cases that firms have handled, factored by quality, might smaller, country firms find that clients would leave them and go to city firms that dealt with more cases?

**Lindsay Montgomery:** The question is whether the firms have the expertise. There is no reason why a small firm would not have expertise in a wide range of areas, but it might deal with certain subjects only once every five years. However, there would be nothing to prevent a small firm from going to a larger firm to get the service.

The Law Society runs an accredited specialist scheme. Developing that might help people to discover who has expertise in specific areas.

**Michael Matheson:** I want to pick up on the issue of quality assurance and the quality control mechanisms, particularly in relation to the idea of greater community legal services, to which those mechanisms would be essential. You said that that issue is high on the CLS working group's agenda. My concern is that everyone in that forum and in the Law Society, for example, has a vested interest in the process. I am always suspicious of bodies that set their own standards and monitor whether those standards are suitably applied. Should there be an independent element in the scrutiny of the quality of legal aid services? Might that be done by a Scottish legal commission?

**Lindsay Montgomery:** I am not sure that all the people and bodies involved have the same interest. We pay for what the solicitors or others might be doing and it is perfectly legitimate to say that, as we do with accounts generally, we should have an independent view of the process and arrive at a position on whether we should pay the balance. Quality can be considered in that way. However, organisations such as ours need to have other watchers, which we have. We have to ensure that whatever part of the system is being considered is subject to independent review and has an appeal mechanism.

The CLS working group represents a wide range of interests. I hope that from that diversity will come a set of proposals that all sorts of people will be happy with. People who represent the consumer—representatives of the Scottish Consumer Council—sit on the working group. It is perfectly possible to strike a balance. The process has to be made open to public scrutiny. The test is how people feel about it.

**Michael Matheson:** I can imagine a fight developing if SLAB were in a position to decide what was good-quality service. From what you are saying, I believe that SLAB would decide that the service was not good enough. The legal profession would fight with SLAB over who would be responsible for enforcing the standards, even if everyone had been involved in the negotiations over setting the standards. Have you thought about the wider implications of the watchdog role that you envision for SLAB?

**Lindsay Montgomery:** We should be careful on this issue, so I am glad that you came back on that point. We are not saying that we should suddenly take on the responsibility for monitoring standards. One of the good things about the CLS working group is that it is examining proposals that cover the whole system in an attempt to ensure that there is as much agreement as possible on who should carry out various roles. It would be dangerous for us to pre-empt the work of that group well before it is ready to report to ministers, which should be in October. The group is considering the issues that you raise and there will be some interesting discussions as we go through that process.

**Phil Gallie:** Do you think that your operations, practices and procedures are 100 per cent compliant with the European convention on human rights?

**Lindsay Montgomery:** Who would be daft enough to answer that? [*Laughter.*] We did an awful lot of work internally on that last year—primarily Tom Murray's team and the legal members of our board. We then employed three external parties to give us their views. We have identified the changes that we have made. For example, we can give far more detailed reasons in criminal cases of why we have refused legal aid.

We have not been deluged with a huge number of challenges and I hope that we are reasonably protected against legitimate ones.

**Michael Matheson:** Have you had any challenges?

**Lindsay Montgomery:** We have not. Obviously the Executive has had a number of challenges, but we have not.

**Tom Murray:** To give the broader picture, it has to be said that we have not seen a number of applications coming in against other public authorities either. I expected a raft of applications to come in, but that has not been the case.

**The Convener:** Perhaps the people involved cannot get legal aid.

You mentioned the review of the urgency provisions. Did you say when you expected the results of that?

**Lindsay Montgomery:** We expect to consult towards the end of the summer on our recommendations on how to change and improve those provisions.

**The Convener:** Some witnesses have mentioned the problem with getting speedy legal aid to deal with domestic abuse cases. Do your proposals cover that issue?

**Lindsay Montgomery:** The special urgency provisions work in that area much of the time. There is a link to special urgency issues—someone might be asked for £500 up front because that is what the solicitor thinks the contribution would be. Those are the sorts of thing that the consultation will cover; the recommendations on other contributions will read across to that. The time scale is to go to consultation by the end of the summer.

**The Convener:** In your evidence, you refer to the fact that certain areas are outwith the scope of legal aid. Which are the most important?

**Lindsay Montgomery:** There was a range of tribunals for which legal aid was not previously available. We are pleased that the issue is now being addressed on a tribunal-by-tribunal basis. We have also been concerned about people who are just outside the limit, as has been mentioned. In the whole process, they can be the ones who are worst-off. If they are against someone who is legally aided, issues arise about how far eligibility goes and about whether eligibility could be wider but with commensurate contributions. Those are the two main areas.

The third area is the one that the CLS is dealing with—ensuring that people can get information and advice early enough to deal with a particular problem and ensuring that they know where to go to get that information and advice. I hope that the CLS will provide better solutions to co-ordinating what solicitors do with the advice sector.

**The Convener:** As you probably know, it has been suggested to us that, in areas such as welfare law, the legal profession is neither interested nor especially qualified. Have you come across that notion?

**Lindsay Montgomery:** That is not an area that a lot of solicitors deal with, although some do. In particular, such solicitors will be found in the law centres. Those people are expert in their fields and in the advice sector. Whether they should be more widely spread—especially in rural areas—is an issue that the CLS will consider.

**Nora Radcliffe:** It has been put to the committee that a move to a community legal service would improve the delivery of advice and representation. What is your view on that?

**Lindsay Montgomery:** Provided that it was funded properly, such a service would provide more advice and more information to more people, where they need it. That must be a good thing.

**Nora Radcliffe:** A worry seems to be that such a service would lead merely to a redistribution of financial resources across the different types of legal advice and representation. Your previous answer may almost have answered this question: is that worry valid?

**Lindsay Montgomery:** I do not think that what you suggest might happen will happen. However, that will be for the Executive and ministers to take a view on. I would be surprised if some additional funding is not necessary to set up such a service and make it operate. In England, as the community legal service was being developed, a significant amount of money was put into it to make it work; that investment seems to be bearing fruit. Our service will be different from the one that has been developed in England.

**Nora Radcliffe:** You seem to be saying that it is unlikely that ways can be found in which the community legal service can provide advice and representation more cost-effectively than under the present system. Can you confirm that that is the case?

**Lindsay Montgomery:** The system may well be cost-effective, but there will be a cost if more money has to be put into a range of not-for-profit organisations and the advice sector. Cost will also be involved in ensuring that those organisations have access to the necessary expertise and can build up their infrastructure. Those are the kind of issues that the group will have to look at when it gets to the tough bits of the CLS discussions.

**The Convener:** Will the straight-line budget continue to be valid?

**Lindsay Montgomery:** That is a provision that we will be interested to discuss with the Executive.

**The Convener:** As the committee does not have any further questions, is there anything that the witnesses would like to say to us as a result of this morning's discussion?

**Jean Couper:** We will be happy to follow through on the points that were made this morning by providing the information as agreed. If the committee has any other questions, we would be delighted to provide members with further information.

**Michael Matheson:** When the witnesses last gave evidence, it was suggested that copies of the papers that solicitors have to complete would be sent to us. I am not sure whether other committee members have received a copy of those papers, but I have not. We have heard complaints from various witnesses about the detail that they have to provide in the papers, so a copy of them would give us an idea of the problem.

**Jean Couper:** We will deal with that request.

**The Convener:** I thank the witnesses from SLAB for their evidence this morning.

**Jean Couper:** Thank you.

**The Convener:** Given that the minister cannot be here until 11 o'clock, and as the rest of the morning is packed, I propose to move quickly into private session for item 5.

10:46

*Meeting continued in private until 10:54 and then adjourned.*

11:01

*On resuming—*

## Subordinate Legislation

**The Convener:** Agenda item 4 is subordinate legislation. Two motions are to be discussed and they will be disposed of separately.

I call the minister to speak to and move motion S1M-1842.

**The Deputy Minister for Justice (Iain Gray):** Both sets of regulations derive from the Bail, Judicial Appointments etc (Scotland) Act 2000, which was passed by Parliament last summer. Sections 7 and 9 of that act deal with the way in which part-time sheriffs and justices of the peace could be removed from office if they were found to be unfit for office. The sections have aspects in common, but there are some differences.

The Bail, Judicial Appointments etc (Scotland) Act 2000 created two types of justice and it is important to distinguish between them. A justice of the peace is now either a full justice or a signing justice. A full justice is qualified to undertake any function of a judicial nature. The draft regulations are concerned with full justices and, as well as allowing for their removal, the regulations allow for their functions to be restricted to those of a signing justice. Signing justices are subject to separate removal procedures.

The act makes provision for Scottish ministers to instruct the Lord President of the Court of Session to convene a tribunal to conduct an investigation of a justice. Members will recall that that arrangement was included at the committee's request. The regulations govern the procedure of the tribunal. We expect that the measures would be used rarely.

There may be many reasons why the process is initiated. A judicial office at any level is a unique occupation and its members are expected to maintain high standards in their professional and private lives. It is not therefore possible to specify exactly what circumstances would cause the procedures to be invoked. The procedures are flexible and allow for a range of possible circumstances. However, in appropriate cases, Scottish ministers may ask the Lord President to convene a tribunal to investigate a justice. We shall also write to the justice under investigation to explain the reasons for convening the tribunal.

The tribunal will consist of a sheriff principal, a second person who has been legally qualified for at least 10 years and one other person. The tribunal's role is to carry out an investigation. It would not be a court proceeding. As such, we

have left it to the tribunal to decide how best to carry out the investigation. Some safeguards are built into the system—for example, the justice will have the right to give evidence and be represented if he or she wishes.

The tribunal has the power to suspend the justice from office if it sees fit and to end the suspension should it choose to do so. It also has the right to lift temporarily the suspension to allow the justice to complete a case if it feels that that is in the best interests of the parties involved.

Once the investigation is completed, the tribunal will send a draft of its findings on the investigation to the justice, who will have an opportunity to comment. That gives the justice the opportunity to challenge any aspect about which he or she has concerns. When the investigation has been completed, the report of the outcome will be sent to Scottish ministers, indicating whether the tribunal has decided to order the removal of the justice or a reduction in their role to that of signing justice. The report will also indicate the date on which that removal comes into effect.

The key feature of these arrangements is that an independent tribunal—not ministers—will take the decision to remove a justice from office. That is an important safeguard that we are happy to propose in order to protect the independence of the judiciary from political interference.

I move,

That the Justice 1 Committee recommends that the draft Justices of the Peace (Tribunal) (Scotland) Regulations 2001 be approved.

**Phil Gallie:** I want to raise two points—one is partly for clarification and the other is partly an observation.

Regulation 7(4) refers to the tribunal sitting in private and to the fact that information must be kept within the tribunal. That is perfectly understandable, but then the minister referred to regulation 10 and to the final report. Once the tribunal has made its decision, that is it—ministers have no right to intervene. Does the individual have the right to appeal against the findings contained in that report? If so, to whom would they appeal, given that their services would have been dispensed with by that point?

The findings of the tribunal appear to be kept secret to the minister, to the members of the tribunal and to the justice who has been affected. If so, no information is released to the public. The decisions of a justice who has been dismissed may well have considerably affected the lives of a number of people within our communities. It seems to me to cut across all the good intentions expressed in documents such as the draft freedom of information (Scotland) bill if no information is to be given to the public about the dismissal of a justice. That is the level of secrecy that we are building into this instrument.

**Iain Gray:** There is a balance to be struck, but the regulations require the investigation to be held in private since the proceedings may well deal with the justice's private life. Therefore, it seems right for the investigation and the tribunal's report to be confidential.

In relation to the justice's input, I repeat that the draft report will be made available to the justice for comment. The ultimate redress available to someone affected by the regulations would be a judicial review of the results of the tribunal's investigation. Therefore, redress exists, although judicial review is a serious option.

**Phil Gallie:** Judicial review is assumed, minister; it needs no comment in the instrument.

When people take on responsibilities such as those of a justice, there is a responsibility on all of us to face up to these issues. Dismissal must be for fairly serious offences or misbehaviour. I repeat that a public interest matter could be involved. Rather than waste time and repeat my points again, the same situation arises in the Part-Time Sheriffs (Removal Tribunal) Regulations 2001. It would be even more important to reveal information to the public as far as the removal of a part-time sheriff is concerned.

**Iain Gray:** I have little to add. There is a balance and that balance has been struck in the instrument. There are comparable regulations for judges under the Scotland Act 1998 and for full-time sheriffs under the Sheriff Courts (Scotland) Act 1971. While we are not considering those regulations today, I think that I am right to say that they contain a requirement to report to Parliament. If there is a difference in where the result goes, it lies there, rather than in the public revelation of the decision.

**Phil Gallie:** On that basis, I would welcome the minister's including in the statutory instrument the requirement to report to Parliament, particularly on sheriffs.

**Iain Gray:** To do that, the committee would have to reject the instruments that it is considering today. That would be unfortunate. However, perhaps it would not be unreasonable to include a requirement to inform the convener of the Justice 1 Committee or the Justice 2 Committee.

**The Convener:** I do not know whether dismissing a justice of the peace merits being reported to Parliament.

**Phil Gallie:** I have sympathy with the instrument on justices of the peace, but not with the instrument on part-time sheriffs. However, I do not want to have to repeat my arguments when we discuss another similar instrument. Perhaps the

minister could consider such a requirement for sheriffs. I would be more than content with that. Such a provision is necessary and would be appropriate.

**Iain Gray:** I am happy to give that undertaking.

**The Convener:** The question is, that motion S1M-1842 be agreed to.

*Motion agreed to.*

That the Justice 1 Committee recommends that the draft Justices of the Peace (Tribunal) (Scotland) Regulations 2001 be approved.

**Iain Gray:** There is little difference between the Part-Time Sheriffs (Removal Tribunal) Regulations 2001 and the previous regulations, except that these regulations apply to part-time sheriffs. The one key difference is in the tribunal. The first member of the tribunal could be a sheriff principal or a Court of Session judge. In the other regulations, the first member can be only a sheriff principal.

I move,

That the Justice 1 Committee recommends that the draft Part-Time Sheriffs (Removal Tribunal) Regulations 2001 be approved.

**The Convener:** The question is, that motion S1M-1841 be agreed to.

*Motion agreed to.*

**The Convener:** I thank the minister for attending. That concludes that agenda item.

Members will notice that a joint meeting with the Justice 2 Committee will take place immediately after this meeting. The next meeting of this committee is on Wednesday 16 May, when we will take evidence on the draft freedom of information bill.

We are required to report to Parliament on the two affirmative instruments. It is normal for such reports to be short and formulaic, and I expect to circulate the report to members by e-mail. I ask them to return comments on it.

**Phil Gallie:** Can we write into that report the confirmation of the minister's comment about sheriffs?

**The Convener:** We will try to find an appropriate form of words.

**Phil Gallie:** Thank you.

*Meeting closed at 11:12.*

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