JUSTICE 1 COMMITTEE

Tuesday 19 June 2001
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
22nd 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

WITNESSES

Michael Clancy (Law Society of Scotland)
Iain Gray (Deputy Minister for Justice)
Roger Hamilton (Legal Services Commission)
Martin McAllister (Law Society of Scotland)

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 19 June 2001

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:41*]

The Convener (Alasdair Morgan): We will start now that we are quorate. I apologise for the 10-minute delay.

At our previous meeting, we discussed a memorandum about a workshop that will take place tomorrow evening, organised by the Equal Opportunities Committee. That committee was looking for a volunteer from this committee to attend. Is anyone who was not present at that meeting able to volunteer or has anyone who was present changed their mind?

Members: No.

Legal Aid Inquiry

The Convener: I thank Roger Hamilton, the policy and legal director of the Legal Services Commission, for coming to give evidence for our legal aid inquiry. Roger did not have time to prepare an advance submission, so he will make a short opening statement.

Roger Hamilton (Legal Services Commission): I have had the benefit of reading one or two of the *Official Reports* of evidence that has been given to the committee, including that of Alan Paterson, so I have a broad idea of some of the committee's interests and concerns. Unfortunately, I did not have a great deal of notice of this meeting, so I could not prepare a written submission. It may help if I outline our analysis of some of the problems that have concerned the committee and if I said what we have done about them.

The starting point in England and Wales is the "Modernising Justice" white paper, which was published in December 1998 and was the product of much work that had been carried out over some years. The white paper contains a relevant and apposite analysis of legal aid problems south of the border. It describes six characteristics of the legal aid system that were considered no longer acceptable and that the reforms were intended to change.

The first problem was a large and increasing budget over which there were no effective controls and which had increasing unit costs in the cases that were being funded. The second problem was that the service that was provided was largely unplanned and fragmented. The third problem, which was crucial, was that there was little or no control over quality. The fourth problem was that the legal aid system was considered to be biased towards expensive and court-based solutions; there was inadequate access to up-front advice and assistance that could obviate problems or prevent them from turning into litigation and becoming more serious later. The fifth problem was that the system was considered to have a far too general merits test for funding cases, which allowed many cases of rather dubious priority into the system. The sixth point, which is very important, was that little information about the service was available, so that the ordinary punter on the street had little idea where to go for help, whom to turn to and what they could expect when they got there. That was the guts of the analysis in the white paper, which is still worth reading.

13:45

The white paper produced a four-point solution. The first point was that we had to replace the

existing system with a more planned one in which we could allocate resources in the light of priorities. The idea was not to sweep everything away and replace it, but to build on the existing service by moving it in the direction of the results of planned analysis of need.

The second major plank of the reforms was contracting. We have adopted a wholly contracted system. From April this year, all publicly funded services south of the border have been provided under contract to the Legal Services Commission.

The third plank was shifting from the rather general merits test that was based on the reasonableness of a case in the eyes of a lawyer to a more flexible merits test that focuses on priorities set by those who are in charge of the system—the Government and the commission, aided by partnerships with local authorities and other funders, who were involved in analysing and consulting on true legal need. Our funding code is flexible. It can be changed relatively swiftly as new priorities appear and old priorities fall away.

The fourth plank of the reformed system is the directory of quality-marked suppliers—a website gives internet-based access to it—which means that, for the first time, we have a complete guide to who provides services to the standards that we require, where they can be found and what work they do. That is beginning to transform access to and knowledge about the system for ordinary people who seek services.

How were those planks translated into legislation? The Access to Justice Act 1999 established the Legal Services Commission and gave it broad set of powers. The powers were broadly intended to achieve the four planks that I described. The way in which the system works—a question that has interested the committee—and the relationship between the Lord Chancellor and the Legal Services Commission as a non-departmental public body are interesting. We have broad powers, but the Lord Chancellor also has broad powers under the act to control what we do, through directions or orders.

The best analogy is that the system is a bit like an airliner in which the commission comprises the co-pilot and the cabin crew. We can fly the airliner ourselves; we do not need the Government to help us, except by providing money. However, some key risk points exist—particularly take-off, landing and bumpy weather along the way—at which the captain, in the form of the Lord Chancellor, may take over the controls, or at least direct us on what to do. The areas in which the Lord Chancellor is interested in running the controls are fairly obvious: the scope of the system, remuneration and financial eligibility. We will give him advice on how we think those matters should develop and he will take our advice or leave it and make his own decisions.

The 1999 act requires us to make direct reports. We have a close and increasingly good relationship with the Lord Chancellor's Department, which works more in partnership than it used to. The department accepts that we run matters day by day. The department must inevitably intervene when things get difficult—when press stories appear, for example—but that is done on a partnership basis. Usually, the department is happy with how we run matters and will become involved only in broad-brush policy questions.

As the commission's chief lawyer, I used to be frustrated, because we wanted to change the system in all sorts of ways but we could never find parliamentary time to alter the detailed regulations. Now we have a set of contracts where, essentially, the rules are dictated between us and the providers. If things need to be changed, we can simply negotiate a change with our providers and change the specification under the contracts. The Lord Chancellor's Department needs to agree to that, particularly if the changes are important, but the process is quick and effective. Over six weeks, we operate a quick consultation under the contracts. We then give six weeks' notice of the change, after which the change is made. We can move fast and are no longer trammelled by many of the difficulties that we used to face in keeping the system up to date and moving ahead.

Basing the new system on contracting achieves four critical aims. First, we can meet our priorities through letting contracts. We can decide where to let a contract and the category of law; there is also a new method of delivery that involves telephone access rather than the traditional service. We therefore have enormous flexibility on the type of contracts that we let. The Access to Justice Act 1999 merely gives us the power to do that. It does not dictate terms—those are for us to decide. Secondly, contracting is a way to control the budget. I will come to that shortly. Thirdly, contracts aim to set and monitor standards. We have built on the franchising system that pre-dated the legal aid reforms. What we call the quality mark under the new, reformed system is a basic qualification for any provider to get a contract. Fourthly, contracting allows us to refocus resources on all kinds of new providers. In particular, it allows us to bring in the advice and not-for-profit sectors and to begin to fund the services that they can best provide. We now fund a wide range of mediation services in the family sphere and are spending around £25 million to £30 million on the not-for-profit advice agencies.

That is a thumbnail sketch. I want to move on to what has happened as a result of the changes. The community legal service started in April 2000

and the criminal defence service commenced only in April this year, so those services are very new. It is too early to make long-term judgments, but some points are worth sharing.

The first concerns the scope of cuts south of the border. Those are not necessarily an integral part of the new system. They came from a simple prediction that the costs of the system would exceed its budget, which meant that some hard decisions had to be made when the new system was implemented. It was decided to exclude from the scope of legal aid those cases where people were most likely to get help on the market through insurance systems, after-the-event insurance and conditional fees, for example, although they would not get a perfect service on the market. The Access to Justice Act 1999 liberalised the conditional fee system.

Those decisions were political and have been controversial. Without the deficit in the budget that was anticipated, the measures would not have been necessary. That is all that I want to say about them. They mean that personal injury cases, some business cases and others of that ilk are no longer funded unless there is real public interest in them.

The second point concerns contracting. We have concentrated the supply side into around 5,000 to 6,000 offices throughout the country. About 5,000 offices do civil work under contract and around 300 to 400 are not-for-profit advice agencies. On the criminal side, we have about 2,900 offices, many of which are the same as those on the civil side, because the office does civil and criminal work. That is why I say that we have between 5,000 and 6,000 offices throughout the country.

We are convinced that the franchising system—and the quality mark that now replaces it—has been effective in improving quality. It has not been completely effective, but it has been a necessary start. We know that it is criticised for being bureaucratic—it probably is more bureaucratic than it needs to be and we must address that. On the other hand, all the research evidence that we have, as well as the evidence from solicitors and the not-for-profit sector, is that the most advanced providers are saying that they are glad that they achieved the quality mark—it was painful, but it improved their services. The quality mark is a good base mark and is the basic qualification for entering into contracting.

Where we are going now is largely dictated by the research report that the Legal Services Commission is publishing today. That is a major study of some of the pilot contracts that we ran in the lead-up to the reforms. It tells us that, although the quality mark is a pretty good start, it is not as effective as it should be. In particular, about 20 per cent of the firms who have quality accreditation through us are not delivering to acceptable standards. We instinctively recognise and accept that research conclusion. We need to develop the quality mark criteria to take account of outcome and competence checks rather than input and process checks. That is the direction in which we are likely to move.

The other point that has been of considerable concern to the committee is control over the budget. I have read your discussion on whether there should be a hard cap or a soft cap on the budget. That is an important debate. We now have a series of levers, which represents a string of controls that, over time, can begin to contain and control expenditure. We do not have a hard cap. We have budgets that are allocated by the Government. However, if we ran out of money during any period, we and the Lord Chancellor's Department would consider that a major disaster.

One of the committee members—I forget who it was—asked what would happen if there was a 19th murder case when we had allocated money only for 18. That would obviously be a disaster—it is no way in which to run the system. Our controls do not run like that; they run in a much more sophisticated way. As I said, they give us a series of levers through contracts. Those levers allow us to control case starts in different areas, to fund new services in other areas and to tell suppliers that we no longer want to fund services that are not a priority. The system moves much more slowly and in a measured way in the direction in which we want to go.

The other crucial point is that we now operate on a three-year budget cycle. That is critical. Legal aid is a large ship and expenditure on legal aid does not turn round quickly. Even if we put a brake on the expenditure by cutting the scope or reducing eligibility, that takes some time to work through. A three-year planning cycle gives us a much better way of staying within the budget that has been allocated to us than an annual budget does. It allows us to carry forward overspends and underspends and to begin to predict what will happen in the three years. That is a much easier task.

We have moved from some pretty crude controls, which caused real problems in the system, to a much more sophisticated set of controls. The committee may remember that the major brakes on the previous system, which were used when the Treasury got nervous and wanted to pull back funding, were to cut scope, cut eligibility or freeze remuneration, all of which produced serious problems. I am pleased to say that, under the new system, we are—as far as I can see—beyond the need to use such crude controls.

The first effect of what we have done is to create headroom in the budget. We have increased remuneration this year for the first time for several years. We are also about to increase eligibility. It is interesting that, in his evidence to the committee, Alan Paterson argued the case for increasing eligibility at the first advice and assistance level, which in our system is now called legal help. His argument was along the lines that it is important that wide services are available and that a lot of people can be helped at that level, as it is the first access point in the system—the first point of contact. Our system is like the Scottish system. The eligibility for up-front advice and assistance is restrictive. When someone obtains a legal aid certificate to proceed to litigation, the eligibility is a bit more generous.

14:00

The first step that we are taking later this year will be to increase eligibility for advice and assistance. We think that something in the region of a further 5 million people will be brought into the system as a result. There are some pretty helpful effects of being able to predict and control the budget with the series of levers that I described.

My next point relates to who controls the detail of remuneration and regulation. It is horses for courses now. We control a lot of detail in the contracts. We obviously check what we do with the Lord Chancellor, but if something needs changing, we will change it. We do that in consultation with the profession, the not-for-profit providers and the consumer groups. Other features of the system, such as remuneration, will always remain in the control of the Lord Chancellor. That is critical, as such features have a direct effect on the budget, which will have to be negotiated and agreed—we still have annual settlements.

However, even though the Lord Chancellor controls remuneration, we have moved to a much more strategic view of what we use remuneration for. Remuneration used to be an annual negotiation between the profession and the Lord Chancellor's Department in which a series of legal aid fees would be fixed in regulations and would remain fixed until there was further negotiation.

Now we do something quite different. We use remuneration as a key ingredient of our planned access and service development strategy. For example, last year we identified a shortage of contracted providers in certain key spheres. One was immigration, another was community care services and a third was mental health. We simply increased the remuneration for advice and assistance in those areas and left the rest alone. That was an encouragement to suppliers to provide the services that we needed in those areas.

This year, there has been considerable concern about the number of family contractors, a lot of whom were beginning to worry about their profit margins and whether they could stay in the system. The problem that they face is that, in most family cases, they do not get costs orders from the other side; they rely on their legal aid fees. For a damages claim, lawyers can get from the other side costs orders that are much more generous than the legal aid fees, so a proportion of their income is much better paid. Family lawyers had a problem: they did not have access to the benefits of costs orders from the other side. Their income was falling behind that of other lawyers. This year, we have simply raised the rates for family suppliers across the board by 10 per cent—and, indeed, more for those who are prepared to become accredited to the Law Society of England and Wales children panel or the Solicitors Family Law Associaltion panel.

We are beginning to use remuneration far more strategically to ensure that we have the services on the ground that we want and need. There is little argument between us and the Lord Chancellor's Department. We do the analysis, which the Lord Chancellor's Department discusses with us. Out of that emerges a strategy that is put to the Lord Chancellor and the Treasury for future funding.

That is all I want to say in opening. I hope that it is helpful.

The Convener: I will pick up on your last point. You talked about being able to take a more strategic view with regard to fees. However, it strikes me that you basically have a series of taps and are busy running along turning one tap off and another on whenever you see the basin beneath it getting dry. I am not sure that that is as much a strategy as just finding out where there are problems from year to year and putting in more resources to meet them.

Roger Hamilton: It is a strategy because, over a period of time, we are reshaping the supplier base to accord with what our regional legal services committees, which are involved in assessing need on the ground, say the need for services is in the priority areas.

This is not a game in which there can be a once-and-for-all solution. Things develop rapidly. We need to be able to move perpetually in the direction in which we are being told that the system needs to move. If we do not control the budget and are too generous with the system, we will hit further budget crises, and so be forced into some of the cruder controls that have previously been in place. We have managed to design a contracting system that prioritises and targets the

resources to what are considered to be the greatest priorities. That system has saved quite a lot of money and I have already told you how some of the savings have been put to use.

We have also managed to make savings by squeezing quite a lot of waste out of the system. We have done that by redefining the rules of the game in our contracts and by taking a far greater degree of control over the problem of high-cost cases, an issue that was not much discussed in "Modernising Justice", but which has since emerged as fairly critical. In any system there will always be litigation cases that cost an inordinate amount of money. Our system is no exception. Some very high cost cases that we are running consume £500,000 or £1 million per case.

Often those cases begin with lawyers saying, "Yes, it's a dead cert winner". We spend £500,000 on the case, by which time the prospect of success has fallen to 50 per cent. We spend another £250,000 and the prospect of success has fallen to 40 per cent. In the past, those cases have carried on being funded to their unsuccessful conclusion. Now we haul those in, give them special treatment, consider them closely, seek independent opinions and turn off the tap where there is little justification for going on. We turn the taps on and off according to where we see the priorities lying. That must be done continually to keep the system going in the appropriate direction.

The Convener: One argument that was put to us by the proponents of a legal services commission was that it would allow a more strategic view to be taken. I am not quite sure who is taking the strategic view in your case. Is the Lord Chancellor taking the strategic view simply on the advice of the Legal Services Commission? In other words, is his role nominal? Alternatively, is the point that there is now someone in a position to give him the strategic advice that he did not have previously?

Roger Hamilton: I do not think that the Lord Chancellor would ever accept being called the nominal anything. He is firmly in control. We have regular briefing meetings and he has a good grasp of the issues.

The process is rather complicated. We are very committed to partnerships with other funders and suppliers who are involved in legal service advice and assistance and representation, principally local authorities and the many advice groups that they fund. On a regional basis, we have set up partnerships that carry out a needs analysis in their area and produce local plans. The local plans are widely consulted on among community groups, other funders and all suppliers in the local area. Out of those plans a regional plan is developed which outlines the priorities, the gaps in the service and the directions in which people want to go.

The regional plans feed upwards and are considered nationally by the commission. They are analysed and formed into an overall strategy, with a budget attached to that. That strategy is sent to the Lord Chancellor for approval. Obviously, the Lord Chancellor is not involved in the detailed consultation on the ground, but he is involved in considering the overall direction and thrust of what we are doing and sanctioning it.

The Convener: You have probably already answered several of the questions that we intended to ask you. However, Nora Radcliffe has a question.

Nora Radcliffe (Gordon) (LD): I have a daft-lassie question. Could you describe what a typical contract is? Is it for an individual case, a series of cases or a period of time?

Roger Hamilton: We did quite a bit of research on that before we came to a conclusion about what our contract should be based on. We are paying for time for solicitors. We are paying for time for the not-for-profit sector as well, but in a slightly different way. The research showed us that, out of the different pilot contracts that we were running, the best quality results came from carrying on paying for time and that is what we decided to do.

We have devolved a lot of power to solicitors to decide how much work to do within certain limits. They simply get on with that work and bill us for it, but they are required to tell us up front the number of cases that they are starting monthly. With that information and knowledge of the average case costs for each firm in each area of law, we have an up-to-date profile of what the expenditure will be. That was one of the other deficits of the previous system—we had no idea what was in the system. Today's work is a bill that will be presented in one or two years' time. We had no idea of what we were in for. Now we have a much more up-to-date view of the budget and can predict what it is going to be in a year or 18 months' time and what our resource call on the Government will be.

In the not-for-profit sector we are funding caseworker posts, with the expectation that each post will deliver 1,100 hours per year. Those contracts are also time-based, but are measured by half-posts and full posts.

Nora Radcliffe: What freedom does the commission have in introducing new types of service on an experimental or permanent basis?

Roger Hamilton: We have considerable freedom. Indeed, one of our statutory duties is to investigate, promote and expand new and innovative service delivery. We are running pilot

contracts for different types of service delivery.

One of the most important means of delivery is telephone access, which is used to fill gaps in supply, particularly in provincial areas. Another is second-tier contracting. We fund nationally acknowledged experts for other suppliers who give front-line advice. Those experts identify weaknesses in the advice given, put on training courses and prepare material that can be used. That is just beginning to take off. We are about to launch a pilot to provide duty solicitors to deal with housing repossession cases in our county courts. That has been run on a shoestring up to now, with far too few courts covered and too little quality in the system. We intend to roll that out nationally. Those are just some examples.

Nora Radcliffe: What about the corollary? What about withdrawing or restricting particular services?

Roger Hamilton: After the initial scope cuts that accompanied the introduction of the new system, the emphasis has been on expansion. We quickly got a decision from the Lord Chancellor to extend services to the immigration appellate authorities, which was an excellent development. We are now funding those under contract. We have just started funding three new tribunals, which we are told that we must fund because of the requirements of the European convention on human rights. There is a big debate going on in the Government as to whether we should extend funding to other tribunals. Many differences of view are expressed in the Government and we await the outcome with interest. We now have contracts and suppliers that could easily gear themselves up to deal with that should it happen.

The Convener: Where did the decision come from to extend the coverage to the three tribunals? Did you give advice to the Lord Chancellor on that? Presumably it would require a statutory instrument.

Roger Hamilton: Indeed. I think that it came from the internal governmental review on human rights compliance. We were asked to comment and we thought that there were areas where the Government would be at risk if it did not provide funding. The three tribunals that are being funded deal with situations in which people's livelihoods and liberty are at stake. They were pretty ripe for funding in ECHR terms.

The Convener: Are there circumstances in which you would be proactive? Would you say to the Lord Chancellor that you are not allowed to fund a particular type of appeal in a particular tribunal and that you should be able to do so?

Roger Hamilton: Yes, indeed. We were involved in advising the Lord Chancellor about the extension of funding for immigration appellate authorities. We saw that as a wholly beneficial move, given the importance of the cases. Our suppliers had difficulties in providing advice and they then had to leave their clients unaided at the door of the tribunals.

The Convener: Nora Radcliffe asked a question about withdrawing particular forms of assistance. You talked about expansion, but surely you cannot simply squeeze stuff out of the system all the time to allow you to expand? I assume that there is no area from which you can withdraw service.

14:15

Roger Hamilton: We have clamped down on some services, which we considered were not adding value. A good example is in the welfare benefits arena where, in a sense, we shot ourselves in the foot. In the early 1990s, we encouraged solicitors to get involved in welfare benefits. A weakness of the legal profession was that welfare benefits were an area of the law that traditionally solicitors knew nothing about. They could not help their clients, yet clients need holistic treatment: clients going through divorces need good welfare benefits advice. We encouraged solicitors to get involved in that subject.

We found that, although some solicitors responded well, others set up automatic welfare benefit checks which, in nine cases out of 10, provided no added value whatsoever. The checks were done whether or not the clients asked for them, and we received the bill for that work. It was a complete waste of time. It is interesting to note that the not-for-profit sector, which understands that area of law as it has a tradition of involvement in welfare benefits, assists clients through the process to the tribunal level and identifies cases where there are problems.

In our contracts we saved quite a lot of money by writing out the possibility of doing more unrequested welfare benefit checks. It provided no deficit in service and allowed the money to be recycled into something more useful. That sort of tinkering is important in refocusing resources.

Maureen Macmillan (Highlands and Islands) (Lab): I am interested in the Legal Services Commission's funding. What is a soft cap? Does it mean that there is no limit to your spending? Has the Lord Chancellor said, "Mr Hamilton, you know what I have in mind"?

Roger Hamilton: Clear budgets are set. If those budgets are exceeded, difficult decisions have to be made. Parts of the system, including criminal representation, continue to be demand-led. If the system is looked at from the Government's viewpoint, it is a hard cap. Budgets are allocated, and if we exceed them, we have to find savings from elsewhere in the Lord Chancellor's Department budget.

From our point of view, the system works rather differently. We now have many levers to control the expenditure in the system. That helps us to live within our means much less painfully than used to be the case. We are steering the ship in a way that, over a period of time, aims to bring it in within a certain budget. The levers are soft—they do not say that we cannot help the next client who walks through the door. They change the profile of the suppliers and of their services, so that the suppliers focus on priorities and live within the overall budget. If we get it wrong, difficult decisions will have to be made. The cap will then be found to be a hard cap.

Maureen Macmillan: So you are not saying, "Our budget is about to be overspent. We had better look to squeezing certain types of cases out of the system." Do you find yourself in that situation?

Roger Hamilton: We could do. If we were to find ourselves in an overspend situation, the Government could opt to ask us to retrench current services, let fewer contracts, make access harder, toughen the funding code criteria or put in place higher hurdles for high-cost cases. The only other option is to provide more money. In the end, that decision is political. We have a series of levers that we can pull that make it more likely that we can live within our budget allocation.

Maureen Macmillan: I am also interested in the question of flexibility. You talked about endeavouring to meet unmet needs once those were recognised. You quoted the example of immigration law. How do you establish that there is an unmet need? If, all of a sudden, you need to look for practitioners to meet such a need, how do you control the quality of the service?

Roger Hamilton: Quality control is a slightly different issue. We have a quality control system to which all our providers are required to subscribe—it is built into our contracts. That ensures that the provider has a minimum standard of management practices to run their business and keep their files. Those requirements also ensure that each case is supervised properly by someone who is an expert in the field.

As I explained earlier, local initiatives identify unmet need in a partnership process between our local committees and other funders such as local authorities, the Community Fund—the National Lottery Charities Board as it was known—and so on. They meet regularly in partnership and come up with a plan for their area, which is put out for community consultation. That process results in a plan that the partnership is happy with and which can then come to us for funding approval. It is then down to the regional director to let contracts that aim to meet the need that has been identified. Where there is money to do so, new contracts are let all the time.

Maureen Macmillan: Would you look only at types of cases for unmet need or, if people were not accessing legal aid because they could not afford their share of the payments, would you look at eligibility?

Roger Hamilton: Eligibility has to be one of the gross controls that is handled at the centre. We have relaxed eligibility rules in some limited ways. In the not-for-profit contract, we allow providers to count non-eligible clients up to 10 per cent against their contract hours. Traditionally, providers were not used to means-testing as they helped all sorts of people on a first-come-first-served basis. Relaxing eligibility rules has eased the transition for public funding through the legal aid system rather than through grant funding, which did not require a means test to be applied.

We are likely to extend that principle. The housing repossession scheme will not have an eligibility test. If someone is at court facing a legal case for possession that day, they will be able to access a free duty solicitor and a couple of hours of follow-up advice. We are beginning to look at the relationship between eligibility and access. We control that work pretty closely from the centre as, if eligibility requirements are loosened in a major way, there are large funding implications.

Maureen Macmillan: You said that one of the ways that you might encourage solicitors to take up particular cases would be to pay them over the odds for doing so. Is that the case?

Roger Hamilton: Yes. We would not like to say that it is over the odds. Many solicitors would say that even the increases are well under the odds.

Maureen Macmillan: Of course not. I should declare an interest at this point. My husband is a solicitor and a legal aid practitioner.

The Convener: But he never gets paid over the odds.

Roger Hamilton: They are being paid more than others are being paid. We see that as a legitimate part of the planning process.

Paul Martin (Glasgow Springburn) (Lab): Does the commissioner have a role in revising the fee scales over time and in the light of inflation? Are there difficulties in attracting providers? You touched on that earlier, but could you clarify some of the points that you made?

Roger Hamilton: We have very detailed knowledge of where the pinch points are in the system. We have a limited number of contracted suppliers. We know who they are and they come to us with their problems. That makes it much easier to tell where the pinch points in the system are. We are revising our views all the time on what

the remuneration structure should look like. That forms part of the overall strategy. We are asked regularly to advise the Lord Chancellor's Department on remuneration and on the direction in which it should move.

Paul Martin: What kind of response does the Lord Chancellor generally give?

Roger Hamilton: That depends on whether we are before or after an election. We have yet to see what will happen now. When the community legal service was first introduced, the Government's stance was that it was not about increases in remuneration, but about a different and better way of doing the business. We quickly realised that there was a shortage of specialist practitioners in certain areas and advised on the first increase, which was in the social welfare areas of immigration, mental health, community care and so on. Our advice was accepted and the increase was implemented fairly quickly. It was not part of the annual round; it was introduced in July, because we thought that there was an urgent need for it. This year we were involved in creating a package with the Lord Chancellor's Department, which was put to the Lord Chancellor and the profession for agreement and was implemented on 2 April.

Paul Martin: What scope does the commission have to become a provider of services through solicitors or other staff?

Roger Hamilton: Under the Access to Justice Act 1999, we have powers to provide the services that we need to provide—by funding others, by employing people ourselves or by setting up an organisation to provide the services. We have very flexible powers. We could establish a new law centre or our own office. Members are probably aware that we recently opened four public defender offices in four different towns—three in England and one in Swansea. We have the same powers on the civil side as we have on the criminal side. For the moment we have opted for a limited pilot on the criminal side. Another couple of public defender offices are in the pipeline and will open over the next few months. We have decided not to use our powers on the civil side, because we think that it is fairly well supplied. We see no need to get involved in starting businesses in that area.

The Convener: You have experience of setting up the Legal Services Commission. If we were to establish such a commission in Scotland, are there any lessons that we could benefit from?

Roger Hamilton: We proceeded very quickly, because we had to meet some political priorities. One consequence of that is that we have driven in change at a rate of knots. People working in the legal profession in England and Wales would say that they are punch drunk with the change that is coming out of the Legal Services Commission.

For changes to be made, deadlines need to be set and people have to be forced to accept them. We have encountered a great deal of resistance from the legal profession—I can be quite open about that—which has made our task harder. The lesson that we have begun to learn is that we need to consolidate the gains that we have made. We need to slow down the process of change. We need to work much more in partnership with our providers to ensure that they are comfortable with the direction in which we are moving. We should spend more time explaining, discussing and negotiating that with them.

Michael Matheson (Central Scotland) (SNP): I would like to follow up that issue. I am conscious that your response is predicated on the present structure of the commission. If it were to be established again, would you like different powers or structures to be put in place? Would you like the commission's remit to be different?

14:30

Roger Hamilton: The legislation under which we operate is spot on. There was one difficulty on the criminal side, which resulted from a drafting error, and we had to find parliamentary time to rectify that. However, the 1999 act has established a balance of controls between the Government and the commission that works very well. There are no real difficulties.

Some parts of the scheme—mainly those binding the client, such as the statutory charge and the clawback provisions—are still governed by regulation as they cannot be dealt with in our contracts with providers. Changes in those relatively limited areas can be made only by going through the old system. However, we were closely involved in drawing up those provisions and we are fairly comfortable with them. They are up to date and will not require huge changes in the near future.

Michael Matheson: I missed part of your evidence, so you may already have provided this information. How much does it cost annually to run the commission?

Roger Hamilton: I have brought some figures on our budget, as I thought that the committee would be interested in that. The total budget this year for the civil and criminal legal aid system in England and Wales is £1.633 billion. That is divided between the community legal service and the criminal defence service. The budget for the community legal service is approximately half of the total legal aid budget—£708 million. The combined budget for the criminal defence service is £925 million. Approximately 50 per cent of that funds magistrates courts and summary jurisdiction

and the remaining 50 per cent funds the Crown courts and higher jurisdiction.

On the civil side, about £475 million is spent on lawyers litigating with certificated funding. The balance of £232 million goes on the advice and assistance system. We now control that area quite closely through contracts. We have most leverage over the budget of £232 million, for which we can turn the tap on and off. All grants and innovative service delivery contracts are included in that budget.

We were asked about the cost of quality assurance, and I have had some thoughts about that. About 335 staff across our regional offices are involved primarily in contract and quality management. That includes letting contracts and auditing suppliers against them, but not paying the bills. Total staff costs are about £10 million. That amounts to just under 1 per cent of the global budget.

Michael Matheson: You have been through various budget headings, but I am interested in the total cost of running the commission. Are you saying that that comes to about 1 per cent of the overall budget?

Roger Hamilton: No, I was referring only to the quality assurance system. The overall administrative cost of running the commission's services is £70 million. That is somewhere in the region of 4.5 per cent of the total budget.

The Convener: How many staff do you employ directly?

Roger Hamilton: Excluding the public defender offices, we employ about 1,500 people.

The Convener: Thank you for your evidence, which has been very useful. I now welcome the Deputy Minister for Justice, Iain Gray, who is accompanied by Alisdair McIntosh and Ian Allen. I understand that the minister wishes to make some opening remarks.

The Deputy Minister for Justice (Iain Gray): I am glad to be here this afternoon to answer the committee's questions. I understand that you may raise quite wide-ranging issues on the operation of the legal aid system. As I might not be able to answer every one of them in detail this afternoon, I will be happy to follow up any such questions in writing.

As you pointed out, convener, I am accompanied from the justice department by Alisdair McIntosh, who is head of the access to justice division, and Ian Allen, who is the head of the legal aid branch. In view of the broad scope of the committee's inquiry, it would be helpful to know whether it intends to take further evidence from the Executive before it completes this part of its work. Beyond that, I will limit myself to a few opening remarks and then try to field any questions.

As members might know from their previous existences—or at least might have discovered from the evidence and preceding debates—legal aid is a pretty complex subject, which has significant and far-reaching implications for many areas of civil and criminal justice. There are many different views on how to tackle the concerns that have been expressed about the system. My own relatively recent introduction to the area has only made that extremely clear to me.

The legal aid fund is demand-led. The Scottish Legal Aid Board awards legal aid to everyone who qualifies under the scheme, and ministers have to find the necessary money to allow it to do so. There is no question of capping the legal aid budget, but that money needs to be found from the justice department's overall budget and ultimately from the Executive as a whole. As the committee knows, there are considerable pressures and competing demands on both budgets. As a result, Jim Wallace and I have to perform a difficult balancing act to ensure that adequate funds are available not just for legal aid but for other priority areas such as police, courts and prisons.

The answer to improving access to justice does not lie only in spending more on legal aid. There might well be a case for change in some areas. Along with SLAB and the Law Society of Scotland, we are currently considering a number of aspects of the system to find out whether improvements can be made. The committee's inquiry is therefore timeous and we will be very interested in its recommendations when it is completed.

The Convener: Perhaps I should start with a general question. In your initial written submission to the committee, you said:

"The policy aims … are to ensure that the legal aid scheme is widely accessible and that it is delivered in an efficient and equitable way; and that the system … meets its overall purpose at a reasonable cost to the taxpayer."

Are those objectives being met?

Iain Gray: In general terms, the system is working towards delivering those objectives. However, in my opening remarks, I said that anyone who examines the system will certainly agree that there are areas where we could improve its efficiency, effectiveness and fairness.

The Convener: I asked that question because since 1993, when the lower income eligibility limit was lowered and the maximum contribution was increased, the number of applications has fallen by 36 per cent and there has been a reduced take-up of the offers made. An unbiased observer might conclude that legal aid was becoming less, not more, accessible.

Iain Gray: That is a possible explanation of the difference, but there are others, some of which the committee has explored in previous evidence-taking sessions, particularly with SLAB. For example, there has been a change in the nature of litigation over the period you mentioned. There has been a huge 40 per cent decrease in fault-led divorce actions, which perhaps accounts for some of the applications that no longer happen.

Another change is the increasing number of people who have access to other means of covering legal costs, perhaps through insurance or trade union membership. That is perhaps more common now than it was 10 or 15 years ago. Although the connection implied in your question cannot be made, the issue bears examination, and SLAB is carrying out research to find out what lies behind the drop in applications.

The Convener: What about the second statistic that I mentioned concerning the reduced take-up of offers made? Does that not indicate that the offers are perhaps not as generous as people first thought and that they are concerned that they will be landed with costs that they cannot afford, despite having some assistance?

Iain Gray: That might explain why some of the cases are not pursued once the offer is made, but once again, there might be other explanations or reasons why people think better of pursuing their initial action. The required contribution being greater than expected is one—but not the only—explanation and that is one of the issues that SLAB is trying hard to ascertain, but it is not easy to find a full explanation.

Gordon Jackson (Glasgow Govan) (Lab): I suppose that I should declare an interest as far as legal aid is concerned. I will ask about issues that have been raised with the committee and of which the minister will be aware from the evidence that we have received. For example, it has been suggested that there are inequalities of treatment in relation to eligibility criteria for advice and assistance and full civil legal aid. Although the working families tax credit is a so-called passporting benefit for advice and assistance, it counts as income in calculating eligibility for full legal aid. The Glasgow Bar Association highlighted the example of the woman on working families tax credit who automatically received advice and assistance, but had to meet a very large legal aid contribution. That situation is seen by some as anomalous to the point of unfairness.

Iain Gray: The underlying problem is that the mechanisms by which social security benefits are taken into account for the purposes of assessing eligibility for legal aid are almost inevitably quite complex because the benefits system itself is quite complex. Secondly—and more avoidably—those mechanisms have probably been allowed to grow like Topsy instead of being considered in their fullness. That is because the benefits system changes. Mr Jackson provides a good example of that. I understand that family credit was previously a passporting benefit into advice and assistance, so when that benefit was changed to the working families tax credit the passporting aspect was carried over to maintain rather than to reduce eligibility. The effect has been significant; there has been something like a 40 per cent increase in eligibility because working families tax credit is more widely available than family credit.

Although Gordon Jackson has definitely raised an inconsistency, the issue needs to be examined in the round. For example, some benefits are contributory benefits and others are not. It is not necessarily logical for contributory benefits to be passporting benefits as it would be possible to have a very large income and still qualify for some other benefits. However, we accept that the matter needs to be examined.

Over the summer, we intend to review the impact of social security benefits on eligibility. If the question is whether we are concerned about it, the answer is yes. We intend to produce proposals to make the system more consistent. Clearly, we will bring those proposals to the committee so that it will be aware of our suggestions.

14:45

Gordon Jackson: That links in with what I will say in a minute, but I want to move on for a moment.

The other inequality that has been mentioned concerns the areas of work. Some areas, such as social welfare and tribunals, are dealt with only through advice and assistance and do not receive full civil legal aid. However, the need for full civil legal aid—the amount of money that is required—might be as great in cases of advice and assistance as in any other. It has been suggested that the fact that certain things can be dealt with only through advice and assistance is a problem; that it is inevitable that the amount of time and resources that lawyers give to advice and assistance becomes restricted; and that advice and assistance gets downgraded in the eyes of lawyers, so they do not develop the same expertise. In other words, it has been suggested that it is inevitable that—even without cynicism—a two-tier approach develops in the legal profession. Lawyers will be more concerned about how well they do or how much work they do on one type of case than on another, because only one qualifies for legal aid. That is the problem that has been expressed to us. What is your view on that?

Iain Gray: That would be unfortunate. Advice and assistance is an important and fundamental part of legal aid. The objective of legal aid is to

provide access to justice. Advice and assistance helps deliver that objective because it provides access very quickly. The assessment of benefits and income, which decides whether someone is eligible for advice and assistance, is done in a way that keeps the process relatively straightforward. That means that the lawyer can make the assessment and then give the required advice and assistance without getting entangled in a complex financial calculation.

In our view, advice and assistance is not an inferior part of the legal aid system. Indeed, in the last year for which we have figures, something like 300,000 cases benefited from that kind of support. For people who use the legal aid system, advice and assistance is one of the most important parts. It would be unfortunate if lawyers took the view that you suggest.

Gordon Jackson: I was not suggesting that advice and assistance is not important for lawyers, as I know only too well that it is. My point was about the amount of resources and time that lawyers put into advice and assistance, on which there are financial limits. The suggestion is that there is a basic inequality and injustice, because, for certain types of legal matters—which might be very important—lawyers can get only advice and assistance, which is limited, and cannot get the full civil legal aid. There is no rationale for that distinction. That was the point that was made to us.

Iain Gray: The rationale concerns the level of legal advice that might reasonably be expected to be available for a type of case. Certainly, if there was an instance where advice and assistance was not delivering the level of assistance that the client required, and legal assistance was available only through advice and assistance, that would be a cause for concern.

Gordon Jackson: I will come briefly to my other question. It has been suggested that the problem—you have more or less said this—is that the regulations have become so complex, with so many apparent inconsistencies, that we need a comprehensive review of them. The evidence that we were given by SLAB was pretty much along that line. You have made the point that, like Topsy, the thing just grew. Is there a case for consolidating—as lawyers say—and doing the whole thing again so that we can consider it from scratch?

Iain Gray: There may be. I certainly agree that the regulations are extremely complex, although to a degree that is a reflection of the complexity of the legal system. There are all sorts of reasons for that—some good, some bad. New areas of law are being developed all the time and the system needs to keep up to date. I guess that we are as guilty as anyone else of causing that. The Adults with Incapacity (Scotland) Act 2000, for example, created new areas of law and made the system more complex.

I accept that we could rationalise elements of the system. Two fairly wide-ranging processes are under way that may inform this debate. The first is the committee's investigation and report, which is timeous. The second is the report of the community legal service working group, which has a wide-ranging remit to consider how legal advice and support is provided across the board—by solicitors and others. It would be proper for us to consider that report—which we expect in October—and the committee's report and then perhaps to revisit the question that Mr Jackson has posed. We can then consider whether what is required is tweaking or more fundamental changes.

Gordon Jackson: The Scottish Legal Aid Board has said that a general review and rationalisation is needed, and that we need to redo the whole thing. The board's view, as the administrators, is significant and has influenced us. However, I accept the points that the minister makes.

Going off my script, last night I was at Kinning Park community council—

Iain Gray: That is well off your script.

Gordon Jackson: Indeed. The community council raised the issue of legal aid being made available to groups such as themselves. The community council often has huge planning problems in its area. The applicant for planning permission may be a big battalion and the local group may feel overpowered. The community council wondered whether there were proposals to allow legal aid in such cases. As you are here, I thought that I would ask you.

Iain Gray: I am aware of this issue. In my constituency, the main reason for the existence of a number of community councils is to engage in the planning process. Their members live in parts of Edinburgh where the green belt is under constant pressure from developers. On occasion, they have been involved in actions. That can be expensive if you take into account the work that professionals have had to do or that retired professionals have had to do.

A specific case right next to my constituency is that of Kirknewton community council, which raised an action against the City of Edinburgh Council relating to the council's administration of its planning regulations in the case of a landfill site that is in my constituency but is next to the boundary. The community council incurred legal costs to the tune of £6,000 or £7,000. It perceives an unfairness in standing against developers who can afford the best legal advice available. I say that as an expression of sympathy and

understanding.

At the moment, legal aid is not available for community councils; nor is it generally available for planning matters, except for actions in the sheriff court or the Court of Session. It may be worth considering the issue in the review of community legal services. Local authorities may have a role, because they are required to support community councils in their areas. I would be interested to know whether local authorities could be empowered to provide those sorts of resources or whether they are not allowed to do so. Perhaps I should ask my officials to look into that and get back to Mr Jackson.

Gordon Jackson: I would appreciate that, because I had not considered that angle.

Michael Matheson: This point comes back to some of the minister's comments to Gordon Jackson. Evidence that the committee has heard has indicated considerable concern about the way in which the legal aid budget seems to be heavily biased towards criminal as opposed to civil matters. I understand that the split is 60:40. It is also interesting that we have heard evidence that expenditure on legal aid in England and Wales is more evenly split between civil and criminal matters. What is the Executive's view of why that split has arisen, and what could be done to redress the balance?

Iain Gray: That takes us back to the convener's initial question. As we said, the legal aid budget is not capped—it is demand-led—so the level of civil and legal aid costs to some extent is a function of applications and eligibility. I do not know if the 60:40 split that you describe represents a change over time, but if it does, it takes us back to questions about the reduced number of applications for civil legal aid.

Almost certainly the large increases in the cost of criminal legal aid cases over the period up to the introduction of fixed fees contributed to the shift towards criminal legal aid. Fixed-fees payments have brought that under control and flattened off the increase. With regard to what can be done to redress the balance, fixed fees are the most significant factor. Some of the answers to the first part of your question may be found in the work that SLAB is doing to ascertain why there has been a reduction in applications for civil legal aid.

Michael Matheson: You stated in your opening comments that there is no question of capping the legal aid budget. We have had evidence that while the budget may not be capped, the eligibility criteria have been altered, which indirectly restricts access to some forms of legal aid, and may in particular have affected access to civil legal aid. What is your view?

Iain Gray: The example that we discussed was the working families tax credit, which is a passporting benefit that extended eligibility. I have to ask you to provide an example of what you mean.

Michael Matheson: For example, the uprating of solicitors' and advocates' fees has not occurred, which has been a way of capping the budget. That does not mean that someone will not be provided with legal aid, but it has restricted access. We have been given evidence that some solicitors have decided not to take on certain cases, and that there are difficulties in recruiting staff to work in legal aid practice. The service may not have been restricted in terms of the types of cases that are eligible, but it has been restricted in terms of those who are willing to take on cases and in attracting staff to the sector.

Iain Gray: I was going to say that your question confuses two different things, but that would be unfair. Your question counterpoises two different things. If the legal aid budget was capped, there would be a limit above which it could not go. Presumably, if that ceiling was reached, no legal aid would be available. I think it was Professor Paterson who gave the example of Australia, where there are capped legal aid budgets—that is how the system operates there. Come the time in the year when the budget is spent, there are no more cases until the new financial year.

There is no question of our legal aid budget being capped in that way. However, to say that the legal aid budget is not capped is not to say that the Executive and SLAB do not have some responsibility to control the budget. That is a different thing, and is entirely reasonable. It would be inappropriate for the budget not to be controlled. The fees that are paid to solicitors or counsel are one aspect of that. The committee is well aware that solicitor fees have not changed for almost 10 years in some cases—or perhaps since 1992 or 1993—and there is mitigating evidence concerning the effect of that. For example, although fees have remained static, the average cost of a case has risen steadily over the years, presumably on the basis of the amount of work that has been put into the case. It is reasonable that that should be addressed.

15:00

The issue of solicitors' fees will be addressed by the tripartite group—the Law Society of Scotland, SLAB and the Executive—which is already discussing whether and by how much fees should be uprated. It is probably right that they should be, but I would place two caveats on that. First, that must be done in the full knowledge that if the group increases what we have to spend on legal aid, the money will have to come from somewhere else in the justice department's budget. Those

resources will then be unavailable for other changes that we might want to make. Secondly, such a significant change after a long period of time ought to be considered as part of a package to address other issues such as quality assurance in service provision. We understand that the Faculty of Advocates is preparing a case regarding fees to counsel, but we have not yet received any information from it.

Paul Martin: Minister, prior to your arrival we took evidence from Mr Hamilton of the Legal Services Commission. He gave us a comprehensive insight into the workings of the commission in England and Wales. What is your view on the possibility of such a commission being introduced in Scotland?

Iain Gray: We can learn from the experience in England and Wales. The Legal Services Commission has taken a simpler and different approach from that which is taken in Scotland, as it has gone down the road of franchising to ensure that services and outlets are in place for providing the legal advice that is required. I am not averse to examining the possibility of pursuing a similar approach, but it would be improper to say that we believe that that is necessary while the community legal services working group is examining how we can ensure the delivery of a whole range of advice and assistance that people require throughout Scotland. That group will consider alternative models that are already on the ground, based on partnership and building on local authority and community provision as well as solicitor-provided services, and how to strengthen those.

Once we have received the working group's report, and once the committee's deliberations are completed, we will be faced with the question of whether we want to try to improve the system that we have, make some changes or go for something more like a fundamental review. At that point, we might want to consider the experience in England and Wales and decide whether to follow that model.

The Scottish Legal Aid Board already seems to have some of the powers that the Legal Services Commission has, or it could be given them. That would be an alternative approach to setting up a new body. In its evidence to the committee, SLAB expressed a desire for more strategic powers, and that would be an alternative model. However, the CLS working group should inform us of what it regards as the appropriate solution for Scotland.

Paul Martin: Setting aside those issues, what do you think would be the advantages and disadvantages of such a commission?

Iain Gray: An advantage that the commission has, which our system does not have at the moment, is that it is able to be proactive in ensuring that provision is made available on the ground, either in a geographical area where it feels that it is lacking or in a specialist area where it is lacking. Those concerns must be addressed in Scotland, and the CLS working group should be addressing them. It remains to be seen whether the group will come back with an alternative way of meeting those needs when it reports to us.

Paul Martin: How would you divide the responsibility between the ministers and such a commission, if one were set up?

Iain Gray: That is a hypothetical question. Ministers have responsibility for setting the budget and for deciding such matters as eligibility criteria, although they should take account of advice from the board or the commission.

The Convener: You talked about having to make a decision only after the working group on community legal services has reported. What time scale do you envisage for the making of that decision?

Iain Gray: We expect to receive that report in October, and we will need to consider our response to it very quickly. There is a great deal of interest in its work on the ground, which may read across into other work that is being undertaken in the Executive—for example, consideration of the management of debt in the poindings and warrant sales working group. That may put some kind of time pressure on it. If the CLS working group's report and the committee's report led us to believe that we needed to make significant change, that would almost certainly require legislative change, and I would not be able to say where such change would be possible in the legislative programme.

The Convener: Some witnesses have expressed concern that the resources to establish a community legal service would be provided at the expense of services elsewhere. I know that that is a hypothetical concern, but is the Executive committed to finding extra funding if it is required, or is some other budget going to be raided?

Iain Gray: Some of my earlier remarks implied that, whatever we do, another budget would have to be raided, although it might be a hypothetical budget for something that was not already in place. If we make changes to the system—even if those changes are not the radical ones that we are talking about, there will be some following the CLS working group's report—it will be incumbent on us to try to find the funds to ensure that another part of the service is not disabled.

In all fairness, we are talking about a system to provide access to justice in a broader sense than was envisaged when the legal aid system was set up. Costs and budgets will have to be considered in that broad sense, and there may have to be a rebalancing of resources within that framework. It

is hard to imagine those changes taking place without some additional resource being made available.

Maureen Macmillan: I am sure that you agree that, in trying to deliver equity in access to the law, eligibility must be considered. In 1993, eligibility was cut. You spoke to Gordon Jackson about a small group of people taking action against a council or big business. Equity is not possible without some form of funding for the weaker party. Concern has often been expressed that it is only the very poor or very rich who can take or defend civil actions, and that the rest of the population cannot afford to do so. Do you think that the CLS working group will address that? It seems to be considering other areas that currently lack representation, but not to be concentrating on what many people think is the crucial fact that only the very poor or the very rich can afford it.

Iain Gray: I expect the CLS working group to have something to say about eligibility, as well as about different methods of providing access to justice. There could be any amount of debate about where the eligibility criteria lie, but it is difficult for me to imagine our being able to create a situation in which it could not be argued that access was available for the lower-income client and for the very high income client, but that the middle-income client was missed out. It seems to come down to a debate about where we put the dividing line.

Given that we are discussing an application of public funds, I think that there will always be a test of whether it is reasonable for legal aid to be applied. Somebody who is very rich and is funding an action from their own funds will, I guess, always have the opportunity to proceed with their action in the face of however much advice they are given, even if that advice is pointless or unreasonable. That situation will never be replicated under a legal aid system: to allow that would not be a proper use of public funds. The argument or discussion about this will always come down to where the income levels for eligibility lie.

Maureen Macmillan: It has been suggested that the distinct advantage of being granted civil legal aid, even in cases in which people must make a significant contribution, is that that provides protection against liability for the other party's costs should the legal-aided party be unsuccessful. That protection also extends to the legal aid fund, in that the successful unaided party will not usually be allowed to recover costs from the Legal Aid Board. Is that arrangement equitable, given that, in a civil case between two parties, neither of whom receives legal aid, the successful party is usually granted an award of costs against the unsuccessful party? Some people have even suggested that a grant of legal aid is a powerful weapon against an unaided party.

Iain Gray: I understand that concern about that has been expressed during evidence to the committee. There is provision in the Legal Aid (Scotland) Act 1986 for the court to award costs against the legal aid fund. That has been done to the extent of £36,000 over the past year, so the provision is clearly not often used.

There are some tests: that expenses can be awarded in such a case; that the proceedings are held in the court of first instance; that it is the assisted person who raised the action; and that the person who does not receive assistance would suffer severe financial hardship if obliged to pay. In other words, if the action was launched by somebody who was supported by legal aid, that should not result in the other party—should the supported person win—suffering severe financial hardship.

It seems from the research that I have done in preparation for today's meeting that solicitors do not often use that procedure, but I cannot give members an explanation now as to why that should be. One thing that makes it difficult is that there is no way of telling how many applications were refused by the court. It might be that solicitors use the procedure, but the courts refuse. It is something about which I would like to find out more.

I understand that the Legal Aid Board has plans to draw solicitors' attention to those provisions in the Legal Aid (Scotland) Act 1986. It might be that the injustice is in the application of the system or of the legislation, rather than in the legislation itself.

Maureen Macmillan: I seek clarification of the Executive's position on victims of domestic violence and on the urgency provisions for legal aid. A number of witnesses have told the committee about the particular problems that arise in relation to obtaining legal aid speedily for the protection of victims of domestic abuse. In particular, there is the issue of the notional contribution and special urgency cases, which are mentioned in paragraphs 27 and 28 of the justice department's note. Is the Executive any further forward in its consideration of those matters?

15:15

Iain Gray: There might be two different issues underlying that question—if I have misunderstood it, I ask Maureen Macmillan to come back to me. The first point is to recognise the fact that urgent legal aid is available and is widely used. In the past year, 15,500 such awards were made, so the process is both known and used.

One of the problems with the contribution is that lawyers will sometimes ask for it to be paid up front. My understanding is that that tends to be because of their experience in the past—they would certainly explain it in this way—of having begun the process but then finding it impossible to recover the contribution. Their way of protecting themselves is to ask for the money up front.

I can see the lawyers' side of the issue; equally, I can see the other side, and the issues that Maureen Macmillan raises could indeed put somebody off taking the legal action that they ought to take. We are talking to SLAB about the matter, and we are conscious that the committee is discussing it. I do not have a clever answer to the problem, but if the committee has any suggestions that are fair and equitable, we would be very interested to consider them.

Maureen Macmillan: We will do our best.

The Convener: On abuse, when we published the financial memorandum of the Protection from Abuse (Scotland) Bill, which is this committee's bill, Jim Wallace wrote to me, expressing concern about the

"potential public expenditure cost of the Bill's provisions".

He suggested that that might limit any financial scope for the Executive to be able to respond positively to any recommendations that have expenditure implications that could emerge from this inquiry. Could you expand on that?

Iain Gray: I have made the point on a number of occasions that, although the legal aid budget is not capped, the expenditure in it has to be found in the first instance from within the justice department. The position that Jim Wallace was trying to express was that the Executive is very supportive of the bill in principle, but that there is an obligation on our part to ensure that that support is subject to a requirement for affordability, and there would be some costs. Our estimate is that the costs of the bill as introduced might be £2 million a year. We are very supportive of the bill, but we encourage the committee to consider issues of affordability as part of its inquiry on the bill. Does that answer your question, convener, or were you asking specifically about the financial memorandum?

The Convener: I was concerned about your implication that, if the bill were passed as introduced, that would constrain our ability to reform other aspects of the system or to expand legal aid provision elsewhere. I presume that that is the implication.

Iain Gray: That seems, to an extent, to be a statement of fact. If there are additional costs attached to the implementation of the legislation, those costs will have to be met from within the justice department budget in the first instance, which will have an impact on budgets elsewhere.

The Convener: But not necessarily on the legal aid budget, given that it is demand-led.

Iain Gray: It will impact on that budget, but the costs are not just legal aid costs—there are also costs within the court system.

It is correct to say that the fact that the legal aid budget is not capped means that someone who availed themselves of legal aid under the terms of this bill would not be preventing someone else from accessing legal aid.

Maureen Macmillan: The proposals might save money, because people would be taken to court for breach of interdict rather than for serious assault. I am not convinced that the process would cost more.

Iain Gray: One must always have regard for the costs of the legislation to the budget. Our opinion is that the cost of the bill as it stands would be about £2 million a year.

Maureen Macmillan: And worth every penny.

The Convener: As Maureen Macmillan said, if a policeman can arrest somebody on the spot, rather than spending an enormous amount of time dealing with a situation in which the police do not have powers of arrest, there would be a great saving in police time. However, that would not be reflected directly in the department's budget, although the legal aid costs would be.

Iain Gray: That is correct.

Nora Radcliffe: I want to talk about something else that will impact on your budget, minister. Earlier, you commented on the length of time that has passed since fees for legally aided work were uprated. Concern has been expressed that fee levels are a disincentive to the undertaking of civil and criminal legal aid work. There might have been an exodus of practitioners from legal aid work and it has been indicated to the committee that low fee levels make it hard to take on trainees. Is your department concerned about that?

Iain Gray: We would be concerned about it if it meant that the quality and the availability of advice were reduced. In answer to Michael Matheson, I dealt briefly with the fact that solicitors' fees are under consideration by the tripartite group and that we expect that the Faculty of Advocates will submit proposals to us in the near future about changes to fees for counsel. We have acknowledged that almost 10 years is a long time for those fees to have remained unchanged.

We are concerned about the issue of the impact that that might have had on the availability of advice or the willingness of solicitors to do legal aid work, but we remain unconvinced that that is

happening. Most of the evidence that I have seen presented in various fora, including the committee's evidence-taking sessions, seems to be anecdotal. I have seen no rigorously made case. Some of the evidence that was given to the committee was not to the effect that that happens, but that there exists the potential for it to happen soon. As with some other questions with which we have dealt, that remains hypothetical. Nevertheless, we accept that the time has come when we must consider the fees.

I made the point to Mr Matheson that we must consider that change as part of a package. My personal view—I am not part of the negotiations in the tripartite group—is that we need to ensure that the service that is being paid for by public funds is of the quality that we should expect. That might go some way towards addressing the anecdotal evidence that states that only junior solicitors are willing to undertake legal aid work and that only junior counsel are willing to undertake criminal legal aid work.

Nora Radcliffe: Witnesses have expressed concern about the impact of fixed fees on summary criminal cases. It is suggested that there are two possible outcomes of a fixed-fee system. One is that the service that is provided will be tailored to the level of the fee. The other is that lawyers will provide the service that is required, thereby effectively subsidising the legal aid budget. Neither of those outcomes is satisfactory. Is that a fair analysis?

Iain Gray: No, I do not think that that is a fair analysis. When fixed fees were introduced, there were all kinds of warnings about what would happen. I do not pretend to be a regular reader of *The Scots Law Times*, but I believe that it described the scheme as

"devised by Satan and manufactured in hell".

That is a little strong. Our experience is that fixed fees seem be working. About 90 per cent of criminal legal aid cases were taken under fixed fees in the past full year. Fixed fees have also had an impact on bringing expenditure on criminal cases under control, although there are signs that reductions in spending have bottomed out and that spending is beginning to increase again.

The scheme has some advantages for solicitors—for example, it provides assured and quick payment, which has not always been the case. About 120,000 cases have been handled under the scheme; therefore, we now have quite a lot of experience of such work. The scheme has been in operation long enough for proper research to be done into how well it is working. I think that that research will show that the fixed-payment scheme is working and that the analysis that you have put to me is incorrect.

One caveat is that the Convention Rights Compliance (Scotland) Bill exempts complex cases. If there was a weakness in the scheme, it was that it did not allow for that. We have now acted and dealt with the most severe difficulty with the scheme.

Nora Radcliffe: On how the department has monitored the impact of fixed fees, you seem to be saying that whatever has been done up until now, you are seriously considering more research.

Iain Gray: We intend to commission a proper and detailed research project into the impact of the scheme and we will evaluate that research when we have it.

The Convener: As committee members have no further questions, I thank the minister and his officials. I do not anticipate asking to give you further oral evidence, but we might write to you on one or two points.

Regulation of the Legal Profession Inquiry

The Convener: Item 3 on the agenda is the inquiry into regulation of the legal profession. Does any member have an interest to declare for the *Official Report*?

Maureen Macmillan: My husband is a solicitor and is a former member of the council of the Law Society of Scotland.

Gordon Jackson: I am a lawyer and a member of the Faculty of Advocates. Recently, I have conducted at least one case before the Scottish solicitors discipline tribunal.

The Convener: The inquiry seems to have attracted a fair deal of interest, but this is simply a briefing in advance of the inquiry. The purpose of the briefing is to assist us in refining our terms of reference—a subsequent item on today's agenda—and is not formally part of our inquiry.

We have with us from the Law Society of Scotland Michael Clancy, Martin McAllister, David Preston and Anne Keenan. The society has submitted a paper, but I believe that Martin McAllister would like to make a few introductory remarks.

Martin McAllister (Law Society of Scotland): I will begin by introducing my colleagues and myself. Michael Clancy is our director of law reform; Anne Keenan is from the law reform department; David Preston is the vice president of the Law Society; and I am the current president of the society.

15:30

We welcome this opportunity to appear before the committee. I am grateful to the convener for underlining the fact that this is a briefing. We hope that, once the committee has established the remit of its inquiry, we will be invited back to give evidence.

I want briefly to speak to the paper that we have submitted. Too often when one considers the question of regulation of the legal profession one is tempted to think only of matters arising from issues that are raised by dissatisfied clients or by consumers who consider that they have a grievance. In our paper we have sought to put the question in context and to underline the fact that the legal profession is not regulated solely by solicitors, but that external agencies are also involved. That is why we refer to co-regulation and external regulation.

We also stress that regulation relates not only to issues that arise from client relations, but to admission to the profession, to education of members of the profession—continuing education is very important—and to professional practice matters. We must ensure that solicitors conduct their practices against the background of ethical rules. We have a code of conduct and we issue guidelines to the profession. Another important issue is the guarantee fund, which acts as a unique protection for the consumer of legal services in Scotland. The paper tries to broaden out the issue of regulation because, when the committee considers that, it must address all the matters that I have mentioned.

The Convener: The Solicitors (Scotland) Act 1980 sets two objectives: the promotion of the interests of the solicitor's profession in Scotland and the promotion of the interests of the public in relation to that profession. Can there be a conflict between those two objectives?

Martin McAllister: The Royal Commission on Legal Services that reported before the Solicitors (Scotland) Act 1980 was passed summed up the position. The committee will no doubt refer to the commission's report during its inquiry. That report stated:

> "While therefore we are in no doubt that the interests of solicitors and of the public can from time to time be in conflict we consider that there is undoubted benefit to the public in having the solicitor's professional body under a wider obligation than simply to look after their own membership. Much of value would be lost if the Law Society were to become simply the professional association or trade union of solicitors."

I trust that when we give evidence to the committee we will be able to address that issue. This is a difficult matter for the Law Society to deal with, but it is a privilege, and one that must not be abused.

The Convener: You mentioned that other bodies are involved in the regulation of solicitors. What are those bodies and how do they tie in with the Law Society in the overall regulation of the profession?

Martin McAllister: There is a statutory framework to the whole system. The 1980 act is the basis of what we do and lays out the structure for how we conduct ourselves and regulate the profession. Below the statute, there is what we would call our subordinate legislation—practice rules, codes of conduct and practice guidelines. They come from the Law Society, but because we operate in a statutory framework, we are ultimately answerable to the Parliament, which is why we are here.

Examples of co-regulation that we have identified are in areas such as financial services, consumer credit, insolvency and immigration and asylum services. Regulation of financial services is a good example. Our members who provide

financial services are regulated by the Law Society, but the Financial Services Authority ensures that we regulate properly. When the Law Society goes into solicitors' offices to ensure that financial services matters are being conducted properly, it is ultimately answerable to the body that Parliament has laid down as being responsible for such matters with every supplier of those services. That is an example of regulation from outside.

The situation is the same with insolvency, although members will see from our paper that only 19 solicitors are insolvency licence holders. We regulate those solicitors, but the way in which we do so is governed by the Department of Trade and Industry.

On consumer credit matters, we are subject to the Consumer Credit Act 1974. That is perhaps the best example of co-regulation involving legal aid.

For the provision of criminal legal aid, the Scottish Legal Aid Board admits solicitors to the register and monitors the behaviour of solicitors who are on that register, to the extent of having the power to enter solicitors' offices to ensure that matters are being dealt with properly.

The regulation of immigration and asylum services involves a new concept. We are a designated professional body under the Immigration and Asylum Act 1999. The immigration services commissioner has the power to receive complaints against Scottish solicitors who give immigration advice and is required to monitor how any complaints that are passed to the Law Society are handled. We have a close relationship with the commissioner to ensure that that is done properly. The regime is new, so we are learning as we go along.

Regulation also comes from external bodies. Parliament, which gave us that privilege in 1980, is the ultimate regulator of the profession. Solicitors appear in court and are officers of the court, so in conducting their business they are regulated.

The Court of Session has some powers in relation to solicitors. It can cause the name of a solicitor to be struck off the roll or suspend a solicitor from practice. It can fine or censure a solicitor and can deal with expenses.

I said that Parliament is the ultimate regulator. In professional practice and for the ability of solicitors to continue in practice, the Scottish solicitors discipline tribunal is important. It is independent of the society. The Lord President appoints its members, who include lay representatives. The tribunal has the power to suspend a solicitor, to strike a solicitor from the roll and to fine a solicitor—the fines are forfeit to the Crown. It can also make findings of inadequate professional service. There are layers of regulation.

When we handle the concerns that clients raise, the Scottish legal services ombudsman is involved. If consumers approach her, she can monitor the way in which we deal with those matters. In addition, like everyone in this room, solicitors are subject to civil and criminal law. It would be useful for the inquiry to examine those areas of law.

Maureen Macmillan: Who sets the criteria for admission to the profession? Who is involved or consulted when determining the regulations for the education and training of solicitors? Could you cover continuing professional development in your response?

Martin McAllister: That is a big question, but I will do my best. It is a particularly big question for us at the moment, because the solicitor training regime is changing. I will start with the basics. The profession is open to all who have the necessary academic qualification and are aged 21 or over. There are caveats. Because of convictions, certain individuals may have difficulty entering the profession, but if we leave that to one side, the principle is that the profession is open to all.

It is more sensible to talk about the new regime, as that is what will be in place this year. Someone entering the profession typically will have a university law degree and a diploma in legal practice. The degree takes three or four years and the diploma takes one year. That person will enter on a training contract for two years. Training will either be with a firm, the Government—the Crown Office and Procurator Fiscal Service or the Executive—a local authority or in-house lawyers. During those two years, they are supervised and monitored. The new part of the regime is that during that period, the trainees will be required to undertake a three-week professional competence course. At the end of the two years, they will be required to sit and pass a test of professional competence. That is the structure that is in place.

Maureen Macmillan: Those are your regulations and you decide what subjects entrants must have.

Martin McAllister: Some of that is determined by the 1980 act, which lays down the rules for admission to the profession. The new part of the training regime that we have installed has been worked on over the past seven or eight years, with the aim of providing the best-qualified solicitors for the public.

Every solicitor has to undertake a set number of hours of continuing education every year, which is monitored. There is a committee in the Law Society to ensure that people comply. I have to complete and submit a record card to the Law Society. Cards are sampled at random and if there

is something wrong with a card, the Law Society investigates and can start disciplinary action against any solicitor who has not complied with the continuing professional development rules.

In addition, we are aware that solicitors in private practice who are embarking upon practice as a principal or sole practitioner or who are joining a firm require special training. For some years, we have had a two-day practice management course. Everyone who joins a firm as a partner or sets up in business on their own account is required to attend that course. The course covers areas such as ethics, accounts rules, guarantee fund matters and client relations. It is compulsory and we think that it is useful.

15:45

Maureen Macmillan: Presumably you monitor the quality of the training that is on offer. Are you concerned that you need to have more or better training? If so, do you have any plans to develop the training?

Martin McAllister: One reason for embarking on the new regime is the realisation that every system has to be assessed constantly. If improvement is needed, steps have to be taken. Because of the course, the training of individuals will be monitored more now than in the past. Individuals have to sit a test at the end of their two years' training; it would be difficult for people to pass that examination if they had not been properly trained in the two years. We have addressed training and are considering it constantly. If any changes are needed in future we will put them in place.

Maureen Macmillan: Are you happy with the quality of training for continuing professional development?

Martin McAllister: The quality of all training varies. There are a number of training providers. The universities are involved, as is the Law Society, whose update department has a number of successful training courses. Local faculties of solicitors are arranging their own training, because it is not especially easy for people who practise in rural areas to travel—for example, from Kirkwall or Skye—to do training. Videoconferencing is used for training, for example by the Law Society update courses.

It is not difficult for me and most of the people to whom I speak to meet the CPD requirements. Solicitors have always been engaged in some kind of training, as there are always new things to think about. Given what the Parliament has done in the past two years, there are many innovations and new laws on which solicitors have to be up to speed.

Michael Matheson: You mentioned that the monitoring process for newly qualified solicitors who have to go through a two-year traineeship has been improved. Who monitors those trainees in the first place? What training do people receive to meet the standards that are appropriate to undertake the monitoring?

Martin McAllister: The profession must be open to all. We must not put barriers in the way of anyone; everyone, regardless of background or income, must be able to train to become a solicitor. We must start from that viewpoint.

If my firm takes someone on as a trainee, it is my responsibility to ensure that he or she is properly trained. Members should bear in mind that that person has studied for a university degree for three or four years and has then studied for a diploma. As an aside, I should point out that the diploma has changed. It is more focused now and better than it was some years ago and it dovetails with the new training regime. I ensure that that person is properly trained. Under the regime that we are starting, there is a logbook that the trainees and I have to complete. There is also a monitoring system. That has not started yet, because the new trainees are not in position. Someone will monitor the monitoring of the trainees. What is being done is very innovative. It is more hands-on than it has been—we acknowledge that it should be.

Michael Matheson: I know that there is a new system of monitoring the monitoring, but I am concerned about the monitoring of the trainer. I will give an example from my previous profession. When I finished my degree and wanted to become a clinical teacher, I had to qualify as one. I then had to renew that qualification continually to allow me to train other students who were coming through—because, although I might have been well qualified in the profession, I might not necessarily have been good at teaching it and providing another person with the skills that they needed.

My concern in this case is that there appears to be a missing link—the training of the person who is responsible for the monitoring in the first place. Monitoring the monitoring is fine, but the weakness may be right back at the start with the person who is providing the training.

Martin McAllister: That is an interesting and valid point. We constantly review things and that is an aspect that we will address.

Those of you who know of family members, friends, or friends' daughters and sons who have looked for a training place will realise that finding one was not easy in the past. Things are better now. I take all that Mr Matheson said into account, but the last thing that we want to do is put an

obstacle in the way of people taking on trainees, because that might mean that people are unable to enter the profession.

Nora Radcliffe: I want to move on to questions about discipline and the investigation of complaints. How many complaints about solicitors does the Law Society receive in an average year?

Martin McAllister: First, I will put the question in context by talking about the way that solicitors work and what they do. My local newspaper describes what I do as "soliciting".

There are more than 8,500 solicitors in Scotland. Some of those are not engaged in private practice, but I think that Nora's Radcliffe's attention is more on those in private practice. It is difficult to know—

Nora Radcliffe: Sorry, can I stop you there? My next question was going to be on how many solicitors are in private practice and how many are in the public sector or in business and commerce.

Martin McAllister: It would probably be best to deal with that question now, because it puts things in context. On 31 October 2000, there were 8,609 solicitors. In private practice as principals—that is, partners in firms or sole practitioners—there were 3,552. There were 266 consultants, who tend to be solicitors who are perhaps semi-retired but who have been partners in firms. There were 802 associates, who are solicitors who are not partners but who, in some firms, are perhaps on the step between partners and assistant solicitors. There were 1,793 assistants.

In local authorities, there were 611 solicitors. In central Government, including the Procurator Fiscal Service as well as the Executive, there were 548. There were 119 in public bodies and 303 in commerce and industry. There were nine retired solicitors. It may seem sad that not more than nine solicitors get to see their retirement, but what the statistics show is that there were only nine solicitors who retained practising certificates although they were retired. There will be many more retired solicitors who no longer have a practising certificate. There were 124 people who had a practising certificate but were not employed as solicitors, and there were 482 people classified as miscellaneous—please do not ask me what they are.

Members will note that a large number of solicitors—about 6,000—are involved in private practice. It is difficult to establish what they do and the number of pieces of work that they do. Classically, they give advice and negotiate business on behalf of clients. They draft documents, deal with conveyancing and wind up estates. They litigate in the civil courts and defend or prosecute in the criminal courts. They also provide a whole range of financial and consultative services for clients. It is difficult for us to establish how many pieces of work are done by a solicitor. It would be difficult even for a practice to establish that. However, it is important to investigate the matter a little further.

I mentioned conveyancing. In 1999, there were around 170,000 bits of Land Register business, and about 204,000 bits of business connected with the Register of Sasines. There were between 44,000 and 45,000 bits of business in the Books of Council and Session, and 14,000 in the Register of Inhibitions and Adjudications. About 99.9 per cent of those pieces of business will have been conducted by solicitors.

The Scottish Legal Aid Board's statistics and report give us some idea of the number of pieces of legal aid work that have been done. In 1999, there were 316,822 items of advice and assistance, 14,500 items of civil legal aid, and almost 70,000 items of criminal legal aid. The Court of Session handled 4,500 actions, and sheriff courts handled between 135,000 and 136,000 actions. That gives you some idea of the number of pieces of work that solicitors will be doing for their clients.

In 1999, 1,338 matters were referred to the society by clients. I am using the 1999 figures because they suit the comparison with the court figures, but the 2000 figures show that in that year 1,094 matters were referred to the society, so that figure is going down. Members had a briefing last week or the week before from Mrs Costelloe Baker. In 1999, 95 opinions were issued by the Scottish legal services ombudsman. Of those, 43 were satisfactory and 52 were critical. Of the 52 that were critical, the criticism ranged from mildly critical to fairly seriously critical. That is the kind of range and context of the matters that you referred to.

Nora Radcliffe: How is that split between public and private work?

Martin McAllister: There may be conduct matters relating to public legal work, but for the purposes of these statistics we are considering only solicitors in private practice. They are the ones who are providing the direct advice and work for clients. Solicitors who are not in private practice are employed, whether by the Scottish Executive, by the fiscal service or by companies such as Shell.

Nora Radcliffe: Does the Law Society have special rules or procedures relating to discipline of solicitor advocates?

Martin McAllister: There is a special code of procedures for admission. Solicitor advocates are solicitors who have extended rights of audience.

Nora Radcliffe: So they would be disciplined in the same way as solicitors who do not have that

extra string to their bow.

Martin McAllister: That is right.

Michael Matheson: I would like to ask about your procedure for dealing with complaints that you receive against a solicitor. How do you go about categorising complaints that relate to negligence, professional misconduct and so on?

16:00

Martin McAllister: Negligence is not a matter for complaint. It involves a breakdown in the contract between the client and his or her solicitor, and the outcome of such cases is determined ultimately in the courts. It is important that we make that distinction. The society has laid down rules about professional indemnity insurance, to ensure that solicitors have the proper cover and that clients can be compensated properly when solicitors are negligent. If someone contacted the Law Society to complain about a matter that clearly involved negligence, we would not deal with that.

Michael Matheson: Would the client be advised of that?

Martin McAllister: Yes. In 2000, 17 people were so advised.

The categorisation of complaints is contained in our annual report, copies of which we will leave with the committee. In 2000, 218 complaints were categorised as relating to misconduct; 318 were categorised as relating to inadequate professional service; 96 related to a combination of inadequate professional service—IPS for short—and misconduct; and 443 were categorised as conciliation, by which I do not mean complaints about solicitors who have failed to conciliate.

Of 1094 cases that were referred to the Law Society in 2000, 443 were dealt with through conciliation. We have a two-tier system for dealing with such complaints. First, the case managers in the Law Society attempt to get the solicitor and the client concerned to sort out the problem. If the problem is resolved to the client's satisfaction, we do not become involved. If not, the complaint is referred to the second tier of conciliation, in which a member of the Law Society's staff attempts to resolve the matter through conciliation. As well as the drop in the number of complaints year on year, one of the most encouraging developments is the rise in the number of cases that we are able to resolve through conciliation. Both the client and the solicitor are then satisfied, and the problem is sorted.

The balance of cases is dealt with through our complaints system and it may be useful for me to say something about what that involves. Six solicitors are employed exclusively to deal with client-relations matters; they are assisted by 20 administrative staff. We have never shirked from giving that system the resources that were needed. Some years ago, we had some administrative problems because of back-ups and so on, but as we strive to bring down turnaround times, so we give more resources to achieving that. If there were an issue that could be sorted by resources, we would certainly provide those resources.

Phil Gallie (South of Scotland) (Con): I believe that negligence is the factor that creates the most problems for you. One problem that seems to arise is that when someone has made a negligence claim against a solicitor, it is extremely difficult to find other solicitors to pick up the case and assist the individual in the courts. What role does the Law Society play in such cases? What do you do when you cannot find solicitors to take on such cases?

Martin McAllister: That is a difficult problem, which is double-edged. If I said that the Law Society should have a panel of people who would deal with such cases on behalf of consumers, some would accuse us of bringing that into our club and controlling it, so we cannot have such a panel. Instead, we have a troubleshooter scheme. If someone is toiling to find a solicitor to assist them, the Law Society—at arm's length—will pay for two interviews, the preparation and preparatory work for that person, to see whether they can take the matter further.

The difficulty with which we constantly toil—members will know this from constituents who approach them in relation to negligence matters—is that the fact that something is wrong is not necessarily a result of negligence by a solicitor. Furthermore, if it is established that something is wrong, the value that is put on that by the person who feels aggrieved is not necessarily the same as the value that would be put on it by a court.

Let me make an analogy. If I had a car accident, the first thing to establish would be who was at fault. Although I have a big bump on the front of my car, it might not have been the other driver who was at fault. Even if the other driver was at fault, if I think that my car is worth £5,000, but an insurance company determines that it is worth £2,000—

Phil Gallie: I think that we have drifted off the point. I recognise that no court case will be 100 per cent satisfactory—whoever wins will feel good, but whoever loses will feel bad. However, I come back to the point on negligence and how the Law Society addresses the fact that, on occasion, individuals find it difficult to find a solicitor to oppose another solicitor.

Martin McAllister: To be frank, I do not consider that the difficulty would be in finding a

solicitor to oppose another solicitor. The difficulty may be in finding a solicitor who would be prepared to take on a case if there was no merit in the case. That is difficult, because, again, it could be said that that is an example of the profession looking after its own.

The fact is that the professional indemnity insurance statistics show that, on average, about 600 claims are notified each year. Those claims are notified and dealt with, and solicitors pay premiums to cover that. The typical premium per partner in a firm is £2,500 to £3,000 per annum. If we multiply that by the number of solicitors, the amount of money that is involved becomes clear.

Occasionally, people may feel aggrieved that their case is not being taken forward, but in the majority of cases in which there is a valid claim, the case is being dealt with properly. However, Mr Gallie makes an interesting point about an issue that we have talked about over the years. We have pulled back from the idea of having a panel of solicitors to deal with such matters for the reason that I mentioned earlier. I suspect that it would not be long before the panel was devalued as a result of people saying that it did not work because the Law Society was looking after its own.

Michael Matheson: You said that, when a client comes to you with a case that clearly involves a matter of negligence, you advise them that remedy must be sought in a court of law as opposed to through the Law Society. Phil Gallie pointed out that people find it hard to secure the services of a solicitor who is willing to take up such a case. You also mentioned that you operate a troubleshooting scheme that could help with such situations. Would you tell someone who was having difficulty in finding a solicitor about that scheme?

Martin McAllister: Yes. We have no statistics on that matter, as it is difficult to link together all the incidents, but we know that the majority of cases are dealt with when people go to a solicitor. Solicitors are in business to make money and, if they can take on a case and fulfil a professional duty for a client, they will do that, regardless of whether the case concerns another solicitor. A solicitor may not want to raise an action against a local solicitor because, apart from anything else, the perception of the client would be affected if he or she saw the two solicitors in the bowling club. In such a situation, a solicitor might refer the case to a solicitor outside the area.

Michael Matheson: I wanted to establish whether clients are made aware of all the procedures at the time as, often, clients can be unsure about where they stand.

You talked about the categories of complaints that you can consider. Would the caseworker make a decision about when the case would be referred to a tribunal?

Martin McAllister: If the matter cannot be conciliated away, the case manager, the client and the solicitor correspond to try to establish the circumstances of the case. After that, there might still be a possibility of conciliation. If we accept that there is no prospect of that happening, the matter will be referred to a client relations committee, of which there are four that deal with general business and one that deals specifically with legal aid matters. That committee was set up to deal with complaints that were referred by the Scottish Legal Aid Board, although there have not been many such complaints. The four mainstream committees are made up of 10 individuals, four of whom are lay members and the others of whom are council members and solicitors. We have had lay involvement in our committees for many years and, over the years, that involvement has become more refined. The lay members are not paid, and are chosen by an interview panel after they answer newspaper advertisements. We try to ensure that the interview panel has a degree of independence, and I think that the last round of interviews involved Sheriff Principal Nicolson.

When the committee deals with the matter, it has before it the relevant papers on the complaint and a report that has been prepared by a member of the committee who is either a solicitor or a lay member. The committee deals with the matter and makes a recommendation to the council of the Law Society, which decides what is to be done with the case. If the matter is to be prosecuted before the discipline tribunal, we not only refer it but prosecute it.

It is important to consider our turnaround times, which we are always striving to improve. We must take into account the European convention on human rights and ensure that the case is properly brought to and dealt with by the committee. We must also ensure that the client and the solicitor have had a proper opportunity to make representations in writing. However, as far as turnaround times are concerned, some cases take longer than others take. I noticed that Mrs Costelloe Baker referred to “suitcases” and thick files in her evidence. She may have to deal with such files in some of her cases, but so do we—some cases are unusually lengthy or complicated. However, the figures for 1998 showed that 76 per cent of all cases were disposed of within 201 days, and that figure rose to 81.8 per cent in 1999.

16:15

The Convener: We had an indication that the witnesses had to leave by a specific time. Is that still the case?

Martin McAllister: We have five or 10 minutes.

Michael Clancy (Law Society of Scotland): We should leave by half-past 4, if that suits the committee.

The Convener: We should try to make quick progress, on both questions and answers.

Michael Matheson: I am trying to follow the paper trail. Once the case manager has referred a case to the committee, do they make a recommendation to the committee, which the committee considers in the light of the report?

Martin McAllister: No. The reporter would make a recommendation to the committee.

Michael Matheson: Would the committee consider the report against that recommendation?

Martin McAllister: Yes.

Michael Matheson: Then the case is referred to the council. What standards does the council work to in deciding the action to be taken? Does it have a benchmark? For example, if the solicitor had done X, would the council be expected to apply the sanction of Y?

Martin McAllister: Are you asking if we operate a tariff?

Michael Matheson: Yes. What criteria does the council work to? I know that criteria can be difficult to work to in such circumstances, but—

Martin McAllister: Criteria can be very difficult to work to. The basic criteria are the Solicitors (Scotland) Act 1980—the statutory framework—and case law. The question of misconduct was determined in the court: professional misconduct was determined to be conduct that was serious and reprehensible. That is the Law Society's standard.

The inadequate service provisions in the 1980 act allow the Law Society to order a solicitor to pay compensation of up to £1,000 for the provision of inadequate professional service.

It would be difficult to lay down a tariff. For example, one might have to specify the amount of compensation to be paid if one or two telephone calls were returned but five were not. Cases must be considered on the basis of the experience that the council has built up.

On turnaround times, we are concerned about the fact that legal opinion has determined that the Law Society does not have delegated powers to deal with certain matters. Previously, the committee dealt with matters of inadequate professional service. We could improve turnaround times if the Law Society had those delegated powers. I know that we are short of time and that members may wish to raise other matters. When we present our written evidence, we will highlight this area.

Paul Martin: Could you clarify how long it takes to deal with a case? I am reminded of a double-glazing salesman who came to see me once. He took two hours to tell me how great his windows were, but he did not tell me the price. The ombudsman said that it could take 121 weeks to deal with a case.

Martin McAllister: Sorry?

Paul Martin: The ombudsman said that two cases took 121 or 122 weeks to deal with. Are you satisfied with that? Is that length of time typical?

Martin McAllister: I think that the ombudsman said that that was not typical. She also referred to a turnaround time of a year, and said that she would be surprised if the turnaround time was less than a year. However, she was speaking about the cases that go before her. The ombudsman considers only the cases of dissatisfied clients who have been through the Law Society's complaints system and who remain dissatisfied with the way in which their complaint has been handled. That is all that she considers. She does not consider the way in which we handle complaints within the society. In 1999, 95 cases were considered by the ombudsman, compared to 1,300 that were considered by the society.

Your first question concerned the turnaround times for dealing with complaints. I have picked on two statistics and compared years. I appreciate that we are short of time, but I am happy to go through those statistics, or we could provide them for you. They are contained in our annual report.

Michael Clancy: In answer to Mr Martin's question, unlike his double-glazing salesman, we intend to be transparent. We will make those figures available. However, it might be appropriate to do so in the context of further written evidence, which we know that you will want soon.

Martin McAllister: I picked the figure of 201 days because it was close to the period of six months to which the ombudsman has reduced her turnaround time through valiant efforts. She referred to the care that must be taken over each case. The ombudsman produces an opinion on the basis of the file that has been compiled, whereas we deal with the solicitor and the client, going backwards and forwards in trying to clarify issues. In 1999, we achieved 81.8 per cent of turnaround targets. We can provide the figures for you.

Gordon Jackson: The ombudsman said that the Law Society would not investigate cases in which

"someone complains about the advice or professional judgment of their solicitor"—[*Official Report*, *Justice 1 Committee*, 5 June 2001; c 2533.]

on the basis that that is not something that the

Law Society can second guess. Such cases concern something like negligence. Is that an accurate summary of the practice? What type of complaint would you refuse to touch?

Martin McAllister: Solicitors have contracts with their clients. In an adversarial situation—for example, in a court action—that solicitor has no contract with the client opposing his or her client. Therefore, we do not consider it appropriate for that solicitor to raise any question regarding the conduct of the solicitor of the opponent.

Nevertheless, there are certain exceptional circumstances in which we would consider such complaints. We would consider the matter if the solicitor breached any code of conduct, against a background of that solicitor's being an officer of court. However, you can imagine the difficulties that could be caused if, in a wholesale way, we admitted matters being raised by the client of the other solicitor who is involved in a case. It would be yet another grievance to list on the claim against the other person. In a matrimonial action, for example, it would be yet another string to pluck.

Gordon Jackson: I understand that. However, I am talking about the relationship between the solicitor and his own client. The ombudsman is saying that you will not consider a complaint from someone about the quality of the advice or the professional judgment of their own solicitor. That is a bit like saying that you will not consider matters of negligence.

Martin McAllister: If someone was engaged in a court case and their solicitor did not call a witness that the client thought should be called, at one level that could be regarded as negligence. At another level, it could be regarded as the provision of inadequate service. However, the fact that the solicitor did not call that witness does not in itself mean that either of those perceptions is accurate.

Gordon Jackson: I want to pursue that. In general terms, you will not consider somebody's complaint about the professional judgment or the professional quality of the advice that they receive.

Martin McAllister: That is right.

Gordon Jackson: I appreciate that such a complaint would often be resolved in a court case, but there might not be any value in holding such a case. Why would you not look into such a complaint? What is wrong with the Law Society forming a view as to whether advice that has been given falls below the standard that would be expected of a good competent solicitor? If the solicitor does not like the ruling, he can appeal against it.

Martin McAllister: I think that we do that. For example, if a solicitor fails to record a deed for someone's house and says that it is a matter of his judgment whether he should—

Gordon Jackson: But that could not be a matter of judgment.

Martin McAllister: We could say that it is not a matter of judgment. If it was a matter of cross-examination during a court action, and of whether a particular question was asked or not, we would say that that was a matter of professional judgment. The other example was, on one level, one of negligence; if there was negligence, it is possible that there was either misconduct or the provision of inadequate professional service. We would look into that.

Gordon Jackson: I do not want to go round in circles—that is perhaps my fault—but, in general terms, how would you summarise the circumstances under which you would say to somebody that you would not investigate a complaint? I suspect that the public feel aggrieved when they are unable to get matters dealt with.

Michael Clancy: In answer to that, one might say that we work within a framework of law, and that we have obligations to investigate complaints of professional misconduct. If, on first flush, the complaint does not relate to an issue of professional misconduct, we would have no locus and no power to investigate it—

Gordon Jackson: Would the giving of advice that you—as a group—believe falls below the standard that is expected from a solicitor come under professional misconduct?

Michael Clancy: It might under certain circumstances, but, as I was about to say, we also have an obligation to investigate complaints of inadequate professional services. If, when a dissatisfied client writes in, one can identify that a complaint comes under the category of inadequate professional service, we would have a locus and the power to investigate the complaint. We must remember that we work within a framework of law; if we transgress the framework of law, we are acting outwith our powers. We would then reap the consequences of that through a judicial review or whatever other remedies were available.

Gordon Jackson: I have, for the record, a final question. I appreciate that this is a grey area, and that it is difficult to determine where the line is drawn. There might be a suspicion that the Law Society is more than keen to draw the line in a certain place and not to investigate matters. In your own mind, do you feel quite satisfied that you are drawing the line in the appropriate place?

Michael Clancy: Again in the spirit of transparency, when we submit written evidence we will address that question and we will identify where the line is drawn and how we quantify the

question of whether that line is sufficient.

The Convener: And the question whether the line should be drawn somewhere else?

Michael Clancy: Yes—we would question whether the line should be drawn somewhere else.

The Convener: Clearly, Parliament could address that.

Michael Clancy: Indeed.

The Convener: When explaining what goes on and the rationale behind your procedures, you have referred to the fact that there is a contract between the solicitor and the client. Is the contract any different between a client and anybody else who provides another kind of professional service?

Martin McAllister: I cannot speak about other professions, but the difference with the contract that a client has with a solicitor is that the solicitor must not only take account of the contract with his or her client, but must do so against the background of the obligations in the framework in which the solicitor works, and in accordance with and with regard to professional rules and the code of conduct.

The Convener: Is the contract implicit? When I go to see a solicitor, I do not sign a contract when I go through the door.

Michael Clancy: It is a consensual contract, which does not have to be written down. You could make a contract with me for me to act as your solicitor.

The Convener: When I go to a dentist, a French-polisher or a hairdresser there is, in the same way, a contract involved. What is the difference?

Martin McAllister: The difference is that, if you get a bad haircut, there is probably—

The Convener: There is not much left to cut.

Martin McAllister: I was certainly not making a comment about your hair, convener.

If someone gets a bad haircut, there will be no one there to put things right for them.

The Convener: You are probably maligning the hairdressing profession. Come on, now.

16:30

Martin McAllister: I do not intend to do that.

If someone gets bad or inadequate service from a solicitor, they can raise the matter with the Law Society. In addition, if their contract—consensual or otherwise—involves them giving money to that solicitor, they have a unique guarantee because of the guarantee fund that we have.

Michael Clancy: Furthermore, although many people do not enter into written contracts with their solicitors, details of the service that the client will receive, such as how much will be charged and at what rate the charge will be made, will be set out in a letter of engagement. We encourage the use of letters of engagement between solicitors and their clients.

The Convener: You mentioned the guarantee fund. How often are payments made from that fund? What is the level of those payments?

Martin McAllister: The structure of the guarantee fund is based on statute. That means that every solicitor in private practice in Scotland pays a sum each year as a guarantee fund contribution. That sum is used to compensate clients who suffer as a result of solicitors' dishonesty. In the past few years, the average has been about £100,000.

The Convener: Is that per payment or per year?

Martin McAllister: Per year.

The sum that every partner in private practice pays per annum is £195. Most of that money is used to monitor the system. That is hands-on regulation. Inspectors from the guarantee fund visit every firm on a two-year cycle. Those inspectors are accountants who go into firms, check the records and make sure that they are in order.

There is also a self-certification system in which every solicitor must certify on a six-month cycle that they comply with the rules and must highlight any defects in the rules. If a solicitor certifies that things in are in order and an inspection discovers that they are not, that might lead the solicitor into disciplinary difficulties.

Most of the money is paid to police the system. However, if major loss were incurred, every solicitor would put their hands in their pockets to pay for it. That is the unique guarantee. To support that, the Law Society has paid for insurance, which means that £25 million in any year is guaranteed and will be paid out. Solicitors would contribute to anything more than that.

There is no cap, which is why the system is unique. Many other countries are examining the Scottish system to learn how it works.

Phil Gallie: I have a quick question. Is it a basic remit of the Law Society to uphold a positive image of the profession and to uphold public confidence in solicitors? I think that we have missed that point. How important do you consider that to be?

Martin McAllister: That is how we opened proceedings. That is in section 1 of the Solicitors (Scotland) Act 1980. That is what we have to do.

Michael Clancy: We have to strike a balance between promoting the interests of the profession and the interests of the public in relation to the profession. You might think that that is a fine balance to strike. However, since the Royal Commission on Legal Services in Scotland reported in 1980, that balance has been examined and re-examined by the council of the Law Society on a number of occasions. It has been part of the legislation going back to 1949.

Phil Gallie: Every month, we are besieged at the Parliament by a group—I will not name it—that has a considerable number of complaints about solicitors and which, in my view, makes a number of slanderous statements against them. Given the requirement to uphold the image of the profession, have you had any contact with such groups?

The Convener: You missed the early part of the meeting. We are merely having a briefing to help us determine the remit of our inquiry. That question is properly a matter for the inquiry, when the Law Society will undoubtedly come back to give further evidence.

Michael Clancy: I have a couple of points on the draft remit. On the time scale, eight weeks is too short. We put in a bid for 12 weeks. On the list of witnesses, I see that the Lord President is not among them and that the committee intends to consult the Westminster Parliament, the National Assembly for Wales, the Dáil Éirann and the Northern Ireland Assembly. I wondered whether the committee intends to achieve that within the period that has been set for the inquiry. I do not see any Whitehall ministries mentioned. That is a run down of what we suggest.

Martin McAllister: I also thank members for the opportunity to appear before the committee. Regulation of the legal profession is such a big topic that, if it would be of assistance to the committee during its inquiry to come to the Law Society and see what is done in various regulatory parts of the offices, we would be delighted to have you.

The Convener: I thank you for your attendance and for that offer. We will be back in touch.

Petitions

The Convener: We move to item 4, which is consideration of petitions. The first petition is PE200 in the name of Andrew Watt. We await guidance that the Scottish Legal Aid Board will issue in the autumn, as the committee will note from the paper that the clerks have prepared. It would be sensible to carry on consideration of the petition at such time as that guidance is available. Are we agreed?

Gordon Jackson: I notice that there is an alternative in the "Options" section of the clerks' paper. It is not really an alternative in that, without ending the consideration, we could write and tell the petitioner about the correspondence that we have had and at the same time continue our consideration.

The Convener: We would normally keep the petitioner informed of actions.

Is that agreed?

Members *indicated agreement*.

The Convener: The second petition is the long-running PE102 from James Ward, on which we continue to receive communications from Mr Ward. It is my opinion, following the previous reply of the Minister for Justice and his clear opinion on the jurisdiction of the Court of Session in the matter, that we cannot take the petition any further and that we should close consideration. However, I am open to other views.

Gordon Jackson: We cannot do anything else. Rightly or wrongly—I have no view—the minister has said that the Executive is not considering the law on the matter and will not change it. I can think of no way in which the committee could take the petition further.

The Convener: Do members agree to close consideration of the petition?

Members *indicated agreement*.

Protection from Abuse (Scotland) Bill

The Convener: Item 5 concerns the Protection from Abuse (Scotland) Bill. The committee has before it a paper on how we will consider amendments to stage 2. The paper suggests that, if any members of the committee wish to lodge amendments to the bill—I suspect that that is unlikely, given that the bill is fairly technical—it would be helpful if such amendments were channelled through the committee so that we could have a consensual approach to the bill.

Are we agreed?

Members *indicated agreement*.

Police and Fire Services (Finance) (Scotland) Bill

The Convener: Item 6 concerns the Police and Fire Services (Finance) (Scotland) Bill. We are not the lead committee on that bill, but it has been drawn to our attention in case we want to report to the lead committee on the bill's contents.

I do not think that we will want to report, but I am open to comments from the committee.

Michael Matheson: Which is the lead committee?

The Convener: The Local Government Committee.

Gordon Jackson: I have not read the bill. Should I have done?

The Convener: Of course. You should read all the bills that come before the Parliament, Gordon.

Gordon Jackson: I meant, "Should I have read it by today?"

The Convener: If there are no further comments, we will not report to the Local Government Committee. Is that agreed?

Members *indicated agreement*.

Consultative Steering Group Principles

The Convener: Item 7 concerns the Procedures Committee's inquiry into the application of the consultative steering group's principles in the Scottish Parliament. The deadline for submissions is 26 June and this is our last meeting before then. If we want to make a submission, we must get it under way now.

Gordon Jackson: This may be the same for every committee, but in my view the work of this committee has been a good demonstration of the CSG principles in action. On a number of occasions we have used the committee to uphold the principles that are listed by the Procedures Committee: by changing things, we have forced power to be shared; we have, quite properly, called people to account; and we have been accessible—many groups say that they are impressed by our accessibility. Without saying that we are wonderful and that the Parliament is wonderful, it would be legitimate for us to respond by saying that in our experience the committee system has succeeded in upholding the CSG principles. I do not know whether all members agree, but that is my view of the work of this committee and its predecessor over the past two years. Perhaps we could say that in a wee letter. It would be better than saying nothing.

The Convener: We will draft a letter and e-mail it to members of the committee. If it meets with everyone's approval, we will send it to the Procedures Committee.

Michael Matheson: I go along with what Gordon Jackson said, but I am not sure that we have done as much as we could to make ourselves accessible. The committee meets predominantly in Edinburgh. We may want to reconsider that. I am conscious that we will be the lead committee on the land reform bill. We should probably meet more outside Edinburgh when we take evidence on that. We have had only two meetings outside Edinburgh—another one was cancelled. I do not know how often the other committees meet outwith Edinburgh—their practice may be similar to ours—but I feel that we have done so very rarely.

The Convener: Moving around does not necessarily equate to greater accessibility.

Michael Matheson: That is true. When we met in Glasgow hardly anyone was there, but I would like to raise the issue.

Gordon Jackson: I do not disagree with Michael Matheson. I am not saying that we are wonderful, but I do not like the idea of our failing to respond to the Procedures Committee. If members want, we can make a warts-and-all response.

The Convener: We will draft a response, e-mail it to members and, if we get a consensus, we will send it to the Procedures Committee.

Gordon Jackson: I am sorry—I have just given somebody more work.

Cornton Vale Prison (Visit)

The Convener: Item 8 concerns the visit to Cornton Vale prison by members of our committee, along with members of the Justice 2 Committee.

Michael Matheson: I presume that all members have received a copy of the report on the visit that the Justice 2 Committee produced.

The Convener: I do not think so.

Michael Matheson: The clerks to the Justice 2 Committee have written a full report on our visit, which should be circulated to all members, as it will provide them with more detailed information.

The Convener: It is intended that the report will be circulated. It is awaiting circulation as we speak.

Michael Matheson: I would like to highlight a couple of issues that struck me most. Over the years, many of the problems in Cornton Vale have related to the remand provisions there. This was my second visit to Cornton Vale and I noticed that there has been a marked improvement in the remand unit. That impression was supported by prisoners and by the staff who work in the remand unit. The improvement is the result of investment in the building and of training for staff.

Since I was last at Cornton Vale, there has also been a significant improvement in medical care services. There is a greater number of staff and a higher standard of facilities for them to operate in. However, there is concern that the Scottish Prison Service may have plans to put the medical care services out to tender, so that they are no longer provided in-house. If that is the course of action that the SPS is considering, it could have considerable implications for the quality of service that is available, given the experience of the staff. It also appears that links between medical staff in the prison and medical staff in the community have improved considerably. However, the range of agencies involved continues to cause problems.

16:45

On a negative note, overcrowding, which is due to on-going work in Cornton Vale, is a continuing problem. The cells are fairly small and in some parts of the remand unit, which is in the old building, and some other areas, prisoners are doubling up.

Another problem is the fact that we continue to lock up people who should not be in prison. The vast majority of the prisoners in Cornton Vale are in for only three months, which makes it difficult for the staff who provide services in the prison to do anything constructive with them. That is not an argument for keeping prisoners in prison for longer, but there is a serious need to examine how female offenders are dealt with and alternatives to custody. It remains the case that a considerable number of people are locked up for fine defaulting or failing to have a television licence.

I detected that the staff at Cornton Vale feel that they are doing everything they can—they are keeping their side of the bargain by improving the situation in the prison—but the situation outwith the prison is not improving. The prison continues to receive prisoners who should not be in prison. That must be addressed, as staff at Cornton Vale are under continuous pressure and, as ever, it is inevitable that even greater difficulties will arise at some point.

I was extremely impressed with the staff whom I met. Kate Donegan, the governor, has made tremendous changes and has improved the quality of the services that are provided at the prison. Those improvements are, primarily, a result of the dedication of the staff—they made sure that things improved for the prisoners.

Phil Gallie: I ask Michael Matheson to expand on his suggestion that the courts do not deal fairly with people. I recognise that the sentences imposed by the courts are outwith the remit of the Justice 1 Committee, unless we are talking about mandatory sentences and the limits that can be imposed on sentences. A prisoner who is released after three months will have received a six-month sentence. I would hate to think that a first-time offender who had not paid their television licence would get six months in prison.

There is a lot of emotion about this issue. I would like Michael to expand on the unfair imprisonment that he mentioned.

The Convener: I do not think that remission is available for short sentences. Is that correct?

Michael Matheson: No. Remission is available—

Gordon Jackson: May I—

Michael Matheson: Let me try to respond to Phil Gallie's question first.

Gordon Jackson: I was just going to give my view on Phil's comments. Carry on, by all means.

Michael Matheson: I used fine defaulters or people who had not bought a television licence as examples. I am not sure what information the court considers when it imprisons first-time offenders, but the examples show that people are still sent to prison for such offences. We have also been told of prisoners with obvious mental health problems who should have been sent to hospital but who were sent to Cornton Vale because there was

nowhere in the NHS for them to go.

It is questionable whether some offenders should be in custody in the first place, including those women who should be in hospital rather than in prison. As I said, there is a question about how female offenders are dealt with, which is something that—

The Convener: The Justice 2 Committee is covering the issue of female offenders in its work programme. We are carrying out on-going research into sentencing and public attitudes to sentencing. We have agreed to take oral evidence from the chief executive of the Scottish Prison Service as soon as the long awaited estates review is published—if that ever happens. Her Majesty's chief inspector of prisons' annual report is due out towards the end of August, so we might want to hear from him as soon as possible after the recess.

Maureen Macmillan: Did the visit cover the support services that are available to women when they are released from prison? Was there any indication of the rates of reoffending and readmission?

Michael Matheson: As I went round the prison with the inspectors and the governor, I was struck by the fact that the governor seemed to have seen most of the prisoners that we came across in the establishment before. We were given the impression that there is a revolving door problem—the same people come back time and again.

We discussed support services outwith the prison. There have been some developments in improving links between health agencies and social work bodies. The problem is that Cornton Vale takes female prisoners from all over Scotland. It is not as though it serves a local area. Naturally, that presents some considerable difficulties. The discussions that we had with the staff and the inspectors revealed that there is a need to improve community-based and support services for prisoners.

The Justice 2 Committee is inquiring into female offenders and it will have to consider alternatives to custody and support services for people coming out of prison. Many women in the prison—nearly 80 per cent—have had some type of drug problem. Often, they are in prison for a short time, they return to the same chaotic environment that they came from and they end up committing more crimes to feed their habit. If we are to break that link there must be proper community support services. I had the impression that the good links that have been developed were mainly in the large urban areas and not necessarily in the smaller locales.

Maureen Macmillan: Female prisoners in Inverness have the option of going to Cornton Vale if they are going to serve a longer sentence, but many opt to stay in Inverness prison, because it is closer to the local community. I take the point that those who go down to Cornton Vale need support when they return to their community.

Phil Gallie: I hate to be controversial, but we must also be practical. Michael Matheson's comment about female prisoners having drug-related problems extends equally to male prisoners. Most short-term offenders are involved in drugs and there has been an effort to address the problem of the prison population being recycled in that context. I wonder whether, now that we are subject to the European convention on human rights and equality legislation, it is right that any of our committees considers women offenders specifically or whether we should simply consider offenders.

The Convener: I do not really want to open up that discussion. In any event, it is not for us to discuss what other committees should or should not decide to investigate.

Phil Gallie: I seek a ruling on the matter, either from the clerks or from you, convener, to guide the committee in the future. It is an important point. We cannot talk about equality and then go off along different lines. I accept that there are differences—that is a position that I have long held—but at the same time I recognise that there have been changes to the rulebook.

The Convener: If I were tempted to comment off the cuff—I am not necessarily being forced to do so—I would say that the fact that we have equality legislation does not preclude us from deciding that, in certain cases, there are differences between men and women, which require different approaches and treatment.

Phil Gallie: I welcome that.

Maureen Macmillan: We also said that we would consider young offenders and no one raised the objection that we should consider old offenders as well.

Michael Matheson: In my defence, allow me to say that my comments were predicated on the fact that I visited Cornton Vale, which is a women's prison.

The Convener: We must deal with the reality of the situation.

Regulation of the Legal Profession Inquiry

The Convener: The declarations of interest that were made earlier still stand. The Law Society of Scotland will have to be disappointed about its request for an extension of the deadline. If we extended it, our evidence sessions would take up time in which we may have to take evidence on various bills that we will consider after the summer recess.

Members have a copy of the draft terms of reference. I would like to change the first bullet point under the heading "Terms of Reference", which refers to

"the framework of regulation of the legal profession in Scotland",

to include regulation of legal services.

It strikes me that one issue that was opened up, which falls within the scope of regulation of the legal profession, is regulation of entry into the legal profession. The Competition Commission is considering the impact of that on the legal profession south of the border and, I presume, north of the border. I feel that the remit of the inquiry would allow us to consider that, which would be useful. I do not want to exclude it, although it might make the inquiry a bit bigger.

If people are happy with the approach and the time scale, we must agree on the list of witnesses. The Law Society suggested adding the Lord President and a Whitehall department, although it was not clear which department.

Gordon Jackson: I did not understand that suggestion.

The Convener: The Lord President might be a sensible addition.

The Law Society mentioned other organisations that are involved in co-regulation of the legal profession. We should not contact them all, but the Financial Services Authority might be worth approaching, given that some complaints seem to centre on matters of cash. I do not think that the insolvency service or the immigration services commissioner are worth approaching at this stage. Perhaps we could write to the Office of Fair Trading and the Competition Commission. We want to consult as widely as possible, so if anyone has any additions to the list of consultees to suggest, please e-mail them to the clerks.

With those additions, is the remit agreed?

Members *indicated agreement*.

Phil Gallie: Have we determined who we will call to give evidence?

The Convener: No. We will decide that on the basis of the submissions.

Michael Matheson: I seek clarification of the list of proposed witnesses. Under the heading "Government, etc", Westminster, the Welsh Assembly, the Dáil and the Northern Ireland Assembly are mentioned. What do we intend to gain from contacting them? Will we contact the committees that deal with justice matters?

The Convener: We will make contact at a parliamentary level. We will speak to the committee—or whatever passes for our equivalent—in those legislatures to find out whether there are any relevant issues or inquiries in those jurisdictions that might inform us. If so, we will investigate more.

This is the committee's last meeting before the summer recess. We will restart in September. The timetable for meetings in September and thereafter is still being drawn up, but we will send it to members as soon as possible. Thank you for your co-operation, and enjoy the recess.

Meeting closed at 16:58.

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