

# **JUSTICE 1 COMMITTEE**

Tuesday 19 November 2002  
(*Afternoon*)

Session 1

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## **JUSTICE 1 COMMITTEE**

**39<sup>th</sup> Meeting 2002, Session 1**

### **CONVENER**

\*Christine Grahame (South of Scotland) (SNP)

### **DEPUTY CONVENER**

\*Maureen Macmillan (Highlands and Islands) (Lab)

### **COMMITTEE MEMBERS**

\*Ms Wendy Alexander (Paisley North) (Lab)

\*Lord James Douglas-Hamilton (Lothians) (Con)

\*Donald Gorrie (Central Scotland) (LD)

\*Paul Martin (Glasgow Springburn) (Lab)

\*Michael Matheson (Central Scotland) (SNP)

### **COMMITTEE SUBSTITUTES**

Bill Aitken (Glasgow) (Con)

Kate Maclean (Dundee West) (Lab)

Mrs Margaret Smith (Edinburgh West) (LD)

Kay Ullrich (West of Scotland) (SNP)

\*attended

### **WITNESSES**

Michael Clancy (Law Society of Scotland)

Linda Costelloe Baker (Scottish Legal Services Ombudsman)

Martyn Evans (Scottish Consumer Council)

David McLetchie (Lothians) (Con)

Douglas Mill (Law Society of Scotland)

Sarah O'Neill (Scottish Consumer Council)

David Preston (Law Society of Scotland)

Mr Jim Wallace (Deputy First Minister and Minister for Justice)

Philip Yelland (Law Society of Scotland)

### **CLERK TO THE COMMITTEE**

Alison Taylor

### **SENIOR ASSISTANT CLERK**

Claire Menzies Smith

### **ASSISTANT CLERK**

Jenny Goldsmith

### **LOCATION**

Committee Room 1



## Scottish Parliament

### Justice 1 Committee

*Tuesday 19 November 2002*

*(Afternoon)*

[THE CONVENER *opened the meeting in private at 14:04*]

14:10

*Meeting continued in public.*

**The Convener (Christine Grahame):** I advise members that the meeting is now in public session. I ask members and witnesses to turn off mobile phones and pagers. I have received apologies from Maureen Macmillan and Donald Gorrie, who will be along later. I apologise to the panel, but they are caught up in other meetings.

### Items in Private

**The Convener:** I ask the committee that agenda item 6, on witness expenses, be considered in private. As members will be aware, the item concerns expenses relating to individual witnesses, and our policy has been that it is not appropriate to discuss such matters in public. Are we agreed?

**Members indicated agreement.**

**The Convener:** I also propose that the committee considers questions for witnesses for the alternatives to custody inquiry and the Prostitution Tolerance Zone (Scotland) Bill in private at its next meeting. Are we agreed?

**Members indicated agreement.**

## Convener's Report

**The Convener:** The matter that I want to mention is the report on Cornton Vale that came out today. I am in the committee's hands on the issue, but I know that Lord James Douglas-Hamilton agrees with me that it would appropriate to arrange an early visit to Cornton Vale prison. I also suggest that we endeavour to invite the former chief inspector of prisons, Clive Fairweather, to speak to his report as soon as possible after our visit. Shall we set that up?

**Michael Matheson (Central Scotland) (SNP):** If we are going to do something like that, we should try to fit it into our alternatives to custody inquiry, as opposed to having a special sitting just to take evidence on the specific issue. I would welcome some guidance from the clerks about how we could possibly work in any such meeting with our alternatives to custody inquiry. That is where the crux of the issue lies.

**The Convener:** I do not think that the two exclude each other. It is important for us to take the evidence on the practical circumstances and from Clive Fairweather on his report. We will then be in a position to weave it into our alternatives to custody inquiry. I must admit that I have not had a chance to read the report, but many points refer to the fact that too many women are being put into Cornton Vale for minor offences. We could work that way, but I am in the committee's hands. With our commitment to Cornton Vale over many years, it is important that we have a look and speak to staff for ourselves. If we can speak to Clive Fairweather too, we can weave that into our inquiry. We need to get something fixed up quickly.

**Lord James Douglas-Hamilton (Lothians) (Con):** It is desirable to go to Cornton Vale. A lot of evidence has been put forward on behalf of the women prisoners, and we should see the situation at first hand from the point of view of prison officers and medical staff and the prisoners. I have been there at least three times, but I would like an up-to-date picture.

**The Convener:** Shall we contact members by e-mail about what we fix up? We will get back to members with proposals as soon as we can tomorrow morning. Is that agreed?

**Members indicated agreement.**

## Council of the Law Society of Scotland Bill: Stage 1

14:15

**The Convener:** To give evidence on the Council of the Law Society of Scotland Bill, I welcome from the Law Society of Scotland David Preston, who is the president; Douglas Mill, who is the chief executive; Michael Clancy, who is a director—I welcome him back—and Philip Yelland, who is a director. Of course, I also welcome David McLetchie MSP.

I declare that I am a member of the Law Society, although I have been a non-practising solicitor since I entered Parliament. Does anyone else have an interest to declare?

**Lord James Douglas-Hamilton:** I am a non-practising Queen's counsel.

**The Convener:** I will kick off. The witnesses should feel free to indicate who wishes to answer. I expect that Mr McLetchie will answer most questions.

**David McLetchie (Lothians) (Con):** Could I declare an interest?

**The Convener:** Certainly. I beg your pardon.

**David McLetchie:** I am a member of the Law Society of Scotland and I am the bill's promoter. Before we proceed to detailed questions, I record my thanks to colleagues who have supported the bill, which I trust will be non-contentious. I thank particularly the members who signed the bill—Pauline McNeill, Roseanna Cunningham and Donald Gorrie, who is a member of this committee.

My panel and I will be happy to answer the committee's questions.

**The Convener:** We are in danger of making the Parliament look like it is full of solicitors, which it is not.

The explanatory notes that are issued with the bill say that, before 1999, committees and sub-committees of the council of the Law Society discharged some functions of the council. Will you outline the functions that committees and sub-committees undertook and why it was thought necessary to suspend the practice of delegation?

**David McLetchie:** I ask the chief executive of the Law Society, Douglas Mill, to give the background to that.

**Douglas Mill (Law Society of Scotland):** The bill is an essential part of our modernisation programme, which is an endeavour to make the

organisation more open, modern and accountable. We have undertaken programmes on matters such as better resourcing, improving our communications with the profession and the public, improving our ability to produce strategy and internal management.

An examination of our rules and procedures was part of the programme. In 1999, we discovered—having taken the opinion of the then dean of the Faculty of Advocates—that our ability to delegate fully might be questionable. For that reason, we approached the Parliament for a member's bill to allow us to improve our present system. Our system is slow and paper laden—as some committee members will know from attending council meetings—and it adversely affects the velocity of the overall system, which is particularly noticeable in our ability to deal with client relations matters.

**The Convener:** Does the bill do more than tidying? You tell me that it is intended to regularise what was practice, but does it not do more than that?

**Douglas Mill:** Yes. There is no doubt that a belt-and-braces approach is being taken. On examination, we found that we were not the only body with such difficulties or potential difficulties with our ability to delegate. Law on such matters has changed considerably. We discovered that our English counterparts had closed off any uncertainty in 1974 through statutory provision. We approach the committee in a similar manner today.

**David Preston (Law Society of Scotland):** The convener asked for examples of some functions that had been delegated. Some matters that arise from the issuing of practising certificates had been delegated and we would like to delegate them. Questions that relate to admission to the profession, the removal of restrictions on practising certificates for technical reasons, continuing professional development and client relations and complaints require referral to the council for decisions. Committees would be perfectly competent to deal with many such issues.

**The Convener:** Do committees undertake such tasks?

**David Preston:** They fulfil their tasks by looking into such matters, but they must make recommendations to the council, which requires to consider the basis of those recommendations and approve the functions.

**Douglas Mill:** Since we were made aware of the issue in 1999, we have acted in good faith by amending our procedures to bring everything back to the council for ultimate decision making.

**The Convener:** I would not say that you had ever acted in anything but good faith.

What is the role of non-lawyers on such committees? Do they have a function?

**David Preston:** Non-lawyers serve on a number of committees, particularly the education and training department committee, the law reform department committee and the practice management committee. They contribute a lot to the working of the committees. Further, the client relations department and committees have increased the use of non-lawyers.

**The Convener:** As we have narrowed our inquiry to deal with complaints, it is interesting to hear that you have lay members on your client relations committee.

**David McLetchie:** Perhaps Mr Yelland might like to talk about that, as he is the relevant director.

**Philip Yelland (Law Society of Scotland):** We have five client relations committees, on each of which are four non-solicitor members. In 1990, there were three committees with only two non-solicitor members on each. That demonstrates that the input of the non-solicitor members has increased significantly and is important to the process.

**The Convener:** How many solicitor members are there on the committees?

**Philip Yelland:** Each of the five committees has six solicitor members.

**The Convener:** The explanatory notes state that the suspension of the previous practice of delegation to committees and sub-committees is

“adversely affecting the Council’s ability to provide speedy and effective regulation of the profession”.

You referred to that earlier. Can you provide us with examples of those adverse effects?

**David Preston:** As the adverse effects are most apparent in the client relations department, I ask Mr Yelland to answer that question.

**Philip Yelland:** When a complaint about inadequate professional service is dealt with, the matter will go to a committee, which will make a recommendation to the council for the final disposal of the matter. The time between the committee considering the matter and the council deciding on it is six to eight weeks. If powers are delegated back to the committees, the time it takes to deal with a case will be reduced by six to eight weeks.

**Lord James Douglas-Hamilton:** You may have answered this question already, but perhaps you could elaborate a little. The written evidence submitted on behalf of the Law Society contains

some information on how the powers of delegation contained in the bill might be used in relation to complaints handling. How do you envisage using the powers of delegation contained in the bill?

**David Preston:** Are you asking about matters other than those relating to client relations?

**Lord James Douglas-Hamilton:** I am asking generally.

**David Preston:** As has been said, the intention behind the bill is to modernise and streamline the council’s processes and empower the committees to make decisions. As I have said, issues arising from admissions to the profession, practising certificates and continuing professional education are all areas that could be speeded up. Policies of the committees could also be implemented much more quickly. Of course, as the bill accepts, that will not deal with the rule-making or legislative function of the council, which has been specifically excepted, as have the decision-making powers of individuals.

**Lord James Douglas-Hamilton:** Can you provide us with some information about the role that you anticipate for non-lawyers in the decision-making processes of the Law Society?

**Douglas Mill:** That has to be put on a proper footing. We have considerably increased our use of non-solicitors in all our committees and the bill would clarify our power to do that. We live in an era where we are all well convinced of the value of cross-fertilisation and of using people effectively and that process is accelerating.

**Lord James Douglas-Hamilton:** Do people who are not members of the Law Society’s staff receive remuneration for the work that they carry out on behalf of the council—for example, serving on committees and sub-committees—and how does their involvement with the Law Society affect their work and opportunities?

**Douglas Mill:** Solicitor and non-solicitor members of committees are not paid, but their expenses are reimbursed. Given the loss of time in their practice that their membership causes, some of our council members receive remuneration if they convene a certain committee.

**Michael Clancy (Law Society of Scotland):** It is important to point out that there are certain circumstances where people are paid for specific items of work. For example, if research was required into legal aid matters, the Law Society would pay a researcher on a proper commercial footing. It also pays for external advice on specialist areas.

**Michael Matheson:** The bill gives discretionary powers to the council but is silent on when they should be used. Questions have also been asked about lay representation on those committees to

which delegated powers have been given. The bill does not mention the extent to which lay people should be involved in those committees. Would it be helpful if the bill contained more detail on when those discretionary powers should be exercised and more guidance on the extent to which lay people should be involved in committees?

**David McLetchie:** The purpose is to empower the council rather than be too prescriptive. The policy issues that underline the statutory provisions are matters for the council of the Law Society by reference to the primary statute.

**Michael Clancy:** It is helpful to consider the Solicitors (Scotland) Act 1980, which I will refer to as the mother act. The 1980 act allows the council to embark on many of its activities. Only in very few circumstances is it prescriptive about the obligations that are imposed on the council. For example, under the amendments in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the council is obliged to investigate matters of conduct and inadequate professional services. It is also mandatory for there to be a guarantee fund, but, by and large, the functions of the 1980 act are discretionary, not mandatory, and it is in that setting that the bill is introduced.

The bill is meant to fit into the scheme of the 1980 act; it is meant to be an empowering measure, not a prescriptive one. To unduly encumber the bill with prescriptive provisions would make it much more unwieldy. That could have unforeseen consequences and would inevitably fetter the council in its provisions and in the achievement of its objectives to promote the interests of the solicitors' profession and the interests of the public in relation to that.

**Michael Matheson:** One concern that has been highlighted to me is that the council does not have any lay involvement. Being more prescriptive about how and when the council should use its discretionary powers would help the process of modernisation and transparency. Is that a potential missed opportunity? I understand Michael Clancy's comments about keeping the bill's provisions within the terms of the mother act, but are we missing an opportunity to have greater transparency at the heart of the Law Society, which is a matter about which the committee has received representations?

**David McLetchie:** That is a broader policy issue for the Law Society, so the president may wish to comment.

**David Preston:** The council is discussing the issue of lay representation. It is felt, however, that the purpose of the bill is to empower committees to take those decisions without the need to involve the council. Non-lawyer involvement will be increased and enhanced without necessarily

introducing non-lawyer members to the council. As I said, that issue is subject to debate within the Law Society. In order to make progress with modernisation, we want to proceed with the bill. That would not be a bar to future consideration of non-lawyer membership on council.

14:30

**Michael Matheson:** My comments are not intended to be a criticism of how the council operates. Evidence received from the Law Society by the committee during its inquiry into the regulation of the legal profession stated that the fact that there was no lay involvement in the council was unhelpful, especially given that the council is responsible for considering complaints. It is fair to say that the Law Society recognises that issue. However, it would be interesting to know how far that debate has progressed and whether there is a possible time frame in which changes may occur or whether it is just a continuing debate.

With the provisions of this bill, will the council of the Law Society still consider conduct complaints?

**David Preston:** Whether matters of conduct will remain with the council is also under discussion. I cannot give any undertakings on the part of the council. Debate is continuing, and the matter is due to be discussed at council meetings within the next few weeks.

**Douglas Mill:** Would it be helpful if Philip Yelland put into context the amount of conduct debate that is required at the Law Society?

**Philip Yelland:** Approximately 450 to 500 cases come before committees during a year. Those cases must also come before the council for a decision. Of those, only 3 to 4 per cent have any suggestion that professional misconduct should be prosecuted before the tribunal. It is an issue only in a very small proportion of cases.

**David Preston:** It is a technical point, but the council does not make a determination on the specific question of conduct. That is reserved exclusively to the independent Scottish Solicitors Disciplinary Tribunal. The council puts the matter forward for prosecution before that independent tribunal, but does not make the final determination. The composition of the tribunal, as committee members know, includes non-lawyers.

**Michael Matheson:** On the debates about lay involvement in the council and dealing with complaints about conduct, is there a time frame around when those debates will end and some recommendation or decision will arrive at?

**David Preston:** It is difficult for me to give any sort of prediction. Saying that the debate is continuing is as close as I can come to a time frame.



**The Convener:** I am not quite sure whether Michael Matheson has asked this. We will be taking evidence from the legal services ombudsman, who has raised the following point:

"The Bill as drafted is not, in my view, sufficiently specific in relation to complaint handling. I asked the Law Society to write to me to confirm its intentions with regard to complaint handling arrangements if the Bill becomes enacted. In the absence of a reply, I consider that the draft Bill allows too much discretion."

First, did you receive the letter from the ombudsman? If so, when did you reply?

Secondly, I refer to page 2 of paper J1/02/39/04 from the legal services ombudsman, which states:

"I ask the Committee to consider adding a requirement to the Bill that all complaints about the conduct of and service provided by Members of the Law Society should be determined by a Committee which must include a proportion of people who are not Members, one of whom may be appointed as Chair."

Will you take the opportunity to comment on both those quotes, as we will take evidence from the legal services ombudsman after you have left the meeting?

**Douglas Mill:** I re-emphasise Mr McLetchie's point about enabling. As far as the two on-going debates are concerned—about lay involvement and the model that we should apply—there is an element of putting the cart before the horse. Obviously it is not for the Law Society to presume that the bill will become an act, but we are working on a scheme of implementation, which we would be happy for the committee to see in due course.

The council has a fundamental decision to make about the model that is applied. It has to decide whether only matters of conduct or matters of conduct and other issues should eventually go to the council or whether another body should be established. If so, on what terms should that body be established and what degree of lay involvement should there be?

**The Convener:** Will the committee have information about that before stage 2 or, indeed, stage 3?

**David McLetchie:** That would be the intention.

**Douglas Mill:** That would be the intention, if we could have an indication of when stages 2 and 3 will be. The scheme is being worked on now in an operational sense, but it must still be adopted as council policy. In a spirit of openness, we would share the information with the committee.

**The Convener:** I do not know about time scales. It is Mr McLetchie's bill. Does he have any idea about the timetable?

**David McLetchie:** The council is considering the matter at the moment. As proposer of the bill, I would be happy to bring to the committee the

scheme as it is approved by the council. Of course, that scheme would then be conditional on the bill being approved by Parliament.

**The Convener:** That would be useful. The first question was whether the legal services ombudsman has had a reply yet.

**Michael Clancy:** We sent the legal services ombudsman a copy of our memorandum. In so far as that contains sketches—

**The Convener:** I put the question to you simply because we are going to take evidence from the ombudsman and, in fairness, I wanted to allow you to respond.

**Paul Martin (Glasgow Springburn) (Lab):** I return to the point about remuneration for lay members. Is there a reason in principle why lay members do not receive remuneration? I am asking out of curiosity rather than because I have a hidden agenda.

**David McLetchie:** My guess would be that it is because of economical management of the Law Society's affairs, but I will allow the president to answer.

**The Convener:** Pleading poverty for the Law Society of Scotland will not get you far, Mr McLetchie.

**David Preston:** We have never asked for that.

**Philip Yelland:** I might be able to assist you, convener. Over the years, there have been debates about whether non-solicitors or, indeed, solicitors should be paid to attend committees or prepare reports in relation to complaints. In the past, when lay members have been asked whether they wish to be paid, their response has been that they would prefer not to be, because were they to be seen by those who make the complaints as being in the pay of the Law Society, they would be perceived as not being independent.

**Paul Martin:** A lot of the evidence that the committee received during its inquiry into the regulation of the legal profession indicated that lay involvement in the council raises questions about the fairness of the process, particularly in relation to the imbalance of power. A solicitor can lobby a council member to argue his or her case before the council but a complainant is not able to do so. Do you accept those criticisms?

**David McLetchie:** The Law Society would prefer to see the totality of the committee's report and conclusions before giving specific comments vis-à-vis that matter. It is not wholly within the ambit of today's discussions. Perhaps the secretary of the Law Society will add to that.

**Douglas Mill:** I agree with Mr McLetchie. We will consider such matters and take them on board

when we receive the committee's report, but the issue seems to go beyond the specifics of what we are here to discuss.

**The Convener:** I remind the committee and the panel that our report into the regulation of the legal profession will be published on 27 November. We will perhaps return to that issue at a different stage of the bill.

**Paul Martin:** The bill contains various restrictions on when delegation is competent and on whom functions can be delegated to. Will the witnesses outline those restrictions and the rationale behind them?

**Michael Clancy:** The primary restriction is set out in new section 3A(10), which relates to functions that are excepted from the scheme of delegation under the bill. Those functions are to make rules or regulations under the 1980 act, and to prepare the constitution of the council. They are excepted from the scheme of delegation because the council is a legislative body, albeit one with a limited scope, and it would be inappropriate for the council's legislative power to be handed over to a committee, a sub-committee or an individual. That would be like the Parliament deciding that Paul Martin should be the person to agree or disagree to bills. The member and his colleagues may think that that is a good idea—I am sure that in certain circumstances it would be—but the issue of democracy comes into play here. The council is the elected, democratic body for the profession of solicitor. Its legislative, quasi-sovereign powers are prohibited from being devolved to committees or individuals.

The other principal exception is to be found in new section 3A(5). Under sections 3A(5)(a) and 3A(5)(b), provisions of the Solicitors (Scotland) Act 1980 relating to the determination of complaints about inadequate professional services and section 33 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 relating to conduct matters cannot be discharged by an individual. New section 3A(5) responds to concerns that were expressed to us in the pre-legislative consultation exercise that we conducted with a number of bodies about judicial or quasi-judicial powers being discharged by individuals. It is possible that the section goes slightly too far, as it could be interpreted as not providing for the capacity to identify whether an issue comes within the council's jurisdiction. We would like to revisit that matter at stage 2.

**The Convener:** There is a lack of lay involvement in the council during the complaints process. A solicitor may lobby a council member to argue his or her case, but that option is not open to the complainant. Could a balance between the rights of solicitors and those of complainants be restored by delegating the power

to hear complaints to a committee? You can see where we are coming from. There is a problem if one side is able to argue its case but the other is not represented.

**Michael Clancy:** That issue was raised during the committee's inquiry into the regulation of the legal profession. I recollect a debate on the topic between Martin McAllister and Lord James Douglas-Hamilton. We are conscious of the matter.

**Lord James Douglas-Hamilton:** I understand that in England the Law Society has decided to make it clear that there should be no conflict of interest and that there should be firewalls between those who make and take up complaints, and those who represent solicitors. Would such a system be practicable in Scotland?

**Michael Clancy:** That depends on the terms of the scheme of delegation that we introduce. When we discussed the issue earlier, the then president of the Law Society of Scotland, Martin McAllister, indicated that the convener of a committee spoke to and defended the minute that was before the council. It is possible that in future minutes will not come before the council, because of the scheme of delegation. The involvement of non-lawyers in the committee structure could be perceived as addressing the issue that Lord James Douglas-Hamilton raises.

14:45

**Lord Douglas-Hamilton:** I am one of the members of the committee who has seen the operation of the full council. Do you agree that the way in which the full council considers and deals with complaints is entirely fair?

**Michael Clancy:** I agree that it is very fair.

**Ms Wendy Alexander (Paisley North) (Lab):** The Law Society submission suggests that a "clarificatory amendment" may be necessary in relation to proposed new section 3A(5),

"to allow individuals to identify whether a complaint is one of professional misconduct"—

and, by implication, to be handled elsewhere—

"or inadequate professional services over which the Council has jurisdiction."

Will you expand on the thinking behind the possible need for an amendment?

**Philip Yelland:** At the start of the process, we must decide whether we have a complaint, whether someone has an interest in making the complaint and whether it relates to inadequate service or professional misconduct. A number of cases come to us in correspondence that clearly do not relate to inadequate service or professional misconduct. We want the power to say at that

stage that the matter is not for the Law Society and that we will not investigate it. In such circumstances, the long stop is already in place, because if we do not investigate or refuse to investigate, the person can go to the Scottish legal services ombudsman if they are unhappy with our view.

**David McLetchie:** I think that the person concerned is advised in correspondence that they have that right, so they are always aware that there is a channel if they are dissatisfied with the initial determination.

**Philip Yelland:** That is correct.

**Ms Alexander:** In the light of our previous discussion, I think that the committee would want the chance to comment on and be fully aware of your proposals. We would also be interested to see in due course the terms of any clarificatory amendment.

**The Convener:** Unless we have omitted to say something or any member thinks that we have not asked a question, I believe that we have no further questions. I thank the witnesses.

**David McLetchie:** Thank you.

**The Convener:** We are running to our timetable. I welcome Martyn Evans, who is the director of the Scottish Consumer Council, and Sarah O'Neill, who is a legal officer for the SCC. I refer members to paper J1/02/39/3, which is a helpful submission from the SCC.

**Sarah O'Neill (Scottish Consumer Council):** I have just been advised that I should declare my membership of the Law Society as a non-practising solicitor.

**The Convener:** Good grief. This is becoming a deluge. I think that there should be a collective declaration in the Parliament at some point.

The written evidence that was submitted on behalf of the Scottish Consumer Council states that it supports the aims of the bill,

"particularly in relation to the Society's complaints-handling functions."

It would be helpful if you would explain how you think the bill would improve the position of consumers, if we may call them consumers rather than clients.

**Martyn Evans (Scottish Consumer Council):** When we discussed the matter with the Law Society of Scotland, we discussed the inappropriateness of its operation, in that its reading of its powers is that decisions have to come back to its council. We believe that the proposal means that there will be greater speed and the added certainty that the society could properly have the power to delegate.

When we discussed the bill with the Law Society of Scotland we agreed to support it, although we do not support its current complaints regime. We were trying to separate what might come forward from the committee's inquiry into the regulation of the legal profession and changes that might occur afterwards. We considered the bill to be a technical amendment to the Law Society of Scotland's powers and we did not make any real comment on the way in which it operates its complaints policy. The bill seeks to achieve speed and certainty.

**Sarah O'Neill:** The bill will speed up the process, which is obviously good for complainers, because their complaints will be dealt with more quickly. It will make the process fairer. Although there are lay members on the complaints committees, when the council is dealing with a complaint, there is no lay input beyond the recommendation that the committee makes. The process would be more transparent if the committee that has lay representation on it dealt with the complaint.

**The Convener:** The explanatory notes to the bill state that, prior to 1999, committees and sub-committees of the council of the Law Society of Scotland discharged certain statutory functions of the council. Uncertainty about the legality of that arrangement, in part, led to the bill. Do you have evidence of how the suspension of that practice affected consumers?

**Martyn Evans:** We do not have evidence on the relative positions before 1999 and now. Our policy position is that the involvement of lay people in resolving complaints is appropriate and that it is inappropriate for the council to make decisions without the complainant being able to be there. Although the bill does not necessarily change the policy of how the Law Society would operate, it empowers it to decide to have complaints committees with a majority of lay members on them.

**The Convener:** Other members might develop those points in questions.

**Martyn Evans:** That is the issue as far as we are concerned.

**Lord James Douglas-Hamilton:** The bill leaves the council of the Law Society discretion as to how the powers that the bill contains might be used. For example, it does not state when delegation should take place or when lay persons should be present on a committee. What is your response to the suggestion that such discretion should be more limited, perhaps by stating clearly in the bill at least some of the circumstances in which delegation should take place or when and to what extent non-lawyers should be present on committees?

**Martyn Evans:** That goes to the heart of the issue that we discussed with the Law Society and internally in the Scottish Consumer Council. We decided that we would support the bill but make no comment on how the Law Society operates its discretionary powers, because we wanted to see what the Justice 1 Committee reported in its review of the regulation of the legal profession. If we had chosen to amend or not support the bill, that would have been on the basis of our view about the proper operation of the complaints system, rather than on consensus that might emerge after the committee's report is published. We were on the horns of a dilemma. Should we support what we considered to be a technical issue that would allow the council of the Law Society to delegate legally and to make decisions or should we seek to amend the bill to say how the Law Society should operate its policy? We chose to see the bill as a technical amendment to the council's powers. We would prefer to wait until the committee has reported before discussing the council's discretion and policy.

**Lord James Douglas-Hamilton:** In evidence to the committee's inquiry into the regulation of the legal profession, the Law Society of Scotland said:

"The fact that service complaints have to go before the council, which has no lay involvement, is not helpful. In matters where there is determination of a solicitor's conduct and, potentially, prosecution before the solicitors discipline tribunal, it should perhaps be reserved to solicitors to determine."—[*Official Report, Justice 1 Committee*, 5 December 2001; c 2948.]

Do you agree that the final decision regarding conduct complaints should continue to be made by the council rather than by a committee of the Law Society?

**Martyn Evans:** In our evidence to you we said that we did not agree with that. We believe that there should be more independence within the system. It is not fair that a council of solicitors who are elected by the membership make the decision about where a complaint should go. We think that it is unfair that a solicitor can object to the decision and ask a member to raise their objections. I am trying to separate that issue from the issue of the bill. We do not agree that the current position is satisfactory or that it should continue. As Michael Clancy of the Law Society said, we see the bill as giving the Law Society the power to exercise delegation to lay committees if it chooses to do so.

**The Convener:** We will get further details before stage 2. Your position is protected should you wish to suggest an amendment to the bill.

**Michael Matheson:** One of the main concerns that the Scottish Consumer Council has about the way in which the Law Society handles complaints seems to be the fact that the council of the Law Society operates on the basis that someone can

represent the solicitor but not the complainant, who is often the consumer. Given the fact that, technically, the bill will give the council of the Law Society powers to delegate the handling of such complaints—a provision that you support—do you expect that the majority of complaints will be dealt with by committees rather than the council?

**Martyn Evans:** Our policy—on which we have given evidence before—is that we expect greater independence in that aspect of the regulation of the solicitor profession. We believe that the Law Society has a role to play in the investigation of complaints against its members; however, we suggest that, beyond the Law Society, there should be powers for the legal services ombudsman to intervene not only at the request of an individual complainant, but when the ombudsman thinks that a part of the process is inadequate. Our ideal would be greater independence of the complaints-handling function that the Law Society operates, more independent review of it and more of what we describe as co-regulation. At the moment, there is self-regulation, whereby the Law Society has a series of discretionary powers that it can exercise. To answer your question fully, I refer back to our original recommendations that there should be greater independence, more co-regulation and a supervisory function for the ombudsman.

In our discussions on the bill, the Scottish Consumer Council agreed to leave those issues to one side and consider the bill as a technical issue. The evidence that you have taken suggests that the Law Society could not legally delegate some of its decisions. We did not want to regard the bill as a vehicle to pre-empt any longer-term, more overarching review of the self-regulation of the legal profession, and we have made our decision within that framework.

**The Convener:** We understand that.

**Michael Matheson:** I understand that. However, let us put aside our inquiry into the regulation of the legal profession. If there is no change to the way in which the Law Society deals with complaints but the bill is passed and the council of the Law Society is given discretionary powers, how would you like the system to work under the bill? Would you like more powers to be delegated, to allow committees rather than the council to deal with complaints?

**Martyn Evans:** If what we are considering was the only game in town, we would like the Law Society—which, under this amendment to the 1980 act and the provisions within which it works, retains discretion—to exercise its discretion by delegating decisions about complaints to committees that are 50 per cent made up of lay people and chaired by independent chairs. We would also like the definition of a complaint to be

widened. The Law Society could make that decision, although it could choose to define it narrowly, because it could look to legislation to support a narrow definition of a complaint.

**Michael Matheson:** That is helpful. Thanks.

**The Convener:** The problem is that we cannot talk about our report yet. The evidence is coming up with some things that will be in the report.

**Ms Alexander:** We asked our previous witnesses, from the Law Society, to comment on their submission, which suggests a clarifying amendment to new section 3A(5), to ensure that individuals could identify more easily whether a complaint was about professional misconduct or simply about inadequate professional services, thereby determining whether the Law Society should be the body to look into the matter. Do you have any views on the desirability or otherwise of such an amendment?

**Martyn Evans:** I will talk about the general position and ask Sarah O'Neill to comment on the detail. When we met the Law Society in the pre-consultation period, we said that we would not support the bill if it allowed an individual to decide on a complaints issue. The Law Society then proposed an amendment to that effect, which Sarah O'Neill has been discussing with it.

15:00

**Sarah O'Neill:** We have some concerns about how such an amendment might be worded. As Martyn Evans says, we insisted that the bill should prevent powers to deal with complaints from being delegated to an individual. The Law Society's rationale is that, without its proposed amendment, the whole council would have to decide on an issue that clearly was not a complaint—for example, someone complaining about the decision that a court had made. If the full council had to make such decisions, that obviously would not help anyone and would slow down the process.

We have concerns about an individual deciding on a complaint. We do not think that "complaint" is sufficiently defined; it is not defined anywhere in the legislation. The legislation gives a definition of "inadequate professional services" and there is a court definition of what professional misconduct might be. Our concern is that the bill would allow an individual who works for the Law Society to prejudge whether a case might consist of professional misconduct or inadequate professional service. An individual should not make that decision. We need to be clearer about what the Law Society means by those terms.

**Ms Alexander:** That is helpful. We have already highlighted those points. Your comments reinforce the need for clarity before we move on to subsequent stages.

**Paul Martin:** Would Martyn Evans or Sarah O'Neill like any changes to be made to the bill?

**The Convener:** Other than those that you are keeping in reserve.

**Martyn Evans:** That comes back to our decision about whether we saw the bill as an entirely technical measure to allow the Law Society to delegate powers to make decisions in certain circumstances, or whether we saw it as a vehicle to make a range of wider changes. We do not currently want any amendment, although we reserve our position on the amendment that the Law Society has suggested. As the convener implied, our difficulty is that we are awaiting the committee's report, which will be published on 27 November. However, the report will be on the wider subject of self-regulation and may address issues that are outside the remit of the Law Society. We believe that the bill is a technical measure and, to that extent, we do not believe that any amendment is necessary.

**The Convener:** Thank you for your evidence.

Let us move swiftly on. The seats are hardly getting cool before more bodies take them. I welcome Linda Costelloe Baker, the Scottish legal services ombudsman, who has attended the committee before. I refer members to her submission, J1/02/39/4, which I mentioned in our discussion with the Law Society of Scotland.

I am sure that colleagues will ask you more specific questions, but in general do you support the bill?

**Linda Costelloe Baker (Scottish Legal Services Ombudsman):** I certainly support the general aims of the bill. The council of the Law Society of Scotland cannot manage adequately the amount of work that it has to do without the power to delegate.

**The Convener:** Do you accept that the knock-on effect of delegating could be a difference of six to eight weeks?

**Linda Costelloe Baker:** In complaints cases, yes. The procedure adds to the complexity as well as to the time.

**Michael Matheson:** You state in your written submission:

"all complaints about the conduct of and service provided by Members of the Law Society should be determined by a Committee which must include a proportion of people who are not Members, one of whom may be appointed as Chair."

That is interesting. Could you explain why you think that that is necessary?

**Linda Costelloe Baker:** I accept that to a certain extent the bill is—as people have called it—a technical measure to solve a problem.

However, although I do not want to widen the bill to incorporate all the things that I would like to happen as a result of the committee's forthcoming report, I believe that the bill presents us with an opportunity that cannot be missed.

I am particularly concerned that, having asked the Law Society at one of my formal meetings in September to indicate how it proposes to use its delegated powers, I did not get a written response until 11 November, which was after the deadline for my submission to the committee. As the bill is a result of proposals from the council of the Law Society of Scotland, I am concerned that the council still has not made clear how it proposes to use the delegated powers as part of complaint handling. To put it fairly bluntly—and I have given examples—the Law Society sometimes needs to be told what it has to do by statute or by organisations with the power to give it directions. I question the way in which it has used its judgment in the complaint-handling process when it has not been subject to statutory oversight.

That is the background. I know that the bill is an enabling bill—it is a technical bill—which I hope will solve some problems, but I would like it to be put in statute that complaints have to be dealt with by a committee that has a proportion of non-solicitor members. Without that, all that the bill will do is put the Law Society back to the 1970s. There are a couple of small opportunities to bring the Law Society up to 2003 with modern complaint-handling processes.

**Michael Matheson:** So you would like the bill to detail when the delegated powers could be used.

**Linda Costelloe Baker:** Yes. On complaint handling, it would not upset the flow of the bill too much to state in statute that complaints have to be dealt with by a committee with a proportion of non-solicitor members.

**Michael Matheson:** Why do you feel that the Law Society should not be allowed to make such decisions on a policy basis?

**Linda Costelloe Baker:** I have examined some of the policies and practices that the Law Society has followed when it has had the freedom to manage its own affairs and that has led me to question seriously whether it balances correctly the interests of the profession and the interests of the public. We have heard an example of that this afternoon. The council of the Law Society of Scotland—and not just in a complaint about conduct—has allowed a council member to make oral representations on behalf of a solicitor who was complained against. The complainant could not do that—complainants do not have that ability. In my book, the fact that the council can allow that to happen questions its impartiality and balance in complaint handling. The council did not have to let that happen, but it did.

**Lord James Douglas-Hamilton:** If the bill was amended in the way that you suggest, what proportion of committee members do you believe should be non-lawyers?

**Linda Costelloe Baker:** The proportion should be 75 per cent, or at least 50 per cent. A sensible precaution would be 75 per cent. I will explain briefly why. Having non-profession and non-solicitor members as part of complaint handling looks good, but it is not necessarily effective. The members are a series of individuals with no particular corporate strength and it is easy, if they are in a minority, for them to get caught up in what I would loosely call the organisational culture. That can particularly apply for people who are post-retirement professionals—they like the work that they are doing, they enjoy it, they get considerable personal satisfaction from it and they get no financial reward. If they go too much against the grain, it is easy for the organisation to say that it does not want them any more, as those people do not have the security of an employment contract. There is a natural tendency for an odd sprinkling of non-professional people to be sucked into and to go along with the organisational culture.

That is why I recommend that lay involvement should be as high as 75 per cent. That lay involvement should consist not only of individuals, but of people who are representatives of organisations. Unlike a series of separate people, such people have the strength of their organisation behind them.

**Lord James Douglas-Hamilton:** Evidence that the committee received during its inquiry into the regulation of the legal profession indicated that the lack of lay involvement in the council raises questions about the fairness of the complaints process. Some witnesses argued that there is an imbalance of power, because a solicitor can lobby a council member to argue their case before the council, but a complainant is unable to do so. In your view, will the bill fully address those concerns?

**The Convener:** You might have answered that question already.

**Linda Costelloe Baker:** The bill will not address those concerns if the council of the Law Society of Scotland holds on to the right to deal with a conduct complaint. I see no need for the council to do that. A positive aspect of the council's examining everything is that it has a vaguely supervisory and strategic role—it pulls things together. I would be keen for the Law Society to maintain some of the good bits of the council's overview role.

In relation to complaints of professional misconduct, the Law Society does not make the decision about whether such misconduct has

taken place—only the Scottish Solicitors Disciplinary Tribunal does that. There is no need for the council to make a decision that some circumstances might amount to professional misconduct and that there should therefore be a prosecution. I would be more comfortable with that being the task of a specialist committee or even a sub-committee.

**Maureen Macmillan (Highlands and Islands) (Lab):** I want to clear up a couple of issues. Will the 75 per cent lay representation apply only to the complaints committees?

**Linda Costelloe Baker:** Yes.

**Maureen Macmillan:** That proportion of lay involvement would not apply to other committees as well. You mentioned representatives of organisations. Would you want that to be stipulated in the bill, or would that be a matter for the Law Society to deal with?

**Linda Costelloe Baker:** I would not want to be as prescriptive as that. It is good practice that non-professional representation comes from organisations, because that creates a genuine chance to balance the strong professional content.

**Maureen Macmillan:** You do not seem to have much hope that the Law Society will do things off its own bat. You imply that it is necessary for measures to be written into the bill before it will do anything.

**Linda Costelloe Baker:** Lawyers are creatures of statute. I am always telling the Law Society, "This is good, modern complaint-handling practice." Its response is that the law does not require it. It is natural for an organisation such as the Law Society constantly to return to statute. That is why I am keen for a couple of bits of progress that have been made during the past 12 years to be put into statute. Unless that is done, there will be no guarantees.

**Maureen Macmillan:** It occurs to me that the process could continue indefinitely. We could go on making stipulations that there needed to be someone from the voluntary sector and someone from another sector.

**Linda Costelloe Baker:** We do not need that much detail. A couple of bits of basic principle have been fought for and hard won. We need something to cling on to, to avoid the slippery slope. That means putting those aspects into statute.

**The Convener:** I do not know whether you have an interest to declare.

**Maureen Macmillan:** I beg your pardon. It is a rather out-of-date interest. My husband was once on the council of the Law Society.

**Donald Gorrie (Central Scotland) (LD):** I want to pursue the novel idea that lay representatives should represent organisations. Will you give us an example of some of the organisations that might be involved? In the past, lay representatives appear to have been the great and the good.

**Linda Costelloe Baker:** It is a matter of good practice in complaint handling that a representative from an organisation such as the Scottish Consumer Council should sit on a complaint-handling body. Unlike a person who simply has a keen interest in serving the public and some spare time, such a person will have the strength of their organisation behind them. For example, the complaint-handling body of the Scottish and Northern Ireland Plumbing Employers Federation has membership from the local consumer council.

**Donald Gorrie:** Would it help or hinder the situation to include some of the snippier, more anti-establishment lawyers, such as those from the Scottish law centres, who are critical of the system?

**Linda Costelloe Baker:** It is useful to have a balance on any committee. Although I would not be so prescriptive as to list the sort of people that the Law Society should have, it is important to have a balance of lawyers and non-lawyers.

**The Convener:** That said, even snippy law agents—which some of us might have been at one time—would still have to be members of the Law Society to have their practising certificates. However, they might not be members of the council.

**Donald Gorrie:** What about people in citizens advice bureaux and so on?

15:15

**The Convener:** If someone was not registered as a solicitor, that would be a different matter. However, a solicitor has to be a member of the Law Society one way or the other—they have to pay their dues.

**Paul Martin:** I was interested by the suggestion in your written evidence that a requirement should be added to the bill to make provision for a single committee with responsibility for complaint-handling strategies and co-ordination. Will you expand on how such an approach would benefit the current system?

**Linda Costelloe Baker:** Complaints are a growing business. However, the number of solicitors has also grown, so I am not suggesting that the situation has worsened. The director of the client relations office of the Law Society said that there used to be three complaint-handling committees. There are now five. Moreover, the

number of new complaints to the Law Society has increased this year by 25 to 30 per cent. Speaking more as a former management consultant than as an ombudsman, I believe that such an increase in the number of committees gives rise to the need for a co-ordinating body to prevent the possibility of the five committees going off on their own.

The Law Society's particular difficulty is that it has not set quality standards against which complaints can be assessed. Dealing with each complaint on its merits and particular circumstances leaves an enormous amount of leeway for two committees to make opposing decisions on almost identical circumstances. However, because it looks at all complaints, the council of the Law Society of Scotland has at least provided an umbrella structure. The structure might work if we had a series of complaint-handling committees under the supervision of a complaints committee, client care committee or whatever the Law Society wanted to call it, which would examine strategy and ensure that the five committees were more or less going along the same lines.

**Paul Martin:** However, would the Law Society not accuse you of creating more bureaucracy? You are arguing that there are possibly too many committees at the moment.

**Linda Costelloe Baker:** At the moment, there is a middle-level committee called a client care committee. However, the client relations committees make recommendations on complaints. I think that there was a committee called the complaints supervisory committee a generation before that, which means that such a committee has always existed.

**Paul Martin:** Is that an argument for reconfiguring the existing strategy to make it more effective?

**Linda Costelloe Baker:** Yes.

**Paul Martin:** Would it be possible to lodge amendments to the bill to create such a structure?

**Linda Costelloe Baker:** I have not gone as far as saying so in my submission. Instead, I have made a couple of specific recommendations for amendments to the bill. The Law Society should consider the recommendation for a supervisory committee, because even though the bill is a result of its proposals, it still does not know what to think about the operation of such a system. I find it quite extraordinary that it is asking Parliament to do something when it does not yet know quite what it wants. I was simply trying to nudge the Law Society into saying that it would be useful to have a committee at such a level.

**Paul Martin:** Should any other provisions be added to the bill?

**Linda Costelloe Baker:** The power to award compensation has not yet been mentioned. Primary legislation would be needed to upgrade compensation levels in line with inflation from the £1,000 that was set 12 years ago. The issue is small, because we are merely talking about bringing up the amount to current-day values. If it were possible to ensure that future changes could be dealt with without primary legislation, I would welcome that. That is what happens for my powers of compensation, which can be amended without fresh legislation. It seems a touch unfair that someone who received the maximum compensation in 1990 got £1,000, yet somebody who gets the maximum compensation this year—which ought to be £1,300—is still limited to that £1,000 ceiling.

**The Convener:** We are having a little debate about whether such an amendment would be competent, given the long title of the bill. No doubt we will find out when that issue comes our way.

**Linda Costelloe Baker:** If you do not ask, you do not get. I thought that the issue was worth mentioning.

**The Convener:** Well, you seem to be a lady who asks. I thank you for your evidence to the committee. We have no more questions.

We are making terribly good time, but the minister will not be free until 3.45 pm. I therefore suggest to the committee that we move on to item 6, which we have already decided to take in private. If I have the committee's agreement, we will deal with item 6 and then, after a brief suspension, take evidence from the minister on the Council of the Law Society of Scotland Bill and on the statutory instrument. Is that agreed?

**Members indicated agreement.**

15:20

*Meeting continued in private until 15:21 and then suspended.*

15:44

*On resuming—*

**The Convener:** I welcome Mr Jim Wallace, the Minister for Justice. The first part of this afternoon's riveting session concerns the Council of the Law Society of Scotland Bill. Let me start by asking a simple question. Do you support the bill?

**The Deputy First Minister and Minister for Justice (Mr Jim Wallace):** Yes.

**The Convener:** Do you support the aims of the bill?

**Mr Wallace:** Yes. As we set out in September in an Executive memorandum that I sent to the



committee, we fully support the purpose of the bill. We recognise it as a measure to remedy a defect in the Solicitors (Scotland) Act 1980 and, in doing so, to relieve the Law Society of Scotland of the onerous administrative burdens that the council has experienced during the past two years. If enacted, the bill will place the society on a similar footing to its counterpart south of the border, which enjoys express powers to delegate under the Solicitors Act 1974.

We support lay representation on the society's complaints committees. It is important for them to have lay representation to ensure that the consumer interest is well represented. In our view, self-regulation enjoys greater public confidence when committees have significant lay input. I understand that to date the society's committees have had six solicitor members and four lay members. There is a need for the profession to be represented, given that such people have an insight into the professional standards that should be expected, but it is not possible to debate exactly where the optimal balance should lie. In that context, the bill allows the council to have a majority of lay members.

I am happy to take questions.

**The Convener:** Are you concerned that the society was unable today to be more specific about the lay membership of the committees that will have power delegated to them? Some may feel that it has had a long while to come up with the fleshed-out details, but it came before us with only a mechanism.

**Mr Wallace:** As I understand the position, the provision to have lay members on committees and sub-committees also includes committees other than the complaints committees. The society's evidence notes that lay members sit on the mental health and disability committee, the tax law committee, the intellectual property committee, the pensions law working party and the law reform committee. Therefore, the balance between lay and solicitor members may vary from committee to committee, and I would not expect the society to have a hard and fast view.

To be fair to the society, it has responded to the recommendations, particularly from the legal services ombudsman, on lay representation, and I have no doubt that it will have regard both to public opinion and to further recommendations. It is important that the bill allows the society to have flexibility and that, as I mentioned, public opinion on self-regulation and complaints requires a significant lay membership.

**The Convener:** I take it that you do not have concerns.

**Mr Wallace:** No. The Law Society of Scotland has responded. I have no doubt but that it will

continue to have lay representation. What we might set down as a fixed formula in 2002 might not be appropriate in 2022.

**The Convener:** Would the Executive be content for the fleshed-out detail, even in proposed form, to be before the committee and the Parliament at stages 2 and 3?

**Mr Wallace:** I am sure that it would help the work of the committee if the society were able to give some indication of what it has in mind.

**Lord James Douglas-Hamilton:** You have already answered the first part of my question, but I want to be clear. What problems do you envisage in the way in which the bill deals with the issues that it covers? Furthermore, do you want to see the bill amended in any way?

**Mr Wallace:** As I am not the introducer of the bill, it would not be fair for me to have the last word. I would counsel caution on amendments because the bill has been some time in gestation.

**The Convener:** That was the very word in my head—gestation.

**Mr Wallace:** When the society first flagged up the problem, we told it that we understood its problem and were anxious to see legislation to cure the specific problem that it could not delegate and the administrative burden that that produced with the council having to hear every case.

We are grateful to Mr McLetchie and others who have co-sponsored the bill for taking the matter forward. We would be concerned if amendments were lodged that might extend the scope of the bill, which might put in jeopardy our aim of getting the bill passed before the election. We all recognise that the bills that are coming before the Parliament now are on a tight time line. I hope that there is general consensus that the bill is worth while. I would be concerned about anything that hindered its passage.

**Lord James Douglas-Hamilton:** Am I correct in thinking that you do not envisage any specific problems arising out of the bill?

**Mr Wallace:** No, the bill is intended to cure a problem rather than generate a problem.

**Michael Matheson:** Given the fact that the bill provides the council of the Law Society with powers to delegate, would it be helpful if the bill included more detail about when and how the council would use those powers?

**Mr Wallace:** Not necessarily. It might be helpful if the council gave some indication of that, but it would not necessarily be helpful to have that information in the bill. There is always a problem with putting in legislation what seems sensible at a certain time and in certain circumstances. You must remember that we are dealing with an

amendment to legislation that is already 22 years old. The problem that the bill seeks to resolve has been identified in the past two or three years, but the 1980 act has substantially stood the test of time. There is a danger that, if we were too prescriptive in the bill, we would have to amend the legislation further at a later stage if what had been prescribed was no longer appropriate. There is merit in maintaining flexibility. Nonetheless, it would be helpful if the council of the Law Society indicated to the committee and the Parliament how it intends to operate the powers of delegation that we are giving to it.

**Michael Matheson:** The evidence that the committee received from the Scottish legal services ombudsman suggested that there is a need for some amendment to require

“that all complaints about the conduct of and service provided by Members of the Law Society should be determined by a Committee which must include a proportion of people who are not Members, one of whom may be appointed as Chair”.

How would you feel about such an amendment?

**Mr Wallace:** There is nothing in the bill to prevent that from happening. I agree with the suggestion that complaints

“should be determined by a Committee”.

If my memory serves me correctly, there is a provision in the bill that does not allow complaints to be determined by an individual.

**The Convener:** To help you, minister, I refer you to page 3 of paper J1/02/39/04, which has been circulated to the committee today. The committee to which Michael Matheson was referring—

**Michael Matheson:** No, I am taking the quotation from page 1 of that paper.

**Mr Wallace:** I have seen the quotation. It was from the Scottish legal services ombudsman.

**The Convener:** Sorry.

**Michael Matheson:** Yes, that statement is on page 1 of her submission.

**Mr Wallace:** That is the paper that I was looking at.

I believe that there is a provision in the bill that would not allow complaints to be determined by an individual. It is important that committee decisions should be consistent and based on common standards. However, I do not believe that it is necessary to state in the bill whether that requires an oversight committee, as has been suggested. That is more a matter of good administrative practice. The bill provides for lay representation, and I expect at least as much lay representation as there is at present on the complaints

committee. The bill does not specify that the chair of that committee can be a lay member, but equally it does not exclude that possibility. It may be wrong to prescribe that, but the permissive terms of the bill allow it to happen.

**The Convener:** That concludes the evidence session on the bill. You seem pleasantly surprised by that, minister—perhaps we have missed something and you have let the cat out of the bag.

**Mr Wallace:** I was told that the session would be longer.

## Subordinate Legislation

### Legal Aid (Scotland) Act 1986 Amendment Regulations 2002 (Draft)

**The Convener:** I refer members to paper J1/02/39/6 on the regulations. I ask the minister to speak to and move motion S1M-3502.

**Mr Wallace:** The regulations, which make civil legal aid available for proceedings before the social security commissioners and the child support commissioners in Scotland, show that the Scottish ministers continue to extend the legal aid scheme to improve access to justice where there is a good case for doing so and where widening the scheme is affordable. The process of reviewing the various tribunals that sit in Scotland and their treatment in relation to legal aid is continuing.

The regulations are part of a package of regulations that are required to complete the process of making legal aid available for proceedings before the commissioners. The Deputy Minister for Justice, Richard Simpson, has signed three related sets of negative regulations, which include provisions to allow counsel to be used before the commissioners and to exempt any winnings from clawback for advice, assistance or civil legal aid that has been provided.

I commend the regulations to the committee. I will try to answer the committee's questions, but if I cannot answer specific questions, I will ensure that the committee receives a written answer.

I move,

That the Justice 1 Committee recommends that the draft Legal Aid (Scotland) Act 1986 Amendment Regulations 2002 be approved.

**Donald Gorrie:** I will display my ignorance. Do people who live in Scotland have to appeal to the commissioners in Scotland or is this another case in which we send things to Newcastle, which is what happens with national insurance?

**Mr Wallace:** The situation is usually the opposite because cases tend to come to Scotland. For administrative reasons, cases can be sent from other parts of the UK for decision by the commissioners in Scotland. However, just because a case is dealt with in Scotland, that does not mean that the matter will be covered by Scottish legal aid. As the committee is aware, we can make subordinate legislation only within the Parliament's legislative competence. A case that involves someone from Durham but which, for administrative convenience, is heard in Edinburgh would probably not qualify for Scottish legal aid. We need a simple and clear test to ensure that

only Scottish cases receive Scottish legal aid. Consequently, applicants for civil legal aid from the Scottish Legal Aid Board would need to show that any onward appeal would be to the Court of Session. That provision is set out expressly in one of the separate civil legal aid regulations that Richard Simpson has signed, which I mentioned earlier.

Scottish cases are not sent south for decision. The commissioners have met officials of the Scottish Legal Aid Board to discuss a number of topics, one of which was the cross-border issue. The commissioners helpfully explained the legal basis for deciding whether an onward appeal takes place in Scotland or England, which is the test that the board will apply in deciding about legal aid. If there is a dispute, the board will be able to seek the commissioners' assistance, but that will not involve the commissioners in deciding whether to grant civil legal aid, which will remain a matter for the board.

**Donald Gorrie:** I am happy whenever we do things better than the English. Again this perhaps shows my ignorance, but the note that is attached to the regulations states that the financial implications will be £0.65 million. I did not realise that there would be so many appeals. Do you have figures for the number of appeals that take place at the moment?

**Mr Wallace:** It is estimated that there is a combined total of about 600 oral hearings.

**Lord James Douglas-Hamilton:** Will comparable provisions be introduced in England? Have you received indications either way on that point?

**Mr Wallace:** I do not know whether comparable provisions will be introduced in England. That is a matter for the United Kingdom Government—for the Lord Chancellor, in particular. As Donald Gorrie suggested, Scotland may be leading the way in extending the scope of the legal aid system.

16:00

**Lord James Douglas-Hamilton:** Presumably the United Kingdom Government is aware that an extension of civil legal aid is being considered in Scotland.

**Mr Wallace:** The Lord Chancellor's Department is certainly aware of what we are doing.

**Lord James Douglas-Hamilton:** Legal aid is demand led. If the cost of appeals exceeds the funding that has been made available, will further funds be found within the Scottish block?

**Mr Wallace:** Yes. As I have explained to the committee on a number of occasions, legal aid is

demand led. If demand exists and statutory criteria are met, we are obliged to pay.

**The Convener:** Presumably you mean that the funding will be made available on cause shown.

**Mr Wallace:** We are obliged to pay if statutory criteria are met.

**The Convener:** I welcome this move. In the interim report on its inquiry into legal aid, the committee identified other circumstances in which legal aid is not available and there is an imbalance between various parties. We are pursuing the Executive for responses to the points that we have made. I do not know what stage has been reached with those responses, but we would appreciate receiving them before too long so that we can complete our inquiry.

**Mr Wallace:** I take your point, convener.

**The Convener:** The question is, that motion S1M-3502 be agreed to.

*Motion agreed to.*

That the Justice 1 Committee recommends that the draft Legal Aid (Scotland) Act 1986 Amendment Regulations 2002 be approved.

**The Convener:** I thank the minister for his attendance. Our next meeting will take place on 26 November at members' favourite venue, the Hub. If Donald Gorrie thinks that the acoustics are a problem here, he should know that both the acoustics and the lighting in the Hub are very challenging. We will take oral evidence for our inquiry into alternatives to custody and on the Prostitution Tolerance Zones (Scotland) Bill. I remind members that the highlight of the week for them is Thursday's debate on the Title Conditions (Scotland) Bill. Maureen Macmillan gave me a cheeky wink, so she is obviously looking forward to that.

I ask members to indicate to Tony Reilly as soon as possible whether they are able to take part in the visit to Reliance Monitoring Services in East Kilbride on Monday 2 December, which will last from approximately 10 am to 4 pm. I cannot make the visit, as I have prior engagements on that day. In common parlance, Reliance Monitoring undertakes what is known as tagging.

I thank members for their attendance and look forward to seeing them on Thursday in the chamber.

*Meeting closed at 16:03.*

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