JUSTICE 2 COMMITTEE

Tuesday 25 April 2006

Session 2

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JUSTICE 2 COMMITTEE
11th Meeting 2006, Session 2

CONVENER

*Mr David Davidson (North East Scotland) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
*Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Mr Stewart Maxwell (West of Scotland) (SNP)
*Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE SUBSTITUTES

Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Carolyn Leckie (Central Scotland) (SSP)
Mr Kenny MacAskill (Lothians) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Margaret Ross (Adviser)
Mr John Swinney (North Tayside) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Chris Graham (Scottish Executive Justice Department)
Louise Miller (Scottish Executive Justice Department)
Mike West (Scottish Executive Justice Department)

CLERKS TO THE COMMITTEE

Tracey Hawe
Alison Walker

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 4

Scottish Parliament

Justice 2 Committee

Tuesday 25 April 2006

[THE CONVENER *opened the meeting at 14:05*]

Legal Profession and Legal Aid (Scotland) Bill: Stage 1

The Convener (Mr David Davidson): Welcome to the eleventh meeting in 2006 of the Justice 2 Committee. We have with us Margaret Ross, who is the adviser to the committee on the Legal Profession and Legal Aid (Scotland) Bill.

As today is the first evidence-taking session on the bill, I ask members to make any relevant declarations.

Maureen Macmillan (Highlands and Islands) (Lab): Because there have been lots of problems in the Justice 1 Committee regarding people's relationship to the legal profession, I would like to say that my husband no longer has a practising certificate and is no longer a practising solicitor. He was a member of the council of the Law Society of Scotland and, when he was a practising solicitor, he came under the umbrella of the master policy and the guarantee fund.

The Convener: I welcome our witnesses, who are Louise Miller, Mike West and Chris Graham, from the access to justice division of the Scottish Executive.

Comments have been made in public about the fact that the Executive is bundling the legal profession and legal aid in one bill. What is the thinking behind that approach?

Louise Miller (Scottish Executive Justice Department): It was to do with timing and space in the legislative programme. The outcome of the consultation on reforming the handling of complaints against solicitors and the need to follow up on the outcome of the "Advice For All: Publicly Funded Legal Assistance in Scotland—The Way Forward" consultation came together, from a timing point of view.

However, although it might not be instantly apparent, there are thematic links between the areas. That might emerge as the bill progresses. For example, some concerns that have been expressed about the bill relate to the cost of complaints handling and how that impacts on access to justice and advice, which is exactly what the second part of the bill deals with.

The Convener: With regard to schedule 1, what influenced the Executive's decision to have a lay majority of commission members?

Mike West (Scottish Executive Justice Department): The purpose of the lay majority is to instil consumer confidence and reassure people that the body has non-lawyer as well as lawyer representation. Both sets of people are essential to the effective working of the commission. Complaints about lawyers need legal expertise, which the lawyer members will be able to provide, but the non-lawyer members will be able to provide a good consumer perspective on the cases that come before the commission.

Louise Miller: The underlying policy is to provide a complaints mechanism that is, and is seen to be, independent of the legal profession, and under which lawyers do not regulate lawyers as regards consumer complaints. Although it is right to say that it would be impossible for the commission to function sensibly without the benefit of input from people who have experience of legal practice and who understand that environment, if the body had a majority of lawyers the process would be seen as being not very different from what the Law Society of Scotland does at the moment and would be subject to the same criticisms from consumers.

Colin Fox (Lothians) (SSP): I will press you on that by asking whether any consideration was given to having different proportions in the nine-member panel. You said that the issues of consumer confidence and of the independence of the body that is being established were at the back of your mind. Was consideration given, for example, to a six to three majority in favour of non-practitioners over legal representatives?

Mike West: We considered various permutations, but we thought that having four lawyer members, four non-lawyer members and a non-lawyer chair was the right balance. If there are too few lawyer members, the commission will be short of legal experience. Given the type of complaints that are made, it is helpful to have lawyers on the commission who know what the standard for a particular piece of work is and who understand the issues involved. That is an essential part of the commission.

Colin Fox: I am not suggesting that there should be no legal representation, but you will understand my concern that the public might look at the make-up of the commission and think that four lawyers against five lay people is a high proportion of lawyers for a body that is dealing with fairly intensive legal matters. It might be felt that a bigger proportion of lay members could better reflect the independence and impartiality of the body. Was that fully considered?

Mike West: It was and, on balance, we came down in favour of having legal experience available to the commission.

Louise Miller: The decision was also partly influenced by the fact that the commission will, as the bill stands, be able to adjudicate on lower and moderate-value negligence claims as part of its role in investigating inadequate professional services. It was felt that, in order to do that effectively, the commission will need strong legal input.

The Convener: I welcome John Swinney to the committee. I am sorry that I did not see him come in—he came in so quietly. He has a right, as a member of the Parliament, to attend the public meetings of any committee. I know that he has a specific interest in the matter before us today. We look forward to his contribution.

Mr Stewart Maxwell (West of Scotland) (SNP): Sticking with schedule 1 for the moment, I notice that paragraphs 2(7)(a) to 2(7)(d) in effect provide for the power to amend the number of lawyers and non-lawyers on the commission. The Subordinate Legislation Committee has raised some concerns about the width of that power, as it could be amended however ministers wished. In other words, they could change the five to four balance that you talked about. Although you said that that had to be the balance so that there would be expertise on legal technicalities, the power in schedule 1 is not restricted to preserving that policy position. Since the Subordinate Legislation Committee wrote to the Executive on that point, have you given it any further consideration?

Mike West: We are currently considering the correspondence that we have received from the Subordinate Legislation Committee. The main point on that power by secondary legislation is that it is subject to affirmative resolution, so the Parliament would need to debate any change. In other words, there could be no unilateral decision by Scottish ministers to change the composition of the commission. The matter would have to be debated by the Parliament and the reasons for any change would have to be clearly explained to the Parliament.

14:15

Mr Maxwell: Do you accept that, even though a statutory instrument that would change the balance of members would be subject to the affirmative resolution procedure, the Parliament would have no power to amend the instrument but would be limited to accepting or rejecting it? The Parliament is disinclined to throw out instruments, so it would be difficult to force a change even to an Executive policy that was not universally approved. Do you agree that a restriction on the Executive's power to alter significantly the composition of the proposed new commission would help to achieve the policy objectives that you described?

Mike West: We are happy to consider the matter. We have not yet responded to the Subordinate Legislation Committee, but we will take its concerns on board as we prepare our response.

The Convener: When will you respond to the Subordinate Legislation Committee?

Mike West: We hope to do so in the next few days. We have secured an extension on the deadline that that committee set for our response.

The Convener: Will you pass a copy of your response to the clerks to this committee, so that the two committees can consider the matter in parallel?

Mike West: I am sure that we can do that.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): It is likely that most issues that come before the proposed Scottish legal complaints commission will be about solicitors. However, as I understand the provisions in schedule 1 on the commission's membership, a situation could arise in which there were no solicitor members of the commission. Is that correct?

Mike West: Such a situation would be highly unlikely, although nothing in the bill would prevent it from arising.

Jeremy Purvis: Does the Executive think that an absence of solicitor members would reduce the commission's understanding, for example, of issues that affect a rural solicitor's practice or that particularly affect solicitors as opposed to conveyancers?

Mike West: Yes. The lawyer members of the commission will be appointed for their skills and expertise in various areas. Given that there are 10,000 solicitors, 700 advocates and 23 conveyancing and executry practitioners, we expect that proportionate appointments will be made. The essence will be to ensure that there is a range of skills and experience among the lawyer members.

Jeremy Purvis: Does the bill say that?

Mike West: No.

Jeremy Purvis: Paragraph 5(1)(b)(iii) of schedule 1 provides that the Scottish ministers may remove a member from the proposed commission if the person

"is otherwise unable or unfit to discharge the functions of a member or is unsuitable to continue as a member."

What criteria will be used in deciding what is meant by "otherwise unable or unfit"?

Mike West: Such provisions are fairly standard in relation to non-departmental public bodies. Ministers would take into consideration all the circumstances of a member's performance and attendance and would consult the chairing member before deciding to remove a member from office.

Jeremy Purvis: The bill specifically mentions absence from meetings and conviction of a criminal offence, which should certainly disqualify someone from being a member of the commission, but I would appreciate further clarification and examples of what is meant by

"otherwise unable or unfit to discharge the functions of a member".

I will move on. What are the key differences between a conduct complaint and a service complaint? What types of behaviour of solicitors or legal practitioners might give rise to the different types of complaint?

Mike West: The range of matters covered by conduct complaints is quite wide. I have a few examples to hand: dishonesty; conduct unbecoming; grossly excessive fee charging; acting in a conflict of interest situation; failing to comply with accounts rules; not acting in the best interests of the client; and failing to act on the basis of the proper instructions of the client. Service complaints are in effect consumer complaints, in which the consumer simply feels that a bad job has been done, that there has been an error in executry or conveyancing work, or that there has been an otherwise poor performance in delivering the instructions of the client.

Jeremy Purvis: Is that the definition that will be used by the commission? Under section 5, the commission will determine whether the complaint is one of conduct or service. At this stage, we do not know how the commission—which is not constituted—will define a threshold for judging whether a complaint should go forward or be referred back to a solicitor; nor indeed do we know how the commission will determine what conduct and service complaints are.

Mike West: The distinction between conduct and service was first made in 1988, when the concept of inadequate professional services was introduced in legislation. Since then, the Law Society of Scotland has, for internal purposes, been making a distinction between conduct and service complaints. We recognise that there are grey areas between conduct and service; for example, acting in a conflict of interest situation can be a conduct matter, but if the resulting service to the client is poor, it is also a service matter. For that reason, the bill provides for the commission and the professional body to co-operate on hybrid complaints.

The Convener: How will the public get to know about such an arrangement?

Mike West: The commission sifts all incoming complaints. It eliminates vexatious or frivolous complaints and determines the nature of the complaint. If it is service, the commission deals with it, and if it is conduct, it needs to be referred to the professional body. Once that decision has been made, the commission writes to the complainer and the practitioner to tell them either that the commission will be dealing with the service complaint or that the professional body will be dealing with the conduct complaint.

The Convener: That is the process after the two bodies have agreed where a case lies—I am thinking about your comment about grey areas.

Mike West: Yes. That would be the process for a hybrid complaint or for cases that were not terribly clear.

Jeremy Purvis: One would have thought that conduct complaints, as you have outlined them, are more serious than service complaints. Ms Miller referred earlier to the concern about lawyers regulating lawyers. However, lawyers will still be regulating the more serious complaints. What is the thinking behind an independent function for the lesser of the two types of complaint?

Mike West: The general view is that conduct is the natural function of the professional body. It fits in with other functions that the professional body carries out: keeping a roll of the members of the body and providing education, training and professional practice rules for members. Essentially, the monitoring and enforcing of professional practice rules and accounts rules are matters of conduct. For that reason, we feel that it is logical that conduct should sit with the professional body. There are safeguards in the bill, though, and the commission will have oversight powers in relation to the professional body's handling of conduct complaints. Some of those powers are held by the Scottish legal services ombudsman, but they are enhanced by some of the stronger powers that the Justice 1 Committee in the previous session recommended that the ombudsman should have. For example, there is the power to carry out general audits of the conduct complaint files of the professional body and the new power to enforce recommendations. All those powers are set out in the bill as safeguards.

Louise Miller: Whether complaints about conduct are more serious than complaints about services might depend on one's perspective. The professional bodies would view the level of culpability of the practitioner as higher in cases to

do with conduct, which would involve failure to adhere to professional standards that the profession had agreed must be adhered to rigorously.

Most service complaints are in essence about human error or sloppiness in service standards. From that point of view, they are less serious, but they might not be less serious from the point of view of the complainer, if indeed there is a complainer. There might be many breaches of professional rules that do not impact much on a client or member of the public, such as breaches of accounts rules and money laundering, in which the client could be complicit. Various breaches might be viewed as serious from the practitioner's point of view but would not have much impact on a member of the public. On the other hand, the kind of human error that is involved in inadequate professional services can be costly to the client in terms of both financial loss, particularly if negligence is involved, and aggravation. It is not that one form of complaint is more serious than the other, when viewed from all angles; they are different.

Jeremy Purvis: Under the current mechanism for service complaints, a complaint would go to a reporter and vexatious or frivolous complaints would be weeded out. However, there is no definition to determine the threshold for such complaints, which could be important in the complaints process.

Mike West: If I understand your question correctly, you are asking what kind of process the commission would follow. The process will be different from that followed by the professional bodies. The Law Society has a series of 10 client-relation committees and voluntary reporters who investigate the complaints and provide reports and recommendations for the committee to consider. The Law Society follows a roughly adversarial process. In other words, a complaint is received from the complainer and is copied to the solicitor for their comments. The solicitor's comments are then copied to the complainer for their comments.

The process that the commission will be following is modelled on the process followed by the Financial Ombudsman Service. The commission staff and adjudicators will use an inquisitorial process. They will be trying to get to the facts of the matter as quickly as possible without necessarily following the adversarial process.

Jeremy Purvis: I was asking how the commission will determine what is a vexatious or frivolous complaint. At the moment, we have a mechanism whereby the Law Society does that, but we do not know what criteria the committee would use or what sifting mechanism would be employed.

Mike West: I find that question difficult to answer, simply because determining whether a complaint is vexatious is in essence a matter of judgment that takes into account the content of the complaint, whether there is substance to it and whether there is any trace of vindictiveness in it. I would not have thought that there were set criteria to determine that. The process that the financial ombudsman operates involves sifting out complaints. Complaints that are deemed to be vexatious or frivolous will not render the practitioner liable to the specific complaints levy. The practitioner will not be charged for the complaint; the complaint will simply be dismissed.

14:30

Mr John Swinney (North Tayside) (SNP): Mr West, you said in response to Jeremy Purvis that there are grey areas between conduct complaints and service complaints. You have also said that the commission will have the power to enforce its recommendations on conduct complaints if it does not believe that the professional body has properly or effectively considered the complaint that has been made. It strikes me that a bit of a contradiction is involved. If the commission is to be given powers to enforce its recommendations at some stage, why, for the sake of clarity, will it not have powers over both service and conduct complaints so that the grey areas are removed altogether?

Mike West: That harks back to our overall feeling that examining conduct is a legitimate function of the professional body rather than of the independent commission. We see the commission as a body that will deal with the consumer interest and provide a swift and effective dispute-resolution service. In effect, we see responsibility for conduct remaining with the professional body.

Mr Swinney: I am trying to understand why you take that view. I understand why you should say that if the commission thinks that the professional body has not properly considered a conduct complaint, the commission could say that it is enforcing its recommendations and that something should be done. However, that implies that there is a role for the commission in assessing conduct complaints if it believes that the professional body in question has not properly considered the complaint. I am trying simply to understand why you do not take the same view on conduct and service complaints. A clear logic seems to me to be involved. If the commission is dissatisfied with the professional body and has the power to enforce its recommendations, why will it not do the whole job?

Louise Miller: It might be helpful to consider section 16. The commission will be given the power to make different sorts of recommendations

about the handling of conduct complaints, which will have different degrees of firmness. For example, it could recommend

"that the relevant professional organisation consider exercising its powers in relation to the practitioner concerned".

That provision relates to disciplinary sanctions against the practitioner. Even if the commission directed that there be compliance with that recommendation and the professional body had to comply, it would simply have to consider exercising its disciplinary powers. Ultimately, therefore, suspension or striking-off-type sanctions would still be within the professional body's control.

The commission's power with respect to consumer redress would be stronger because it could recommend that the professional organisation pay compensation. It could then direct compliance with that recommendation and the professional body would then have to pay the money in order to comply. A difference is therefore involved.

Mr Swinney: In a sense, that makes the point that I am trying to make. Section 16(2)(e) includes a very direct power of direction for the commission. The commission could recommend that a professional body

"pay compensation of such amount, not exceeding £5000, as the Commission may specify".

That would be a direct instruction from the commission. If ministers envisage giving that power to the commission to deal with the way in which professional organisations have handled conduct complaints, why was it not attractive to them to propose giving it the power over both service and conduct complaints in order to remove the grey areas that we all accept will exist? That is what I am trying to understand.

Mike West: The power relating to compensation is—

Mr Swinney: I am not asking simply about compensation. I cited the compensation power as an example of the directness of the powers relating to conduct that will be given to the commission. I am asking simply why ministers did not go the whole distance and propose giving the commission powers over all aspects of conduct. If the commission had such powers, that would remove the grey areas.

Louise Miller: The position that we arrived at is that the commission will have strong powers of consumer redress. The focus of the scheme in the bill is on the handling of consumer complaints and on providing redress to consumers. Largely, those issues involve inadequate professional services. Section 16 recognises that a spillover into conduct can occur in cases in which there should be consumer redress in respect of a conduct complaint. Ultimately, the commission is given power to enforce that.

We did not want to give the commission the full range of powers over disciplinary aspects, as opposed to consumer redress. Fundamentally, the conduct/service split leaves professional discipline, as opposed to consumer redress, with the professional bodies. The commission will become the lead body for handling consumer redress, but the professional bodies will remain in the lead on professional disciplinary matters and disciplinary sanctions, as opposed to the compensatory sanctions that flow from those.

Mr Swinney: Might not the commission end up feeling dissatisfied that its concerns over a complaint have not been properly pursued by the professional body? Might not that simply continue the current rather unsatisfactory situation, in which the Scottish legal services ombudsman has publicly made clear her dissatisfaction about her inability to enforce questions of justice and to make appropriate responses to complaints?

Mike West: The problem with the current statutory provisions for the Scottish legal services ombudsman is that the ombudsman has insufficient powers. Research from the end of 1999 or the beginning of 2000 indicated fairly widespread dissatisfaction with those powers. The ombudsman's main sanction is recourse to adverse publicity. The commission will have powers of enforcement and it will have stronger powers than the ombudsman has ever had.

Louise Miller: The ombudsman's powers are limited to reviewing how the professional bodies have acted on conduct complaints and on service complaints, which constitute the large majority of complaints. The bill envisages that the commission will take over as the lead body on consumer redress matters, on which it will not be subordinated to the professional bodies, although the professional bodies will continue to take the lead on professional disciplinary matters.

Although we can envisage a situation in which enthusiastic members of the commission are keen to take on responsibility for everything, it is more sensible for the commission to concentrate on becoming the consumer body and on getting the consumer remit right. As Mike West said, the backdrop to professional conduct includes issues such as the setting of professional standards and rules, the carrying out of audits and spot checks and the provision of professional education. Dealing with conduct is quite a big job. We envisage the new body focusing on its consumer role.

The Convener: I presume that we can ask the professional bodies for their views on the provisions and on how they would handle the grey areas. Mr West has openly highlighted the issue to us fairly early on, so we should be able to ask questions about that of other witnesses.

Do members have any more questions?

Colin Fox: I have a follow-up question. It strikes me that the bill's distinction between service complaints and conduct complaints is taken straight out of the Law Society's current complaints handling system. Is it fair to say that?

Louise Miller: That is true for the service/conduct distinction, but the bill will introduce a new category of unsatisfactory professional conduct. Basically, the split between service and conduct is taken from existing arrangements.

At the moment, the Law Society and the Scottish Solicitors Discipline Tribunal take different approaches to dealing with complaints, to levels of compensation, to sanctions and so on. With the bill, it will be possible to deal with service complaints in an entirely different way by a body that is independent of the profession.

Colin Fox: The distinction has been made in line with the way in which the Law Society currently deals with such matters, but do you appreciate John Swinney's point that the public wants a new system that is, first, independent of that and, secondly, not as toothless as the Scottish legal services ombudsman? Did you think about giving the proposed commission responsibility for dealing with all complaints, while leaving the Law Society to deal with concerns about solicitors' professional development?

Louise Miller: We certainly considered such an approach, but we concluded that professional discipline is best left to the professional bodies, and that the new body should focus on providing consumers with appropriate redress for their complaints.

I point out that the bill makes important changes to how the Law Society and the Faculty of Advocates will handle complaints about conduct. For example, it provides greater oversight, it gives the commissioner the power to enforce its recommendations—which is something that the ombudsman does not have—and it provides for 50 per cent lay membership of the Scottish Solicitors Discipline Tribunal, which is not the case at present. It certainly does not leave the professional bodies alone to continue their present approach to matters of conduct; however, it acknowledges the difference between providing compensation and redress for consumers and ensuring that professional discipline is carried out.

Colin Fox: I know that the committee is anxious to explore other areas, but I want to press the witnesses on a technical point. Given that there will be a clear procedure for dealing with service complaints, which will be the commission's responsibility, and another clear procedure for dealing with conduct complaints, which will be the responsibility of the Law Society and the Faculty of Advocates, do you envisage any specific problems in dealing with what Mr West called hybrid cases, which do not fall easily into either category? The Law Society has demanded that, in accordance with section 4(2) of the bill, the commission

"must consult, co-operate and liaise"

with it, and that it must

"have regard to any views expressed by the organisation on the matter".

Mike West: The bill stipulates that the commission and the professional bodies should "co-operate and liaise" with each other in dealing with hybrid complaints. That will require the bodies to agree which of them should investigate the complaint and how it should be handled.

Colin Fox: What happens if there is no agreement? Will the commission have the final say?

Louise Miller: It will be up to the commission to categorise the complaint after consultation of the relevant professional body.

Mr Swinney: That is not the point that Colin Fox is making. If a complaint is deemed under section 4(2) to be a hybrid complaint, will not the final say on it, if it is categorised as a conduct complaint, rest with the professional organisation, subject to the caveats that are set out in section 16?

Louise Miller: Yes, it will if it is a conduct complaint. To complicate matters, I suppose that there are strictly speaking two kinds of hybrid complaint. Most hybrid complaints are essentially a series of grievances that arise from the same transaction or relationship, and their various elements can easily be categorised as service matters or conduct matters. As Mike West said, in some cases the same action can be categorised as a service matter and a conduct matter, and both bodies will have equal powers to investigate the action and either enforce their own sanction or award their own redress, as they think appropriate.

14:45

Colin Fox: I hate to be pedantic, but what about when a complaint raises matters that relate to service and to conduct? Who will make the decision? Will the commission decide that, on balance, the complaint is more to do with service than with conduct, or the reverse? What about

occasions when it decides that there will have to be inquiries on both sides?

Louise Miller: In that case, there would be inquiries from both angles. It would be up to the professional body to decide what remedy or sanction was appropriate from the conduct angle and it would be up to the commission to decide what to do about the complaint from a services angle.

Jeremy Purvis: The committee's difficulty relates to section 34, which states that the definition of "inadequate professional services"

"includes any element of negligence".

You will be aware of the academic commentary that the committee has received from Professor Paterson, Janice Webster and others about the difficulty to which Mr Swinney and Mr Fox allude. The definition in the bill of "inadequate professional services" includes negligence, which would previously have been dealt with by a court. However, under the bill's current definition it would be treated as a service complaint and would go to the proposed new commission. Previously, negligence would have been more aligned to misconduct. I would have thought that there is a degree of natural justice in our wishing to test in court whether there has been negligence.

Mike West: No. The purpose of the provision is to provide complainers with readier access to redress in relation to negligence complaints. If someone currently makes a negligence complaint against their solicitor, their only option is to take the matter to the courts, which is expensive and takes a long time. The process has an uncertain outcome and risks are associated with it.

The commission will be able to deal with inadequate professional service complaints that contain an element of negligence. That is based on the precedent of the financial ombudsman service, which carries out such a procedure. The complaint will be dealt with on the basis of what the commission considers to be fair and reasonable in the circumstances, which is the test that the bill introduces in relation to the provision of inadequate professional services and negligence. It is not a court-based procedure and it offers readier access to redress and justice to a range of complainers who have complaints about negligence.

Louise Miller: The complaints would not automatically go to the complaints commission; we have not removed the complainer's right to go to court if they prefer to do so. The ceiling for an award for inadequate professional services—the maximum could be awarded only in what the commission considered to be the most serious cases—is £20,000. If the complainer thinks that their complaint is worth more than that, they would have to go to court to resolve the issue. This is about providing an alternative dispute-resolution mechanism, which does not cost the complainer a lot of money and does not involve the same risks—in particular those associated with costs—that are involved in going to court in a negligence case. The mechanism is designed to improve access to justice in more moderate-value negligence cases.

Mr Maxwell: I will take us back to more general issues. There is so much interest in the split because we are struggling to understand how the Executive concluded that that is the appropriate approach and we are discussing the issue because of widespread concern about self-policing by the legal profession.

In response to an earlier question, you voiced your concern that the commission should be independent of the legal profession and that the purpose of such a body is to provide consumer confidence. I could not agree more with those two statements. Given that they are the raisons d'être of the bill and the establishment of the commission, how can we achieve consumer confidence? We will give the public the understanding that the body is independent of the legal profession, but we will still leave half the complaints with the Law Society. I am trying to understand the Executive's thinking. Its reason for introducing the bill was to do with the underlying principles of consumer confidence and the independence of the commission, but we will still achieve a situation in which there is a split. Maybe you can broadly explain the Executive's thinking.

Mike West: Professional misconduct complaints will remain the province of the Scottish Solicitors Discipline Tribunal, and the Law Society will continue to prosecute such complaints before the tribunal. The commission will have no locus in relation to matters that are before the tribunal.

I hark back to my earlier remarks: our overall feeling is that professional discipline is the natural responsibility of the professional body. Although it is possible to hive off service complaints, we feel that it would be difficult to give the commission functions relating to conduct as well. The commission will not set professional practice rules or accounting rules and it will not enforce professional body rules at all. We had to make a decision on the parameters of the commission's functions. I think that we have set the parameters in the right places.

Mr Maxwell: I still fail to understand. In answer to Mr Swinney's questions, you accepted that the commission will still oversee those other areas. We are having this debate because of public perception of professional discipline. Surely the most basic logic suggests that the system would be clearer and more easily understood by the

public—who would have greater confidence—if the commission dealt with everything. There would be no grey areas such as we discussed earlier—no hybrids—and we would achieve the consumer confidence that we want to achieve among the public.

Louise Miller: It is not accurate to say that the professional bodies are being left with "half the complaints". Our information is that about 70 per cent of complaints that are made to the Law Society are purely about services. Another 10 per cent are classed as hybrid, and the services element would be considered by the commission. Together, the two classes will account for about 80 per cent of all complaints against solicitors.

Mr Maxwell: So, we will be leaving a fifth of all complaints to the Law Society. I was not trying to be accurate when I said that it was half and half; I was just making the point that some complaints would be dealt with by one body and some would be dealt with by another. That seems interesting.

Jeremy Purvis: I want to make sure that I heard you correctly, because I would not like the committee to be misled about the role of the commission with regard to practice. You mentioned accounting and other practices. My understanding is that under section 27, on conduct complaints, the commission must monitor practice and identify trends in practice—that is, how practitioners' dealings have resulted in conduct complaints. The commission will have a duty to monitor practice, and there could be complaints about accounting and other areas. The commission will then give guidance to the relevant professional bodies. However, you seem to be saying that the commission will have no role in that. Is that another grey area? The commission will have a statutory duty to monitor conduct complaints and the trends underlying those complaints, although it will not have a role in dealing with the complaints. Could it make recommendations, for example, about accounting procedures in solicitors' firms?

Mike West: The powers are in effect a translation of the ombudsman's current powers to provide recommendations to the professional bodies on the handling of complaints. The powers have been preserved specifically for handling of conduct complaints. The commission will also have a wider role in disseminating best practice. Over a year, it will receive and deal with a large number of service complaints and it will, as part of its wider role, feed back its findings on the complaints and its general observations to the profession and the professional bodies.

Mr Swinney: The question that Mr Purvis just asked takes us a step further down the road that I was on because we have identified another area of professional conduct in which the commission will be involved. It leaves me with the impression that we seem to be dipping various toes in the water at different stages. Why do we not just jump in—or do something else as inelegant as that metaphor? We could paddle, perhaps. I think that we will come across hybrid after hybrid and that there will be a lack of clarity about complaints, although part of the bill's purpose is to provide clarity. Perhaps you can comment on that point or reflect on it. The example that was just cited about section 27 reinforces my point in a completely different way.

The Convener: Given the questioning of the past few minutes, I am inclined to invite the witnesses to go away and think further on members' comments, using the *Official Report* of the meeting once it is published. They can write back to us to answer the questions, particularly about the Executive's position on how it defines complaints, which seems to be a grey area. Can you manage to do that for us?

Louise Miller: We will be happy to do that. There is probably only limited value in going further down this road just now because we are just exchanging different perspectives on the matter. We will see how much further we can go in writing to satisfy the committee.

Our current position is that we believe that the commission should be in the lead on consumer matters and that it should be left to get on with them. We believe that the professional bodies should continue to be in the lead on discipline, but being in the lead in that area does not mean just being left to get on with it and being completely unaccountable. The parts of the bill that deal with conduct are designed to build in accountability mechanisms. That is why we are dipping a toe in the water, as it was put.

The Convener: I am grateful for that.

Bill Butler (Glasgow Anniesland) (Lab): Good afternoon, colleagues. There will be no external right of appeal for a decision by the new commission on a service complaint; instead, people will be able to go back to an internal committee of the commission or consider going for a judicial review. The witnesses will be aware that the Law Society obtained an opinion from Lord Lester of Herne Hill QC, which stated his view that the lack of an external right of appeal is not fully compatible with article 6.1 of the European convention on human rights, which protects the right to have an independent and impartial tribunal determine one's civil rights and obligations. What is the Executive's view of Lord Lester's opinion? Does the Executive now agree that the lack of an external right of appeal for a decision of the new commission is not fully ECHR compliant? How stands the Executive on that?

Louise Miller: We do not believe that it is essential to have an external right of appeal in order for the commission to be ECHR compliant. When the bill was introduced, it was certified by ministers and by the Presiding Officer as being within legislative competence. We are carefully examining Lord Lester's opinion, but we do not think that the situation is as simple as that. What Lord Lester essentially says is that the reason for what he perceives as the compatibility problem is to do with the commission's constitution—its members' tenure and similar issues—and the lack of external appeal from the body as it is currently constituted. The issue is the combination of those two factors.

We are certainly analysing Lord Lester's opinion carefully, but we are aware that there can be different opinions where there is no conclusive case law on a subject. We do not want the outcome of the process to be legally challenged when we can take sensible measures to avoid that, so we are considering that matter carefully. We do not believe that the lack of an external appeal is an ECHR problem in itself.

15:00

Bill Butler: How long will it take you to analyse and come to a view on not just the absence of an external appeal but the tenure aspect that you have just mentioned, which seems to form the basis for Lord Lester's opinion? Would not it be sensible for the Executive to do that expeditiously, so that it does not get into a situation in which it could be called into question? What is the timetable?

Louise Miller: We are considering that at the moment. If we conclude that it will be prudent to do something about the matter to reduce any perceived risk, we will do so at stage 2.

Bill Butler: Do you feel that there is a risk, even if it is only one of perception? Could you explain the matter of tenure a wee bit more? I did not quite follow the point.

Louise Miller: Without getting into too much detail at this stage—

Bill Butler: Do not worry about detail—just tell the committee about tenure.

Louise Miller: The question is whether the new commission as proposed will itself be an independent and impartial tribunal. If it is, an external appeal will not be needed because it will itself be such a tribunal. An appeal on the merits of the case is not needed; judicial review will be fine.

Lord Lester's opinion raises issues about the bill's provisions on the tenure and removability of members. We are considering that carefully. The bill contains—

Bill Butler: Does Lord Lester think that that might possibly impinge on the independence of the putative Scottish legal complaints commission? Is that it, in a nutshell?

Louise Miller: That is Lord Lester's thinking. It is a combination of how the commission is currently to be set up and the lack of external appeal that has troubled him. His is one opinion, but it is not the opinion of our advisers or of the parliamentary authorities. Where there is not conclusive case law on a point, it is inevitable that there can be different opinions. We are carefully considering what Lord Lester has to say from the point of view of risk management.

Bill Butler: Would it be possible to transmit to the committee the Executive's reflections on those particular and significant points as soon as possible?

Louise Miller: We will do.

Bill Butler: How long will "as soon as possible" be?

Louise Miller: I would not like to give any absolute guarantee about that. We must decide sufficiently in advance of stage 2 what we are going to do, if anything. We need to be ready in time for that stage. At the moment, we are considering different options and are quite happy to keep the committee informed of how we are getting on with that.

Bill Butler: What options are you considering?

Louise Miller: The obvious options would be to address the concerns that Lord Lester has raised on the constitution of the new commission; to provide an external appeal route; or to decide that, on reflection, we still do not feel that there is enough in the matter to worry about and not to do anything. There could be other permutations, but those are the major ones.

Bill Butler: I am grateful for that.

The Convener: I suggest to the witnesses that the committee would like—I imagine—to get an understanding of the position on this point before we get to the stage 1 debate.

Louise Miller: We will certainly do our best.

The Convener: Thank you.

Colin Fox: I would like to explore the issue of appeals more widely. Do you agree that the public might view it as pretty inconsistent that the bill affords practitioners a right of appeal but does not afford complainants a right of appeal?

Louise Miller: I do not really follow.

Colin Fox: Is it not the case that a practitioner who is complained against will have the right to appeal to the Scottish Solicitors Discipline Tribunal

on the outcome of a judgment, but that the complainant who begins the proceedings will not have the right to appeal the ruling if they are not happy with it?

Louise Miller: The Scottish Solicitors Discipline Tribunal exists only to deal with conduct complaints; it will not be involved in service complaints under this system.

Colin Fox: Okay, so in conduct cases the practitioner has the right of appeal but the complainant does not. Do you see what I am getting at? We are supposed to be coming up with an independent, open, transparent and fair system, but the public will not understand why a solicitor can appeal if they are unhappy about a judgment when the person who makes the complaint cannot appeal if they are unhappy about the judgment. That seems to be inconsistent.

The Convener: Perhaps our witnesses could reflect on that point and get back to us in writing.

Louise Miller: We will think about that point.

Bill Butler: Funds for the new commission will be raised from an annual general levy and a complaints levy. The complaints levy will be payable by practitioners who are the subject of eligible complaints, whether or not those complaints are ultimately upheld. The consultation paper proposed a levy payable by those against whom a complaint had been upheld. What is the thinking behind the change?

Mike West: That concerns an important issue that we explained to the Finance Committee this morning. The complaints levy is designed as a fee for a dispute resolution service. The overall policy is that complaints should be dealt with at a local level. If they cannot be resolved at that level, they go to the commission and, if they are deemed to be eligible, a fee is charged to the practitioner. It is extremely undesirable for the commission to be perceived as having a financial interest in upholding complaints. You can imagine aggrieved solicitors complaining bitterly about that.

Another problem is that lawyers are used to having costs following successes. When they see a different position in relation to the complaints levy, it puzzles them slightly.

Bill Butler: Is the arrangement designed to encourage earlier resolution?

Mike West: The complaints levy will have the effect of encouraging local resolution.

Bill Butler: Why not have a levy against law firms against which a complaint has been upheld? That is what was suggested in the consultation paper.

Mike West: Since the consultation, we have reflected on the responses that we received and have realised that the complaints levy has to be chargeable irrespective of outcome. If that were not the case, the commission would be placed in a difficult position.

Bill Butler: What about the position that individual practitioners are placed in? Heaven forfend that I should defend individual practitioners, of course.

Mike West: Effectively, the practitioner is paying a charge for a dispute resolution service because he or his firm has been unable to resolve a dispute.

Bill Butler: I see what you are saying, but I am not convinced.

Mr Maxwell: Mike West is saying that it would be undesirable for there to be a perception that it was financially useful for the commission to uphold complaints. However, I would have thought that that would be unlikely to happen and that there would be another way around the problem.

It seems rather odd that, in effect, a person who is complained against and who is found not guilty will have to pay a fee. I struggle to understand why a person who has had a complaint made against them but who is completely cleared by the commission will have to pay the same as somebody who has a complaint against them upheld. That in no way equates to natural justice.

Mike West: The same procedure and funding mechanism has worked well in the financial services industry—it is the basis on which the Financial Ombudsman Service is funded. I can only repeat that the practitioner, even if exonerated, will be charged for the resolution to the complaint.

Louise Miller: That is the case, unless the complaint is screened out as frivolous or vexatious. If the commission deems that the complaint is not genuine or that the complainer acted unreasonably in making it, the levy will not be payable.

Mr Maxwell: I accept that, but did you consider differentiating the fees? There could be a flat-rate fee and a higher fee in cases in which complaints are upheld, which would be a halfway house between the two positions.

Mike West: That is a possibility. The commission will have the power to charge differential fees. The Financial Ombudsman Service's complaints levy is £300. The first two complaints per year are without charge, but the fee is payable for the third and subsequent complaints.

Mr Maxwell: Will that be the same with the commission?

Mike West: Again, that will be a matter for the commission.

Jeremy Purvis: There is a difficulty with just leaving the matter up to the commission. The financial memorandum contains a breakdown of the costs and levies for illustrative purposes only, but the rule of thumb is that, if 50 per cent of the running costs of £2.4 million were met from the annual general levy, the levy would be £120. The other 50 per cent would come from the complaints levy. Even the financial memorandum does not estimate the cost of administering the mediation services as set out in the bill; it simply assumes a 50:50 split between the complaints levy and the annual general levy. Would it not be better simply to have one flat levy? As, at this stage, you cannot determine what proportion of the commission's costs will arise from mediation and complaints and what proportion will arise from other running costs, would it not be better simply to say that there should be a £240 flat levy to cover the entire costs of the commission? That would get away from the issue of incentives.

Mike West: The Financial Ombudsman Service is flexible in that regard; it does not say that a certain percentage of its income must come from the complaints levy or the annual general levy. At present, about 70 per cent of its income comes from the complaints levy, which reflects the fact that it has been extremely busy in the past two or three years with complaints about endowment mis-selling. The service's income, therefore, has risen and the annual general levy has been reduced. The matter will be for the commission to determine, although it will be required to publish its proposed budget for the following financial year and to consult the profession on it and its work plan.

Jeremy Purvis: You say that there should not be a financial incentive with regard to the complaints levy, but the commission will have an incentive not to sift out cases. If the lion's share of the commission's funding comes from the complaints levy, how on earth can it have a completely objective sifting mechanism, which it has a duty to provide?

Louise Miller: There are different possible systems, but almost every one is open to objections. If I understand your suggestion correctly, it is for a flat-rate annual levy for everyone to pay all the commission's costs. That has attractions, but it would provide no incentive to people to reduce the number of complaints that are made against them, whereas the complaints levy will do that. That is what it is for.

15:15

It is important for the commission to have flexible powers in relation to the levy, so that it can try to get things right at the start and adjust as it goes along in the light of its experience of effects on the market. The annual levy has to be the same for all practitioners, but we have expressly provided a power to vary the complaints levy to take account of different circumstances. That is a fairly broad power that could extend to whether the complaint is upheld and issues such as what the levy should be for lower value or less profitable work. It is important that the commission is able to be flexible and to research, consult and adjust in the light of experience of the bill's impact on the market, in order to get things right. If we try to get things right at the outset, there is a danger that we will get them wrong and be stuck with a bad solution.

Jeremy Purvis: Yes, but there is a big danger with regard to incentives—a danger that you said you are trying to avoid. If the sum total has to be collected from levies, the issue is the balance between the annual levy and the complaints levy. As you indicated, you may wish to consider that in the context of the market. For example, most complaints might be made in civil law, in respect of divorces. Someone could say that, given that they are not involved in that kind of legal practice, they should not have to pay the complaints levy at a particular level.

I am concerned about what will happen if the complaints levy is set at a higher level than the annual levy. If a complaint is made about a practice—possibly a small one—because it failed to return a few phone calls or whatever, it will have an incentive to pay out to the person who complained or who is threatening to do so a smaller amount than the complaints levy. You are creating a false market when it comes to complaints. There is no incentive to have clarity in the complaints procedure; there is an incentive only for practices to pay out sums smaller than the complaints levy.

Louise Miller: There is some truth in that. It is a reality in a number of walks of life. In negligence cases that could be produced in court, for example, there is no doubt that sometimes people make what they regard as modest payouts in order to avoid the sheer hassle of a court case and the risk of future cost, in the hope that the issue will go away. The power to screen out frivolous and vexatious complaints is intended to protect practitioners against complaints that are unreasonable and that may be part of a campaign of persecution by some embittered individual. By charging for the dispute resolution service for a complaint that is genuine, the complaints levy provides practitioners with an incentive to communicate better with their clients, to reduce the number of complaints and to resolve those complaints at source, where they can.

Jeremy Purvis: You have just denied that that is the case by agreeing—

The Convener: Mr Purvis, I would like to allow other members to comment on the issue. You have made your point clearly.

Maureen Macmillan: I was going to put the opposite situation to the witnesses. I refer to cases in which the solicitor who is complained about is willing to discuss with the client how the matter might be resolved, but the client is not willing to engage with the solicitor—possibly quite legitimately, because they are fed up with him or her and want the complaints commission to deal with the matter. As I see it, the complaints levy is about paying for dispute resolution. If a solicitor is willing to have a dispute about a legitimate complaint resolved at local level, but the client refuses for some reason, why should the solicitor be subject to the levy because the complaint has to be referred to the commission for resolution?

Louise Miller: The client might have entirely legitimate reasons for not being prepared to negotiate further with the solicitor. One can imagine situations in which the relationship has broken down completely. If the complaints levy did not have to be paid, the solicitor could say that they were willing to negotiate as an avoidance device, because they knew that the client would not be prepared to enter such discussions. The issue is difficult. A solicitor might be genuine about being prepared to negotiate, but a client might be equally genuine in believing that that will not work.

The commission will have the power to refer cases back to be resolved at source, when it thinks that that is appropriate. It will also have the power to mediate, when it thinks that that is appropriate and both parties are willing to accept that. Ultimately, however, we must accept that, in some disputes, it might genuinely be the case that the two parties are just not able to talk meaningfully to each other any more and dispute resolution has to be provided, which someone will have to pay for.

Maureen Macmillan: Will the levy be imposed at that point? In other words, will it come into effect when everything else has been tried and a case has had to go to the commission?

Louise Miller: Yes. If the commission mediates after both parties have agreed that it do so, that will attract the levy, because the mediation process will involve investigation by the commission.

Alternatively, if the commission feels that more could be done to resolve a dispute, it will be able to refer it back to be resolved at source by the complainer and the practitioner. The complaint would come back to the commission only if such resolution did not prove possible. From its knowledge of the positions of the parties and the relationship that developed between them, the commission will need to take a commonsense view about whether there would be any mileage in referring the case back and whether it would be sensible to do so. I am sure that it will do that only if it feels that there is a genuine possibility of sorting the matter out at source. There might be situations in which it is apparent that that will not be feasible.

Mr Swinney: I will approach the issue from a slightly different perspective. The last thing that I want is for practitioners to have to pay out for a body that has a budget of £2.5 million, let us say, when it should probably have a budget of only £2 million. That might be the case because, for example, it has too many staff to deal with the volume of complaints that are made. Will downward pressure be exerted on the commission's budget and workload to ensure that practitioners will not be charged an annual general levy or a complaints levy that could be 20 per cent lower because the monolith that is created has more staff than are required? What will happen if staff productivity is not as high as some of the estimates that underpin the financial memorandum suggest it should be? Will there be a brake on the commission's costs, to keep the levy under control?

Mike West: Yes, there will be two checks. The first check will be the annual consultation on the budget that we have mentioned already, which will involve the commission seeking the views of the profession and the professional bodies on its proposed budget. The other check will be that the commission will need ministerial approval for the number of staff that it appoints and their remuneration. Scottish ministers will not approve an application for additional staff if they feel that the commission does not have a justifiable case, so that will be an additional pressure.

The Convener: Colin Fox has a follow-up. I would be grateful if he would ask about compensation levels.

Colin Fox: I would be happy to, but first I will deal with the complaints levy. I am sure that the witnesses have picked up the fact that the committee is curious—if I can use that euphemism—about the idea that lawyers should be charged when a complaint is made, which is perhaps the only proposition in the bill that seems to be unfair to lawyers.

You gave me the impression that the easiest way to bankrupt a solicitor would be to have them pay on each occasion on which a complaint was made against them. You suggested that the defence against that happening would be that the commission would rule out hundreds of complaints on the basis that they had been made maliciously.

In my view, if the commission had a record of unilaterally writing off hundreds of complaints as unworthy, there would be a grave danger that its credibility would be undermined.

I hope that you will reflect—perhaps you will do so now—on other members' suggestion that it might be fairer to have a flat-rate fee that every solicitor pays irrespective of the area of law in which they work. That would remove the levy that applies just to solicitors who work in areas of law that are particularly open to complaints. Do you have further comments on that?

Louise Miller: There are two issues. The first is whether complaints are made because practitioners operate in an area of law that is particularly susceptible to complaints, even if they do a good job. There is no doubt that complaint rates are higher in some sectors of legal practice than in others. The power to vary the amount of the complaints levy is partly intended to allow the commission to address that. We do not have closed minds on that and we are more than willing to reflect on the detail of how the complaints levy operates.

However, we must recognise that another reason why a practitioner might receive multiple complaints is that they are not doing a good job—that is the other side of the coin. Sometimes, something happens because it is a risk in an area of practice, but sometimes something happens because a practitioner acts in a way that produces many complaints, which is a concern. If we charge everyone a flat rate and fund the commission from the annual levy, we will give practitioners who attract many complaints no incentive to consider why that is and to consider their procedures and how they perform transactions or deal with clients.

A balance has to be struck. One policy reason for having a complaints levy is to give practitioners who attract lots of complaints an incentive to attract fewer complaints. We are more than willing to consider the details of the levy structure. We are not attracted to it at the moment, but we will reflect on the idea of getting rid of the complaints levy and charging everyone the same amount, regardless of whether practitioner A, who works in the same sector as practitioner B, attracts far fewer complaints than practitioner B. That would have an element of unfairness, too.

Colin Fox: I will move on to compensation. Why is the ultimate penalty that will be at the commission's disposal for compensation for a service complaint—£20,000—four times higher than that for a conduct complaint, which is £5,000?

Louise Miller: That is to deal with negligence. The policy is that the commission is to be used to pursue moderate-value negligence claims as part of its dealing with inadequate professional services. When a person who has a complaint could alternatively go to court with a negligence action, £5,000 would be a pretty low limit. That is why the limit for a service complaint is £20,000.

Colin Fox: The commission will be able to make disposals such as ordering solicitors to charge no fees. On the current scale of disposals—can I call them punishments?—for service or conduct complaints that are upheld, what is the ratio of compensation disposals?

Louise Miller: Do you mean as a proportion of the total number of all types of disposal?

Colin Fox: Yes.

Louise Miller: We do not have that information and I do not know whether the Law Society has such statistics, although we could try to find out. If it does not, we might be stuck.

Colin Fox: Have you reflected on the suggestion in the evidence that we have gathered that some law firms might withdraw from some parts of legal practice for fear of the £20,000 penalty? Have you reflected on the consequences of that for legal practice in Scotland and access to justice?

15:30

Louise Miller: We have reflected on that. The policy is to provide complainers with better access to justice than exists at the moment. Many people on moderate incomes find it difficult to contemplate taking legal action about defective service by solicitors because of costs and because of the risks that are associated with costs. At the moment, their only alternative is to claim for inadequate professional services, which limits them to £5,000 compensation, although the sum that they could recover in court might be much greater than that if they were successful. We accept that if complainers have an easier dispute resolution mechanism available to them, they may be able to recover compensation more often than has been the case in the past, but we must bear in mind the fact that the commission will make awards to complainers only if it is justified. There is no punitive element; it is compensation for loss that has been suffered or for distress or inconvenience.

The figure of £20,000 is a maximum; it is the top of the scale of what the commission can award, so it will be awarded only for the most serious cases that the commission sees; the average level of award will be much lower. If a firm was repeatedly to be the cause of awards at the top end of the scale—approaching £20,000—one would certainly have to wonder why that was and whether there were issues about the competence of that firm and

the service that it was providing. On the one hand, we certainly do not want to close down good small businesses but, on the other hand, consumers of legal services in all areas of legal practice have a right to good and competent services from practitioners. Those are the considerations that we have to weigh up.

Maureen Macmillan: I agree that we do not want good small businesses to close down just because of one big aberration. To a small rural firm of solicitors, £20,000 is a huge amount of money compared with what it would mean to a city practice that has 30 partners. I am concerned about the availability of access to justice in rural areas in any case, so I wonder whether the bill has been rural-proofed.

Louise Miller: There are probably limits to what we can do in that regard. The power to vary the complaints levy is designed to allow the commission to deal with problems in that context, to acknowledge that there might be a need to reduce the relative financial burden on firms in more remote areas or less profitable areas of work, and to have cross-subsidy in the system. However, when you are talking about the level of compensation you are talking about the level of loss to the client. Cases in which £20,000 is awarded will be pretty rare, but it will happen. For example, a conveyancing transaction might have been messed up, and the client would be able to justify the claim that that amount of loss had been caused to them. Although it might be hard for a practitioner who has to pay out a large sum of money, we must also consider that the client who has received the poor service will have sustained a large amount of financial loss.

It is a question of who pays for that loss. Should the person who has had the poor service be left to shoulder it or should it fall on the practitioner? We think that, ultimately, it must fall on practitioners who cause such loss. That is the case at the moment under the court system—if the complainer can get the case as far as court and can get it through a negligence action—although we know that the costs and the associated risks are a big deterrent to many people. We are not attempting to award compensation that is not commensurate to loss that has been suffered. That is not what the bill is about; it is simply about making it easier for complainers who have suffered significant loss to be compensated for that.

Maureen Macmillan: Forgive me for asking, but would those payments be covered by the guarantee fund or by the master policy?

Louise Miller: In principle, negligence is covered by the master policy. The guarantee fund is there for dishonesty on the part of solicitors, which is much more likely to be a conduct issue.

Maureen Macmillan: So the £20,000 in compensation could be covered by the master policy?

Louise Miller: That is right—negligence is in principle covered by professional indemnity insurance. There might be issues about the effect that that could have on the cost of professional indemnity cover; it could mean a modest rise in premiums because of the increased access to justice and the resulting potential increase in complainers' ability to go as far as getting awards.

Jeremy Purvis: Section 8(2)(d) of the bill states that the maximum compensation of £20,000 will include

"an amount for loss suffered or inconvenience or distress caused to the client as a result of the inadequate professional services".

Those words are in parenthesis because any sum that is to be paid as a result of inadequate professional services will be included in the total amount of compensation. That takes us back to a grey area; that compensation includes an element of negligence, but Louise Miller said that if a case were so serious that an award of £20,000 was made, it would raise considerable questions about whether misconduct had taken place. The award could be four times as much as the equivalent for conduct complaints. Why not just create a far clearer situation?

Louise Miller: What you describe is not necessarily the case. The scale of loss that has been caused to the client does not necessarily bear much relation to the gravity of what the practitioner might have done; for example, failure to read a deed properly in a conveyancing transaction or failure to notice the existence of a clause that seriously prejudiced the client's interests are not professional misconduct but are just human error. However, the consequences of such actions in respect of loss to the client could be serious.

Jeremy Purvis: What is the evidence base for setting the compensation maximum at £20,000?

Louise Miller: It is simply an attempt to ensure that negligence cases of moderate value can go before the commission as an alternative to going to court. We think it reasonable that cases in which large amounts of damages are potentially awardable should continue to be heard by a court.

Where a very large amount of money could be paid out at the other end—for example, arising from commercial transactions—the cost-risk balance is different. In such cases, it is legitimate to continue to require complainers to go to court. We are talking really about an alternative dispute resolution mechanism for more moderate claims in which the cost-risk balance of going to court might be more difficult.

Jeremy Purvis: Forgive me, but you have not answered my question about the evidence base for the £20,000. You have evidence from the Law Society in its annual report about the compensation that is paid out in various areas, but why is the maximum compensation for a service complaint £20,000? It is coincidental that it is the same level in England and Wales, but surely that is not the reason for the Scottish solution.

Louise Miller: It is probably not entirely coincidental. The current limit in England and Wales is £15,000, but there has been discussion about raising it to £20,000. The reason behind the limit in England and Wales is the same as the reason behind ours—it is to allow lower-value negligence cases up to a reasonable limit to be progressed by the complaints handling body rather than through the courts. It is essentially the same policy in both places, so it would be surprising if there were not at least a rough correspondence between the figures.

We would be lying if we said that we were not mindful of the figure in England and Wales, because it would be difficult to justify setting the limit significantly lower for Scottish complainers without specific evidence. That would represent less consumer protection up here for substantial amounts.

If there is evidence—that we have not found so far—to suggest that the maximum compensation limit for service complaints should be different, we will be more than happy to consider it. However, the principle behind the limit is the same in both cases.

Maureen Macmillan: The bill provides that the new commission will monitor the effectiveness of the guarantee fund that the Law Society operates—and which provides protection for people—and the operation of the master policy. As you said earlier, that policy is the professional indemnity insurance that the Law Society requires of, and provides for, its members. In the consultation, there was an even split between those who were in favour of and those who were against giving the new commission monitoring powers on the guarantee fund and the master policy. Why did you decide in the end that the commission would do the monitoring?

Louise Miller: In the end, the decision came as a result of the inquiry that the Justice 1 Committee undertook in the previous session of Parliament. In its report, that committee articulated its concerns and others that arose in evidence. Although its recommendations ultimately extended to both, it is fair to say that its concerns were about the master policy rather than the guarantee fund.

The previous session's Justice 1 Committee expressed concern about the lengthy delays in paying out from the master policy; some complainers had raised that. Although complainers were, ultimately, getting the money to which they were entitled, they were getting it only after a very long time—years, in some cases. That committee recommended that we consider establishing a mechanism to oversee payments from the master policy.

In principle, the master policy is a good thing. It provides good protection to solicitors' clients. We tried to take a light-touch approach in the bill. The power is only to monitor and to make recommendations; at the moment, no enforcement power exists. We have attempted to balance the need to retain arrangements that are not unduly upsetting—arrangements that have been carefully crafted and which provide valuable protection—with the need to respond to concerns that the previous session's Justice 1 Committee raised with us.

There should be no need for the professional bodies to get upset about the proposal, which is simply for a light-touch power to monitor and make recommendations. As long as the policy works well, there should be nothing to fear from it. The question is really one of keeping tabs on the policy in order to ensure that it continues to work well in the bulk of cases. In the few cases in which it may not work so well, we need also to provide some sort of power to examine what went on.

Maureen Macmillan: I assume that you are aware that some people who have complained against solicitors feel that the master policy is not a good idea; they say that it removes the incentive to follow best practice. People have spoken about the lack of incentive to make early settlements in disputes. The very fact that the master policy is in place and that every solicitor comes under its umbrella means that solicitors may not be as careful as they should be. People have said that a better system would be for each solicitor to find his or her own insurance because that would make them more careful about how they practise the law. Have you given any thought to that?

Louise Miller: All such arrangements have their various pros and cons. One argument says that the maximum incentive that a solicitor needs to be ultra careful about the way in which he or she works would be for them not to have professional indemnity insurance—every time they caused damage to someone, they would have to pay them in full. However, as the member rightly suggested, a firm could be bankrupted for what may have been a one-off error. The insurance is in place to protect against that.

I agree that, on the one hand, a heightened sense of individual responsibility could result from solicitors having to insure individually instead of collectively. On the other hand, their services

would almost certainly be more expensive. It is likely that the cost would ultimately be passed on to the users of legal services in bills. Such balancing acts are involved. As long as the master policy works well, pays out promptly and delivers proper cover, we think that it is probably a good thing. It probably also results in reduced costs for clients in terms of the bills that they pay for legal services.

15:45

The Convener: Health professions have their own policies, often with the same company, and there is obviously a record of claims so that people's difficulties can be traced back. I presume that you have considered other professions.

Louise Miller: We have probably not done so in a great deal of detail. The bill is relatively minimalist. We wanted to give the commission a power to monitor but not a power to wade in and disrupt the entire master policy. There was a balancing act to perform. The master policy and collective insurance are, in principle, good things; but that had to be weighed against the concerns that were expressed by the previous session's Justice 1 Committee on what had happened in a few individual cases. We wanted to ensure that such things did not happen again and settle into a pattern.

Mr Swinney: Maureen Macmillan mentioned the evidence base that has prompted the creation of a monitoring power for the commission. You have cited the views of the Justice 1 Committee in the previous session of Parliament. What other evidence has the Executive received that has led it to create the power?

Louise Miller: Mike West may know of information that came out of the consultation.

Mike West: The Scottish Consumer Council reported a lot of complaints that had been made to it about the master policy and payments. There was also an investigation by the Office of Fair Trading last year. Within the master policy, differential premiums are charged for solicitors who have higher rates of findings against them.

Mr Swinney: From your comments, the Executive obviously gives some weight to that evidence and has concluded by putting provisions into the bill.

Maureen Macmillan: I will move on to a subject that may or may not be completely different, which is the right of audience of other professionals. Sections of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 that have not yet been commenced set out arrangements by which rights to conduct litigation and rights of audience in the Scottish courts can be granted to members of a professional or other body, other than the Law Society of Scotland or the Faculty of Advocates, when that is approved by Scottish ministers and the Lord President. When the bill was introduced, the Scottish Executive announced that those provisions were to be commenced at a future date. When does the Executive intend those sections of the 1990 act to be commenced?

Mike West: The first step towards commencement will be to remove a defect in the existing statutory provisions that creates a nonsensical position. A person might be a member of a professional body that has been approved and has acquired rights to conduct litigation on the part of its members, but if that member sought to exercise those rights, the member would be guilty of a criminal offence. That is a nonsense—it was an oversight when the 1990 bill was drafted—and section 42 of the Legal Profession and Legal Aid (Scotland) Bill corrects it. The Executive feels that that must be the first step. It will be for ministers to decide when commencement will be but, if we assume safe passage of the bill, it should happen early next year.

Maureen Macmillan: Do you know which professions will be enabled to practise in court?

Mike West: Interest has already been expressed by three professional bodies—the Institute of Trade Mark Attorneys, the Chartered Institute of Patent Agents and the association of commercial attorneys. Those three bodies have been in dialogue with us about commencement of the powers. It might be that other professional bodies acquire an interest after commencement of the provisions of the 1990 act has been announced, but we do not know which other bodies might be interested. Not many professional bodies have sought rights of audience under equivalent provisions in England and Wales, but what will happen in Scotland remains to be seen.

Maureen Macmillan: I am interested in the matter in the context of legal aid reform. The fact that a person must be represented in court by a solicitor has always been a sticking point, because legal representation is the most expensive part of the legal aid service. Will social workers and the staff of voluntary organisations eventually gain the right to address the courts? Where will the line be drawn?

Mike West: That will depend on the demand for rights of audience from professional bodies. Applications for such rights will be approved by the Lord President after consultation of Scottish ministers, who will consider safeguards. People who secure rights of audience will, for example, have to understand court procedure such as pleading procedures, and will have to have the usual safeguards of professional indemnity and

complaints handling procedures, so that clients are protected.

Maureen Macmillan: It has been suggested to me that rights of audience are what makes a solicitor a solicitor and that all other work could be done by a paralegal—although that might be using too broad a brush. The distinctions between solicitors and other professions will be blurred, but the bill will regulate solicitors extremely strictly. What is to prevent a solicitor from saying, "I will give up my solicitor's practising certificate because I can get lots of paralegal work and appear in court as another kind of professional. I can carry on my business without being regulated as strictly as I am regulated as a solicitor"?

Mike West: It is unlikely that solicitors will discontinue their practising certificates and seek to register with another professional body.

Louise Miller: The definition of "practitioner" in the bill includes people who will exercise the new rights of audience, so such people will be subject to the same complaint-handling regime.

Mike West: Yes. Such practitioners will fall within the remit of the new commission.

Maureen Macmillan: Will such people come under the umbrella of the Law Society of Scotland's regulations if they do work that is similar to solicitors', even if they are not a solicitor with a practising certificate?

Mike West: Yes.

Jackie Baillie (Dumbarton) (Lab): The "Strategic Review on the Delivery of Legal Aid, Advice and Information" and the more recent consultation paper "Advice For All" favoured grant funding as the mechanism for funding non-lawyers. I am confused that the bill runs contrary to the weight of opinion by opting to make advice and assistance available on a case-by-case basis.

Chris Graham (Scottish Executive Justice Department): The two approaches are not mutually exclusive. We certainly do not propose that non-lawyers should not be funded by grant funding. The strategic review made it clear that the principal source of funding for local non-lawyer advice services should be grant funding through local authorities, but the bill provides additionally for case-by-case funding in specific circumstances.

Jackie Baillie: I am clear that you already accept the principle of grant funding, as you have pilots with projects under part V of the Legal Aid (Scotland) Act 1986, as well as in-course advice pilots covering homelessness and a variety of other issues. If, however, you accept the principle of grant funding, why are you not putting it into operation just now?

Chris Graham: It was simpler, from both the legislative and the administrative points of view, to put the case-by-case funding into position now because we already had a model for handling it. More consideration would be required of how the grant funding of non-lawyer advisers would be compatible with the existing grant-funding mechanisms for local authorities.

Jackie Baillie: I do not want to put words into your mouth, but if I have understood you correctly the desire is to get to a grant-funding mechanism, but you just have not worked out how to do that in a simple way in the bill.

Chris Graham: Yes.

Jackie Baillie: That is disappointing. Are you aware of the criticisms that have been made by credible sources, which suggest that grant funding on a case-by-case basis will be bureaucratic and that agencies that are not geared up to do that will be asked to change almost the entire basis of their operation and to introduce means testing of clients? You will be aware that most advice agencies are not keen to do that before they consider whether they will provide their clients with a service. Is not this an opportunity lost? Cannot we take some time to get it right just now?

Chris Graham: We are taking the time to get it right. We have scheduled, over the next three to four weeks, a series of consultation meetings with the advice agencies to which you referred, and we will discuss the issue with them in detail.

Jackie Baillie: Excellent. You might want to reflect on whether amendments that you will lodge at stage 2 might please the committee. I am sure that the committee will, equally, be minded to help you out, given that we all want to get to a different position but have perhaps not had the time to do so.

Can I move us on to—

The Convener: Before you do, I suggest that our witnesses read the comments that were made in last week's debate on civil law. The issues of getting advice timeously and the costs and the bureaucracy that are involved in obtaining grant aid for individual cases were raised by several members, to whom the minister gave a partial response. I offer that as a point of information.

Jackie Baillie: Thank you, convener.

Table 1 of the "Advice For All" consultation paper outlines five short-term to medium-term proposals, all of which I like. I am slightly confused, though, because only two of them appear in the bill and we have just acknowledged that one appears only in part in the bill. Where is the remainder of those proposals?

Chris Graham: Some of the other proposals do not require a change to primary legislation, so they will be taken forward either through secondary legislation or through administrative changes.

Jackie Baillie: Are those proposals the severe hardship test and the new financial eligibility criteria? I want to get a handle on the specifics of how you want to move forward.

Chris Graham: Most of the provisions to enable the Scottish Legal Aid Board to have flexible powers to secure and fund the provision of publicly funded legal aid in criminal and civil cases—it is the same issue—can be put in place through existing powers in the primary legislation; through changes to secondary legislation; or through administrative change in the procedures of the Scottish Legal Aid Board. Unfortunately, the proposed provision to relax the severe hardship test in section 19 of the 1986 act has not made it through to the bill due to an administrative oversight on my part, I am afraid. We agree that it should be included, and it was a provision on which we had prepared instructions; for some reason, however, they did not transfer through to our legal people at the time.

Jackie Baillie: We can look forward at stage 2 to an amendment that will introduce that provision.

Chris Graham: Yes.

Jackie Baillie: Excellent.

Maureen Macmillan: Is it a case of inadequate professional services?

Jeremy Purvis: Or negligence?

Jackie Baillie: That is very cheeky.

Chris Graham: Fortunately—or unfortunately—I am not a solicitor.

Jackie Baillie: My final question—before the committee members descend on our witnesses—is about the new financial eligibility criteria. Is that an administrative change?

Chris Graham: Are you referring to the clear and fixed financial eligibility criteria for criminal legal aid?

Jackie Baillie: Yes.

Chris Graham: We will consider that further because it is not an issue on which we got a very clear picture from the consultation responses. Relatively few respondents addressed that question, and many of those did not come up with a consistent position. It is a matter that we will consider in more detail.

Jackie Baillie: Are you going to lodge an amendment on that?

Chris Graham: We do not have that in mind for stage 2.

Jackie Baillie: Okay. Thank you.

The Convener: I thank our witnesses for their forbearance and openness in what has been almost a two-hour meeting. The clerks will copy to you questions on which you have said you will get back to us with written comments. That may be helpful to you, unless you already have somebody scribing for you at the back of the room. Thank you for attending today's meeting.

Witness Expenses

15:59

The Convener: Item 2 is Legal Profession and Legal Aid (Scotland) Bill witness expenses. I ask the committee to delegate to me responsibility for arranging for the Scottish Parliament Corporate Body to pay, under rule 12.4.3 of the standing orders, any witness expenses that are relevant to the committee's consideration of the bill. Is that agreed?

Members *indicated agreement*.

Items in Private

16:00

The Convener: Item 3 is to ask the committee whether it will reflect on the main themes arising from the evidence received on the Legal Profession and Legal Aid (Scotland) Bill in private at subsequent meetings. Is that agreed?

Members *indicated agreement*.

16:01

Meeting continued in private until 17:34.

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