JUSTICE 2 COMMITTEE

Tuesday 2 May 2006

Session 2

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JUSTICE 2 COMMITTEE
12th 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:

Mr John Swinney (North Tayside) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Oliver Adair (Law Society of Scotland)
Craig Bennet (Scottish Law Agents Society)
Michael Clancy (Law Society of Scotland)
Caroline Flanagan (Law Society of Scotland)
Anne Hastie (Law Society of Scotland)
Douglas Mill (Law Society of Scotland)
Valerie Stacey (Faculty of Advocates)
Robert Sutherland (Scottish Legal Action Group)
Ken Swinton (Scottish Law Agents Society)
Philip Yelland (Law Society of Scotland)

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 2 May 2006

[THE CONVENER *opened the meeting at 14:02*]

Item in Private

The Convener (Mr David Davidson): Good afternoon, ladies and gentlemen. I welcome to the 12th meeting in 2006 of the Justice 2 Committee members of the committee and our adviser on the Legal Profession and Legal Aid (Scotland) Bill, Margaret Ross, whom I thank on behalf of committee members for the work that she has done so far.

I noted from the 600-odd consultation responses that I went through that some people seem to think that I have a son who is a lawyer in Scotland. That is not the case. My son was called to the English bar some years ago and then went to the West Indies, where he became an advocate under English law. He is now a solicitor who practises in England. He has no Scottish qualifications whatsoever and is not capable of doing work as a lawyer in Scotland. He is not a member of the Faculty of Advocates or the Law Society of Scotland. I say that because some people said in their submissions that they thought that I had a direct family connection with the professions that we are considering under the Legal Profession and Legal Aid (Scotland) Bill.

Do other members want to say anything?

Maureen Macmillan (Highlands and Islands) (Lab): I refer to the declaration that I made last week. I have received e-mails that say that I should not be a member of the committee. I make it clear that that is nonsense.

The Convener: Thank you.

Agenda item 1 is to consider whether to take in private agenda item 3, on consideration of the written evidence on the Legal Profession and Legal Aid (Scotland) Bill that we have received. Do members agree that we should take that item in private?

Members *indicated agreement*.

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

14:04

The Convener: Agenda item 2 is our second evidence session on the Legal Profession and Legal Aid (Scotland) Bill. There are three panels of witnesses.

Panel 1 is from the Law Society of Scotland. I welcome Caroline Flanagan, who is the president of the society; Douglas Mill, who is its chief executive; Michael Clancy, who is director of its law reform committee; Philip Yelland, who is director of its client relations office; Oliver Adair, who is convener of its legal aid solicitors committee; and Anne Hastie, who is a non-solicitor member of one of the society's client relations committees. It would be helpful if one member of the panel spoke on behalf of the society and brought in others to speak as required. Further to the submission that the society has already given the committee, are there any new comments that someone would like to make briefly?

Caroline Flanagan (Law Society of Scotland): First of all, thank you for introducing us all. I am conscious of the fact that we have brought quite a large team, but we thought that it was important for you to have the benefit of the expertise of the various people who are here. I know that you do not want a long opening address, but I would like to mention one of the things that we want to stress today: we believe in the policy behind the bill that there should be an independent commission to deal with service complaints. There has been a lot of comment in the media, and I would not like the committee to get the impression that we have moved back from where we said we were last year. We think that there should be a commission, but we do not think that it should deal with conduct issues, other than those to do with handling complaints. We do not think that it should deal with negligence or that it should have reach over the master policy and the guarantee fund, but we believe in the fundamental principle.

We are doing what we always do in relation to law reform—the committee will have seen members of our team here before—which is to try to examine things dispassionately and with the public interest, as well as the profession's interest, in mind, to try to ensure that the law that is passed is good law that makes things better for the Scottish public.

The Convener: Thank you for those comments. I shall start the questioning on behalf of the committee by asking you a question that follows on from the comment that you just made about supporting the proposal that the new commission

should consider service complaints. Given that it is recognised that consumers tend to have a fairly low level of confidence in the current complaints-handling system, why should the professional bodies retain responsibility for considering complaints about conduct?

Caroline Flanagan: I shall leave to one side the question whether there is a low level of consumer confidence, because I do not know that that is necessarily correct. The principal issue in relation to conduct is whether or not the profession is independent. Conduct is central to being a solicitor and being part of the profession. Service is very much about somebody who may have a complaint about a bad job and who may be looking for consumer compensation. In a democratic society, it is key that the solicitor or legal adviser is independent. The solicitor often stands between the client and the state, and it is imperative that the state does not have control over that adviser. We know of no other profession over whose conduct the state would have control in a democracy. The same clearly applies to advocates.

The previous Justice 1 Committee felt that it was appropriate that solicitors should deal with complaints about conduct. I understand that the Deputy Minister for Justice believes that solicitors should continue to deal with complaints about conduct, and the bill is based on that approach. As far as we are concerned, the essence of independence is that the profession says who can come into it and who should not have the right to be a solicitor. We think that the two issues are quite different. Where the bill has reach over conduct, we think that it goes too far, so we do not think that the proposed Scottish legal complaints commission should superimpose its decisions in relation to conduct matters on the Law Society of Scotland. We are happy for it to look at how we handle complaints: the Scottish legal services ombudsman will go and we accept that somebody has to look at how such issues are handled. However, we do not think that the commission should, as Mr Swinney put it last week, put its toe in the water in relation to how to deal with conduct complaints. I know that the committee was interested in that issue, and we are anxious to explain what we see as the difference.

The Convener: During the debate in the chamber a couple of weeks ago, I pointed out the following parallel to Mr Swinney. The medical profession has the General Medical Council, which looks at conduct and standards, and the British Medical Association, which has the trade union role. Does the Law Society of Scotland have any views about such a division?

Douglas Mill (Law Society of Scotland): That issue is one that we wanted to raise with you early on. It disappoints me that, at times, the Law Society of Scotland is treated as if it were nothing but a mere trade union. We are a statutory body that was created by the Westminster Parliament under the Legal Aid and Solicitors (Scotland) Act 1949, and we have a section 1 obligation to act on behalf of the profession and on behalf of the public in relation to the profession. It is not in our gift to decide to reinvent ourselves as a trade union. Indeed, our main contact with this Parliament is through the law reform process. We do our best to reform the law—and the bill that we are considering now is no different—in the best interests of the public and the profession.

There is a deeper question about whether, ultimately, it is a matter for the Scottish Parliament to determine whether to re-examine or repeal that section 1 obligation, but such a provision is not within the terms of the bill. However, at the moment we have no drive towards being a trade union, and we are not speaking to you today as mere trade unionists.

The Convener: Thank you.

I welcome John Swinney, who has joined us. Do any other members have questions?

Bill Butler (Glasgow Anniesland) (Lab): Mr Mill, can you define for me a “mere” trade unionist, as opposed to a trade unionist?

Douglas Mill: I am not being pejorative about trade unions, which fulfil a valid role in society; I am talking about the “mere” interest of our profession—or the interests of our members. We have a statutory responsibility that goes beyond looking at everything that we do, which includes admitting solicitors to the profession, educating them or providing them with continuing professional development. We have to consider not just the interests of our members, but the interests of the public, and that is a major balancing factor.

Bill Butler: I am grateful for that clarification. I am sure that you will agree that language is very important.

Colin Fox (Lothians) (SSP): Like the panel, I do not want to get into whether the public have a low or high degree of confidence in the Law Society. I am sure that we all want to ensure that they have the utmost confidence in the Law Society.

The independence of the Law Society has been highlighted. What is the Law Society’s view of the idea of establishing a wholly independent commission that would be responsible for all complaints, not just those in certain subdivisions, which we may touch on later?

Caroline Flanagan: That goes back to what I said before and would imperil what we see as the

independence of the legal profession. I understand the thought of putting everything under one roof. However, last year, having looked at the responses to the consultation, we said that, in service complaints—which are 70 to 80 per cent of the complaints that we handle—we were never going to win the perception battle. We felt that we had won the reality battle, in terms of how the complaints were handled, but that the perception was past praying for as long as the Law Society looked at those complaints. We think that there is a big difference between service complaints and conduct complaints.

The idea that conduct complaints should be handled by an independent body was not consulted on. The option D that is, effectively, before us now only ever related to service complaints. If we had been asked last year whether we wanted to hive off service complaints if conduct complaints were to go as well, we would have said, "No. Keep them all at the Law Society." We are saying that if you are going to split the types of complaint, that should be done so that service complaints go and conduct complaints stay. If there is concern that they should all be dealt with under the one roof, we would say that that should be our roof if we are to maintain the independence of the profession.

Colin Fox: We will come to the separation of those two matters in due course. Is not there a danger that the Law Society is overplaying its hand by saying that its independence is being called into question when we are talking about a complaints procedure? We are talking about an independent commission looking at complaints, rather than an independent commission trying somehow to run or substitute itself for the Law Society.

Douglas Mill: We see two definitions of independence. One—which, I think, the committee is driving at—is that the system should be independent of the profession. In relation to service matters, we fully concede that. Our concern is also about independence from the Government. As the president said earlier, we are concerned that there are certain areas of work in which solicitors are the only people who stand between the citizen and the state. There are also unpopular areas, such as the defence of criminals, cases involving damp houses and immigration appeals, in which the solicitor might not be too popular with the state.

One of our profound concerns centres on compliance with the European convention on human rights. We think that the body that is proposed in the bill would not be sufficiently independent from the Government for us to be relaxed about that. Michael Clancy has been in touch with Lord Lester of Herne Hill, and he has clarified our concerns in relation to the ECHR.

Caroline Flanagan: It is not so much from the profession's point of view that independence is so important, but from the point of view of the people of Scotland, who deserve an independent profession. It is important for the profession—which is part of the public—but it is more from a public perspective that the independence of the legal profession is key.

14:15

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): We will hear from the Faculty of Advocates later, but I was just going through its written submission to the committee. I am interested to see that its existing complaints committee is comprised of

"four persons drawn equally from a panel of members of Faculty and lay persons nominated by the Scottish Ministers."

That does not imperil the independence of the profession, does it?

Douglas Mill: We are not here to answer on behalf of the faculty. Our system is entirely different and is a much more considerable system than the faculty's. I will ask Philip Yelland, our director of client relations, to answer that. Anne Hastie is here to speak on the considerable lay input that we have into our existing system. We are—

Jeremy Purvis: I am sorry for interrupting, but my point was about the appointment of lay members by ministers.

Douglas Mill: Yes, I know. The Scottish Solicitors Discipline Tribunal is partly lay and is appointed, to a certain extent, by ministers as well. Therefore, to an extent, we already have that procedure. The solicitor members of the tribunal are appointed by the Lord President, and the non-solicitor members—Philip Yelland will be able to tell you about ratios and numbers—are appointed by Scottish ministers. Our concern is that the proposed commission is far closer to Scottish ministers than it should be for there to be robust independence.

Michael Clancy (Law Society of Scotland): It is important to look at schedule 1 to the bill when considering the degree to which Scottish ministers will have a role to play in the appointment of the proposed commission. Paragraph 2(2) of schedule 1 states:

"Members are appointed by the Scottish Ministers."

Paragraph 5 makes it clear that Scottish ministers may be involved in the removal of members of the commission. Paragraph 7(1) states:

"The Commission is to pay to its members such remuneration as the Scottish Ministers may in each case determine."

Further on, paragraph 17(1) states:

"The Scottish Ministers may give the Commission directions of a general character as to the exercise of the Commission's functions".

That is slightly more than Scottish ministers having a role in connection with the nomination of part of a disciplinary structure. Their role goes beyond the Government's role in any existing structure in these islands and reflects the position that is assumed in the white paper from the Department for Constitutional Affairs, on the creation of the legal services board and the office for legal complaints in England and Wales.

That is where I draw the distinction between the constitutions of the faculty's discipline committee or investigative committee and the Scottish Solicitors Discipline Tribunal, and that of the proposed commission. The committee should bear in mind the fact that members of the Scottish Solicitors Discipline Tribunal are appointed not by Scottish ministers, but by the Lord President; therefore, there is a judicial input into the Scottish Solicitors Discipline Tribunal. It is important to recognise the distinctions between the existing systems and the commission that is proposed in the bill.

Jeremy Purvis: That will open the debate on, for example, the appointment of the Lord Advocate as an independent prosecutor.

Michael Clancy: You might think that; I could not possibly comment.

Jeremy Purvis: There will be on-going debates. The committee would like to know where the balance will be. As Mr Mill said, to a certain extent, ministers are already involved in the Law Society; however, he then said that the proposals take us in the wrong direction. The committee would like to know where you think the balance should be. You are not saying that ministers should not be involved at all—or perhaps you are. Lord Lester's opinion indicated that, because ministers are involved, somehow the tribunal is not going to be independent. Where should the balance be?

Douglas Mill: It is a question of balance, and the detail is important—detail on which we are willing to engage with the Executive. We do not think that it is beyond the wit of mankind to work out something that balances all the interests. However, what is proposed in the bill is extremely one-sided.

The Convener: The membership of the society's committee for conduct complaints is 50 per cent lay and 50 per cent professional. If the commission had such a balance, do you think that it would be equipped to deal with conduct complaints?

Philip Yelland (Law Society of Scotland): You are quite right to say that the membership of the professional conduct committee, which deals with complaints about professional misconduct, is 50 per cent solicitor and 50 per cent non-solicitor, which is the same as the client relations committees, which deal with service complaints. The move to 50:50 membership, which we took on board very quickly after it was recommended by the previous Justice 1 Committee, has worked very well for us.

The Convener: What if, later on in the bill's passage, such a proposal is made for the commission?

Douglas Mill: The bill does not propose such a committee structure for the commission. I think that we have still to see a lot of the detail, but the proposed system appears to be based on case managers making decisions. That is a retrograde step, because it means that we lose both professional and lay expertise.

The Convener: Colin Fox will now ask some questions on a topic that has been exercising the committee: the distinction between service and conduct complaints.

Colin Fox: Will you give the committee a clear idea of what a service complaint is and how it differs from a conduct complaint?

Philip Yelland: Perhaps I can provide a couple of helpful examples. As we indicated earlier, service complaints relate to the service that the client receives from the solicitor and might involve failure to return telephone calls, answer letters quickly or explain how expenses will be dealt with. Conduct complaints, on the other hand, relate to matters of professional discipline and involve breaches of practice rules or the solicitors' code of conduct, such as lying to a client, taking a client's money, being dishonest or not acting independently.

Colin Fox: Do the public understand that distinction? If someone made a complaint to the Law Society of Scotland, would they understand the categories under which it might be dealt with?

Philip Yelland: Some people understand the distinction, but not everyone does. In recent years, we have tried to improve our literature to explain it to the public. I should point out that some people who complain to us do not seek financial recompense; they simply do not want their solicitor to continue, because they feel that he or she has acted improperly.

Colin Fox: A number of people, including the Scottish legal services ombudsman, have pointed out that complaints can often straddle both categories. In light of that, can the bill's provisions stipulate that service complaints should be dealt with in one way and conduct complaints in another, or will such a separation cause difficulties?

Philip Yelland: Those provisions might well cause difficulties, but they can be overcome. We already co-regulate with a number of bodies, such as the office of the immigration services commissioner, which has made it clear that the approach works quite well. Once the architecture of the new commission becomes clear, we will simply have to sit down and find a way of dealing with the matter to ensure the minimum of disruption, delay and bureaucracy for the person making the complaint.

Colin Fox: Who makes the decision whether a complaint is handled as a service complaint or as a conduct complaint?

Philip Yelland: Under the Law Society of Scotland's current process, we agree the issues with the person who makes the complaint and, after considering the statutory definition of inadequate service and what falls into the category of potential professional misconduct, the case manager decides whether it is a service or a conduct matter.

Colin Fox: Is it fair to say that, no matter what category complaints fall into, having a single mechanism might make things far simpler and ensure that problems never arose?

Philip Yelland: Superficially, things might appear simpler. However, as you proceeded with an investigation and the decision-making process, you would get into difficulties trying to decide what should be done. As I pointed out earlier, there is a distinct separation between a service complaint, which involves the provision of poor service to a client, and complaints about professional discipline.

Caroline Flanagan: Anne Hastie wants to make a couple of comments.

Anne Hastie (Law Society of Scotland): Perhaps the distinction is not that clear to the public. I am a member of a client relations committee, which handles policy, strategy and so on. The non-solicitor members have been keen to ensure that the literature can be easily understood by the public, does not contain too many terms that could be misunderstood and makes clear what the issues are and how they can be dealt with. I have been a non-solicitor reporter for the Law Society of Scotland for about three years, and I was surprised to find that the Law Society in England and Wales does not have such positions. When I told members of the Law Society in England and Wales that I was a non-solicitor reporter they asked, "What's that?"

Perhaps Philip Yelland did not make it clear that the case managers in Scotland, unlike those in England, take on the case, which then goes to the sifting panel, which is made up of solicitor and non-solicitor volunteers. It will then go to either a non-solicitor reporter or a solicitor volunteer reporter to investigate—it is not the case managers who carry out the investigation and reporting, which is what happens in England. Thereafter, the case goes to one of the committees that investigate complaints, the membership of which is 50 per cent solicitor and 50 per cent non-solicitor. We on the complaints, or client relations, committees decide whether the complaint is upheld.

In all the media coverage, the other 85 non-solicitors and I were passed over; we just did not seem to exist. The public are definitely involved; we try to make the process clear and present the consumers' point of view.

Mr John Swinney (North Tayside) (SNP): As I understand it, when a complaint is made against a solicitor, it is investigated first by a Law Society reporter. Is that correct?

Philip Yelland: Once a complaint has come in and we have agreed the issues, the case manager will put those issues to the solicitors for a response. The response and the solicitors' file will come to us and then to a reporter, who, as Anne Hastie said, can be a solicitor or a non-solicitor, depending on the type of case. Thereafter, the report comes back and the parties have a chance to comment on it before it goes to a client relations committee for consideration. The client relations committee, which is made up of 50 per cent solicitors and 50 per cent non-solicitors, then makes the decision, unless the recommendation relates to professional misconduct, in which case it goes to the professional conduct committee, which is also 50 per cent solicitors and 50 per cent non-solicitors. The professional conduct committee will then decide whether somebody should be appointed to prosecute the matter before the independent Scottish Solicitors Disciplinary Tribunal; it may reach a different view, which would not involve prosecution before the tribunal.

Mr Swinney: Are there circumstances in which the view expressed by a reporter commissioned by the Law Society to examine a case is rejected by the client relations committee?

Philip Yelland: Yes, that can happen. If it does, the decision that the complainer gets, which is different from that recommended by the reporter, will be explained by the committee in the minute of its meeting, which is issued to both parties. There should be clear reasoning why there is a change from what the reporter has recommended. If the complainer is unhappy with that decision, they can take the matter to the Scottish legal services ombudsman as a handling complaint. Under the bill, if we were dealing with a conduct matter, that would still happen: the complainer would be able to take the matter to the new commission, which would be wearing the current ombudsman's hat.

Mr Swinney: Let us say that a committee rejects a reporter's findings and the client goes to the ombudsman, who agrees with the reporter. Does the Law Society on occasion refuse to implement the recommendations expressed by the ombudsman?

Philip Yelland: I think that I am right in saying that, if you read the ombudsman's reports of the past few years, you will find that in more than 98 per cent of cases we have accepted the ombudsman's recommendations. If we do not accept those recommendations and the ombudsman thinks that a decision is unreasonable, she has the power to publicise that view. I think that I am correct in saying that during the previous ombudsman's five and a half years in office, there was publicity of matters in the national press on only three or four occasions. We accept most recommendations.

Mr Swinney: When the professional conduct committee judges that individuals are guilty of professional misconduct, which you said meant being dishonest or lying to a client—Mr West gave us other definitions last week—are such individuals always prosecuted at the tribunal?

14:30

Philip Yelland: Current legislation says that the council of the Law Society may prosecute—it is not required to do so—and circumstances could arise in which the professional conduct committee decided that, for good reason, a solicitor was not to be prosecuted but the conduct would be noted on their record, so that if it recurred, the matter could return to the committee for further consideration. However, I think that in fewer than five cases last year was a matter noted rather than prosecuted.

Mr Swinney: So in some circumstances, although the Law Society finds an individual guilty of professional misconduct, no disciplinary action is taken against them.

Philip Yelland: That is incorrect. The society has no power to make a finding of professional misconduct. If the professional conduct committee believes that professional misconduct has taken place, it can send the matter to a fiscal to prosecute before the independent tribunal, which decides whether there was misconduct. Alternatively, if the professional conduct committee decides not to prosecute a matter that may be misconduct, it can merely express the view that behaviour appears to be professional misconduct

In summer 2004, the society said publicly and clearly that it should have powers to deal with low-level misconduct, to enable that to be dealt with properly. The bill proposes a finding of unsatisfactory professional conduct, but it will not allow the society to deal with low-level misconduct, such as solicitors who do not reply to two or three letters.

The Convener: In the early stages of the process, which you described, a complaint is referred to the solicitor who dealt with the client. Does the complainer see the solicitor's response?

Philip Yelland: The complainer normally sees the response, unless the complaint is made by somebody who is not the solicitor's client. In those circumstances, issues of confidentiality can arise so, with the ombudsman's assistance, we have developed a procedure under which the response would not normally be copied. However, if the complainer is the solicitor's client, they will see the solicitor's response.

The Convener: That answer is helpful.

Douglas Mill: I will add to Mr Yelland's earlier description of the process. One recommendation that the Justice 1 Committee made some years ago was that the Law Society should create firewalls, which are what Mr Yelland described. Prosecutions no longer go through our council—that was an important piece of governance redesign that we put in place to keep prosecutions within the ambit of 50 per cent lay representation.

The Convener: Bill Butler will ask about ECHR compliance, which has been mentioned.

Bill Butler: Whether the new commission is ECHR compliant is an issue. The Executive and the Presiding Officer say that the bill complies with the ECHR, but Mr Clancy said that, because of provisions in paragraph 2 of schedule 1 on appointment, removal and remuneration and because of the ability to give directions of a general character, the Law Society felt—having obtained an opinion from Lord Lester—that the commission would not be ECHR compliant as it would not be an independent and impartial tribunal. For the record, will you summarise all the changes that the Law Society thinks are needed to make the bill ECHR compliant and to help the Presiding Officer and the Executive out of the quandary that you think they are in?

Michael Clancy: As the committee knows, I am always here to be helpful. I will try my best. You are correct: ministers and a Deputy Presiding Officer certified that the bill complied with the ECHR.

Bill Butler: I take it that the Deputy Presiding Officer did so in the Presiding Officer's name.

Michael Clancy: The Parliament's officials have taken that view. What the Law Society has presented to the committee is an opinion from a leading Queen's counsel who has great experience of ECHR matters. You might say that

that just means that there are other opinions—sure enough, there are. When the society spoke to the Executive in the latter stages of last year, without the benefit of the opinion of Lord Lester of Herne Hill QC, we came to the view that any structure would have to be compliant with the ECHR. I do not need to rehearse for the committee the necessity for any measure that the Parliament passes to comply with section 29 of the Scotland Act 1998 or with section 6 of the Human Rights Act 1998—the committee knows that only too well. However, there are always views and notwithstanding the fact that my colleagues and I, in discussions with Executive officials, made the point that any new structure would have to be ECHR compliant, the bill was presented to Parliament in the fashion in which it appears before us today.

The explanatory memorandum sets out the Executive's case. It believes that the proposed body will be ECHR proof because it will be an administrative tribunal that will exercise a quasi-judicial function rather than a judicial one. The Executive also believes that the commission will be independent because the Scottish ministers will really be "nominal appointers"—I think that that is the correct phraseology—of the commission members because appointments will have to comply with Nolan certification and go through the standards and appointments procedure. That is all very well, but we are trying to explain that other experts have other views. We must find some means of ensuring that the bill is proof against challenge. It is clear that some things could be done to the bill to proof it against challenge.

Bill Butler: Such as?

Michael Clancy: The issues of independence that I spoke of could be dealt with by further insulating the commission from political interference or the possibility of it. There might be a role for the Judicial Appointments Board for Scotland, the Parliament or the existing judiciary to become involved in appointments to the commission. After all, if it is going to exercise the powers of a court, it might fall under the jurisdiction of the court.

Other issues arise regarding proofing. On whether there will be adequate supervision of the commission, we must remember that case law says that there can be certain challenges to the independence of a body if there is adequate external supervision by a court. However, the bill will not provide adequate supervision. The appeals committee will not be sufficiently detached from the commission. I think that there would need to be provision for an appeal to the court for the commission to be insulated fully against challenge.

Bill Butler: Obviously, you are saying that the Law Society supports having an external right of appeal.

Michael Clancy: Yes.

Bill Butler: In that case, what do you make of the view of the Scottish Law Agents Society that such a right would be costly and cause unwelcome delays and that it would be preferable to focus on addressing the independence of the proposed commission to make the bill ECHR compliant? In other words, it is the independence of the commission, according to the Scottish Law Agents Society, that is the nub of the matter and not an external right of appeal. Does the Law Society have a view on that?

Michael Clancy: With the best will in the world, it is not for me to battle with the Scottish Law Agents Society over this committee table. I can do that privately in the corridor outside after the meeting.

Bill Butler: I am asking only for an opinion, not a full-scale war.

Michael Clancy: You know me; I am not into full-scale wars.

Bill Butler: I am a pacifist myself—on certain occasions.

Michael Clancy: I am quite prepared to express my opinion on some things, but I am not sure that this is one of them. If the question of independence is resolved, it will reduce the importance of external appeal. However, an external appeal is the best way to be 100 per cent certain that the bill is proof against all possibility of challenge.

Bill Butler: I think that you are saying that, although having an external appeal might be the best way it is not the only way, and that if the independence question were resolved, that might be acceptable to the Law Society. Is that what you are saying?

Douglas Mill: There is another element to this, which is the public's right to appeal. I make it very clear that we do not think that it is just the solicitor who requires a right of appeal.

When we responded to the Executive's consultation last year, we identified that the one thing that is missing from our existing system is a meaningful appeal mechanism. The public do not realise that their only right of redress is through the Scottish legal services ombudsman, who can look only at handling issues.

We felt that the existing system could be improved by providing some fairly robust, cheap and cheerful, quick and dirty appeals system rather than something as full-blown and costly as a judicial review. Notwithstanding what fixes the bill from an ECHR point of view, the profession, and more particularly the public, will look to go somewhere else. The public will not consider an

internal appeal from the proposed commission to be a real appeal. The commission will end up with the same perception difficulties that we have.

Bill Butler: What would the Law Society see as an ordinary appeal process without going to a full-blown judicial review?

Caroline Flanagan: I can help you with that. We discussed that point because it is no good saying, "There isn't an appeal," full stop. It is helpful to come up with some ideas.

You could create a separate structure, but that would probably be unhelpful because it would create yet another layer of expense. The easiest thing to do would be along the lines of a licensing appeal. You could take an appeal to a local sheriff on a summary basis. The local authority makes decisions in licensing cases that involve taxi drivers, for example, and there is an appeal to a sheriff. It is not terribly expensive, it is quick and it would provide that measure of independence and the second bite at the cherry that the public will probably want, as Douglas Mill said.

Bill Butler: Is a licensing appeal through local government really analogous to what we are discussing?

Caroline Flanagan: The type of work is not analogous, but the procedure could be. That procedure is quick and it is not expensive for the parties.

Douglas Mill: We consider the sheriff court to be the proper forum because of its local nature, which assists the public.

Jeremy Purvis: I want to be clear about the recourse to the courts as set out in the bill. The point at issue is the appeal by solicitors, rather than by members of the public, who can go to court if they so choose. Is that correct?

Douglas Mill: No. We think that both the solicitor and the public should have an equal right of appeal. Either aggrieved party should have a summary right of appeal.

Jeremy Purvis: But is it the case that the bill would allow members of the public to appeal to the court, but not solicitors?

Michael Clancy: It is not an appeal to the court. Members of the public could take an action for negligence to the court, but a solicitor is effectively disfranchised from his or her rights under article 6.1 of the ECHR to have an independent and impartial tribunal to deal with a civil right or obligation. That is the problem. The commission would not be an adequately independent and impartial tribunal.

Jeremy Purvis: Lord Lester received information about other quasi-judicial bodies in Scotland before he wrote his opinion, paragraph 15 of which states:

"I assume for the purposes of my advice that the existing disciplinary arrangements"

are compatible with the ECHR. Therefore there is an assumption that we have a neat system throughout Scotland and that everything is compliant. Is that correct?

Michael Clancy: When I gave Lord Lester his instructions, I did not speak about a general tour d'horizon of disciplinary systems in Scotland. We talked about the system of regulation of solicitors.

14:45

Jeremy Purvis: Right. Paragraph 15 talks in general terms about

"the legal professional bodies and the discipline tribunals".

Michael Clancy: Of course, the fact is that those arrangements are proof against the ECHR. In the past few years, the cases of Robson and Thomson v the council of the Law Society of Scotland have clarified beyond doubt that the discipline tribunal processes are ECHR compliant.

Jeremy Purvis: I want to return to Bill Butler's point about what would be required to make the bill compatible with the ECHR. Lord Lester is clear that simply changing the independence of the membership of the commission would not be sufficient for his opinion on compliance to change. He states that there would have to be a right of appeal against the commission's decisions.

Michael Clancy: That is correct.

Jeremy Purvis: So his opinion will be the same, even if there is a compromise on the membership of the appeals committee or the commission.

Michael Clancy: Independence would go only so far. For the body to be fully compliant with the ECHR, it is important for there to be a right of appeal. I am sure that Lord Lester would be happy to explain that personally to the committee, if members wanted to invite him.

Jeremy Purvis: How much would he charge?

Michael Clancy: That would be for the committee to negotiate with Lord Lester.

Colin Fox: Last week, the committee heard evidence from the bill team. We pressed them on the apparent inconsistency in the bill that solicitors will have the right to appeal against the commission's decisions, but the general public will not. Perhaps you can shed light on the current circumstances. At present, what right of appeal do members of the public have in the Law Society's complaints handling system?

Philip Yelland: With service complaints, the public do not have a direct right of appeal, although they have the right to refer a handling complaint to the Scottish legal services

ombudsman. In some of the ombudsman's annual reports, she has expressed concern that many people have gone to her with the view that they are appealing, whereas the ombudsman's office does not have a power to take appeals. In a service case, the solicitor has a right of appeal to the independent discipline tribunal against a finding of inadequate professional service, which could involve an award of compensation or a refund of fees.

With matters of professional misconduct that are dealt with by the discipline tribunal, the solicitor has the right of appeal to the Court of Session. In that situation, the council of the Law Society steps into the shoes of the complainer to do the prosecution before the tribunal and has the power to appeal against the decision, if, for example, it thinks that a solicitor should have been struck off rather than only restricted or suspended.

Colin Fox: I want to ensure that I understand the matter clearly. With service complaints, the general public have no right to appeal decisions, but the solicitor has that right.

Philip Yelland: That is correct, at present.

Colin Fox: I am concentrating on the present. With conduct complaints, the Law Society of Scotland, in one guise or another, steps into the shoes of the member of the public and carries out the prosecution. The solicitor has the right to appeal, but the member of the public does not have the right to appeal in their terms, because somebody is standing in their shoes. Therefore, in effect, under the current system, members of the public have no right of appeal in either category of case. Under the bill, the public will have no right of appeal, either. That is something that we need to address.

Philip Yelland: That is right.

The Convener: We will now consider the financial impact on the legal profession of the proposals.

Jeremy Purvis: One concerning aspect in the submissions are the comments on the bill's potential to force certain categories of solicitor out of the market. We have received lots of written evidence on that matter. I will read the evidence from one firm, although I am not sure whether this is a matter of public record, so I will not mention the name. It states:

"My firm provides advice to some of the poorest members of society. We represent people who have mental health issues; require guardians; have difficulty in understanding legal concepts and who have unrealistic expectations of outcomes."

The submission goes on to say that the bill

"will require to be considered by every practice in Scotland. Firms will close and those clients who can least afford to go without representation will be most disadvantaged."

That is a deep concern. What research has the Law Society done into the market impact of the proposals?

Caroline Flanagan: No direct research has been done, because clearly there has not been enough time between seeing the bill for the first time and giving evidence today.

We are attempting to address the law of unintended consequences. We understand some of the aims of the bill, but it is important that this committee—which has to take the bill and make it as good as it can be—knows what the consequences may be.

Members will have seen from our submission that most complaints come in certain areas of work. That is not because the solicitors are in some way bad, but because the areas of work are areas in which people make distressed purchases or have unrealistic expectations.

I think that I have seen the response that you quoted, Mr Purvis. In certain cases, some clients may not be in a position fully to understand what they are being advised on. We are concerned that in civil legal aid, in particular, and in rural areas—indeed, in any situation that does not involve big commercial firms—solicitors will consider certain areas of work and say, "This is not worth the risk." Also, in private client cases the risk and the additional cost of regulation can be passed on to the client, but in legal-aid cases the fee is fixed. We therefore think that the downward trend of civil legal aid—which already concerns the Scottish Legal Aid Board and the Executive—will almost certainly accelerate. No one will take on certain areas of work for which the fee is not very good, the risk of complaint is high, and a fee has to be paid to the commission even if the work was done perfectly. We have real concerns about that.

Jeremy Purvis: We are in danger of conflating three components—the bill procedures, the levy and the type of work. However, as you have said, you have done no research on any of them. There has obviously been time to obtain legal opinion but not enough time to do research among your members.

Douglas Mill: There is a great distinction between obtaining legal opinion, which can be done quite quickly, and doing meaningful research.

I, too, am aware of the response that you quoted, and I think that you will find that it is a law centre response. Anne Hastie has a background in citizens advice and we are concerned about the disproportionate impact of the complaints commission on the coalface of the profession—on people working in Scots law in practices that may be in rural areas or in poorer parts of towns or cities and which do the type of work that is likely to

produce complaints. We are talking about cases in which people are stressed. Big firms tend not to have a record of complaints—not because they have much better lawyers than the lawyers in the smaller firms but because they have a corporate client base and different ways of sorting things out.

There is one statistic that we are in a position to arm the committee with at this stage. We understand that, of the firms registered for civil legal aid—and the number is reducing—50 per cent drew less than £20,000 from the Scottish Legal Aid Board last year. A lot is being done round the margins of legal aid and the president was right to suggest that the main concern is that solicitors will have to let their heads rule their hearts when doing that kind of work, which tends to be done on a pro bono basis.

Jeremy Purvis: Let us leave to one side the complaints levy, which the committee will come back to when considering the financing of the proposed measures. If a firm of solicitors is operating with difficult clients in a difficult area or in an area where provision is sparse, and if the firm is good and has a record of providing good services, complaints will not start to come in from its clients just because a new commission has come into being. The firm's profile will already exist. That is why I was asking about research. I was hoping to hear that you had profiles of firms already, with information about the types of firms and the types of cases that led to complaints. I had expected you to have that information and to be able to tell the committee about it.

Douglas Mill: We can certainly assist the committee with that because we will be able to get that information from our own records.

There are two reasons why a firm should be concerned. First, a disproportionate penalty of £20,000 is proposed, against which there is no meaningful right of appeal. One case in which such a disproportionate penalty was awarded could close the door of the type of firm that we are talking about—and the doors of law centres and CABx. That £20,000 must be considered in the context that for years we operated with a penalty of £1,000; it is wrong that that was not linked to inflation. The penalty was increased to £5,000 last year; indeed the Justice 1 Committee recommended a few years ago that it should be put up to £5,000 and linked to inflation. The profession effectively now faces, within a 24-month to 36-month period, a twentyfold increase in penalty.

That is only half of it. The other reason why those firms need to be bothered is that, regardless of whether they are exonerated—even if the commission finds that they did not provide an inadequate service—they still pay a case fee. That is against most tenets of natural justice. The system has the potential to be a blackmailers charter. Those are the dual reasons why any business, whether it is a firm of solicitors, a law centre or a CAB, will be concerned.

Caroline Flanagan: Mr Purvis, when you said research, I took you to mean had we gone out to the profession, asking them about that subject. We have more information, but we have not gone to the profession and said, "Here are some questions for you." I misunderstood what you meant by research. The fact that the committee has had quite a few responses from the profession probably gives a view of the profession's feelings on that area.

Philip Yelland: To give the committee a brief snapshot, the most common complaints that we get arise out of litigation and tribunal work, where there is a winner and a loser. Many of those cases—not all—arise because the person has lost. Some arise because the people who won did not get the result that they wanted. Ten years ago, it was different; conveyancing was the main cause of concern. If the committee wants more detailed information on that we would be more than happy to provide it. There are also issues about the size and types of firms. Again, we can provide that information to the committee if that would assist it.

Caroline Flanagan: I wonder whether Mr Clancy would come back on the appeals point that was mentioned earlier.

Michael Clancy: Colin Fox said earlier that the complainer did not have an appeal under the structure proposed in the bill. Philip Yelland might have been answering a question about our current system rather than the structure proposed by the bill. In fact, the complainer does have an appeal under the bill. Schedule 3 sets up the appeals committee and the process for dealing with that. Paragraph 1(g) of schedule 3 makes provision

"as to appeal to the appeals committee by a complainer, a practitioner"

or such-and-such. Although the rules of procedure that will be operated by the commission's appeals committee are not laid out in the bill—that is an issue for subordinate legislation, which has its own difficulties—it is clearly envisaged that there is to be an appeal by both the complainer and the practitioner.

Colin Fox: I am grateful to you for pointing that out. A level playing field is to be welcomed.

Mr Stewart Maxwell (West of Scotland) (SNP): You seem to be opposing the increase from £5,000 to £20,000; you said that £20,000 was a disproportionate amount. Why should not an aggrieved client be compensated at an appropriate level, if the appropriate level happens to be £10,000, £15,000 or £19,000?

Douglas Mill: They already are, under the existing system. They already have the right to sue the solicitor for negligence and to recover exactly what they are entitled to.

Mr Maxwell: So your view is that we should put them through a lengthy and costly process in the court.

15:00

Douglas Mill: There are many difficulties if we compare the perception with the reality. We have already conceded that the perception of how a client has been handled can be forever damned even if the reality is solid. There are one or two fundamental misconceptions about the master policy, so I am glad that we are dealing with the matter.

The first misconception is that a person must sue—they do not have to do so. I have figures from Royal & Sun Alliance Insurance, our lead insurer, that show that fewer than 1 per cent of claims against solicitors go to court. Claims tend to go to court only if a relatively novel point of law is being tested or there are unrealistic expectations about the quantum—the amount that the claimant is claiming. Therefore, there is no necessity for a lengthy delay.

The second urban myth seems to be that solicitors will not act against other solicitors and will not take up claims on behalf of clients who have problems with their former solicitors. Again, that is absolutely untrue. As we speak, approximately 130 solicitors firms in Scotland—around 10 per cent—are actively pursuing a claim or claims on behalf of clients under the master policy. A system therefore exists for clients to get recompense.

Mr Maxwell: Yes, but the question is why people should have to take that second step, whether through the court or by dealing with the matter before it goes to court when a compensation level of above £5,000 is appropriate. Surely it would be simpler and fairer to deal with the matter at the first stage rather than have to go through supplementary stages.

Douglas Mill: There are not really any supplementary stages. Some people pursue their own claims against the master policy, but most people will go to a solicitor, who will advise them that they may have a claim for negligence in addition to an inadequate professional service claim. Philip Yelland said that we have a system for dealing with that. Therefore, there is no additional hassle for the client.

Philip Yelland: That is right. The maximum compensation is £5,000 under the current legislation. We can take on the complaint, deal with it and award up to £5,000. If a person wants to pursue the matter further through the courts, they can do so. The only thing that would then happen is that any compensation that we have ordered the solicitor to pay will be taken into account in any final settlement, which is clearly just and reasonable. That approach has been taken for around five years. Previously, we told people that they would have to pursue matters through the courts, but we no longer do so. As a result, in a number of cases we have dealt with the matter and somebody has then made a judgment about how much more money they think they should be entitled to and whether they should take the matter on from there.

Mr Maxwell: If you disagree with the figure of £20,000 for the maximum level of compensation, what do you think would be a fair level? Is £5,000 fair? Should the figure be somewhere between those two figures?

Douglas Mill: The £5,000 limit has only just been introduced. We have been making awards of up to £5,000 for only a year or so. My difficulty with the proposed figure is that it has come straight out of the Department for Constitutional Affairs in England and is designed to reflect the English figure. However, there are big differences in the earning power, structure and so on of the professions down south and up north. The fact that 400 or 500 consultation responses have been received from the profession indicates that it sees the proposal as an unnaturally high leap within a very short period of time.

Philip Yelland: It might help Mr Maxwell to be aware that since we got the power that we are discussing in April last year—the power applies only to business from then onwards—the highest compensation award that we have made is £3,200. There have also been a couple of awards of £2,000, but we have not yet made the maximum award of £5,000.

Mr Maxwell: Given those figures, it sounds as if you are not sure why you are afraid of the change. However, will you clarify one matter before we move on? The danger to firms as a result of the possible size of compensation awards was commented on. I think that it was said that firms would not do the work or that they could be forced out of business. I was not sure that I had picked up correctly what was said and wondered what was meant. Is that what was said? I assume that firms would be insured for any awards that are made against them and am therefore not sure how they would be forced out of business.

Douglas Mill: You are probably referring to what I said. I think that clients will suffer more than solicitors. The proposals might result in certain geographical areas of Scotland being unable to get solicitors in the same way that they cannot get dentists.

The Executive made a dangerous assumption that the compensation awards would be picked up by insurance. I do not think that they would be, for a range of reasons that are set out at length in the excellent responses from Royal & Sun Alliance, which is the lead insurer under the master policy, and Marsh, which is the broker under the master policy. Their worry is twofold. First, the response when the level increased from £1,000 to £5,000 was to increase the excess or self-insured amount that every practice has, to ensure that they were not covered by the master policy. At the moment, they are not covered by the master policy except in rare circumstances in which a solicitor has dropped dead or gone out of business. The insurers are certainly likely to be worried about picking up liability for compensation awards if those awards are not arrived at applying the law of negligence and are not subject to an appeal or to proper scrutiny.

Our director of professional practice has described the master policy as being in effect a deferred loan scheme rather than an insurance policy. In other words, we pick up any claims in our premiums in future years. That is why there is likely to be an impact. It is not as if we simply claim an insurance payment and sail off into the sunset without any downstream financial obligations.

Mr Maxwell: That is the nature of all insurance policies. If someone has a prang in their car or their car is stolen, their insurance premium goes up.

Douglas Mill: Absolutely. The master policy and professional indemnity insurance in general are no different from that. It is not as if there is a panacea.

The insurers have not yet made up their minds about what to do. They are likely to do one of two things. Either they will exclude the compensation payments under the master policy or they will readjust the self-insured amounts. At the moment, any firm of solicitors with seven or fewer partners would in effect have to self-insure a £20,000 penalty. That brings me back to one of my fundamental points, which is that the impact of the commission will fall disproportionately on the high street, which is the sector of the profession that is already under the most pressure.

Mr Maxwell: I do not want to hold up the discussion, but it would be helpful if we could get further information about how the insurance policies work.

The Convener: I know that Maureen Macmillan has a particular interest in the master policy and the guarantee fund. When we hear the answers to her questions on that subject, we can decide whether we need to ask for more information.

Maureen Macmillan: You said that only about 1 per cent or 2 per cent of cases go to court and that somebody makes a judgment about that. Who makes that judgment? How is the quantum worked out? Is it done between the solicitor for the wronged side, as it were, and the insurance company?

Douglas Mill: It is worked out in one of two ways. A claim will be lodged with the broker, which will pass it on to the insurers. RSA, which is the lead insurer, will handle most of the claims. Most of the time, it will handle the claims in-house, using its own staff. However, claims of larger value and more complex claims are likely to be passed to panel solicitors, who have a set of claims-handling obligations and so on. As with most claims, whether they are to do with a broken leg or a damaged car, these claims will be established between the two firms of solicitors.

The point that I would like to make clear is that, where there is a valid claim under the master policy, it is dealt with without the necessity of court action.

Maureen Macmillan: Do you agree that the fact that the claims are established between the two firms of solicitors gives the impression that the system is very cosy and that the amounts of money that are being awarded are being depressed?

Douglas Mill: That is not my impression or the impression of the legal profession. I do not think that there is any evidence that would bear out any assertion that the settlements are unnaturally depressed. I am sure that RSA and Marsh would be happy to give you written or oral evidence to that effect.

Maureen Macmillan: It is useful to have that view out in the open.

You seem to be saying that you do not trust the proposed complaints commission to make a reasonable settlement and that, because the £20,000 is there as a ceiling, it will automatically make settlements that are much more onerous than the settlements that are made at present.

Douglas Mill: It is not a question of trust. From a standing start, the new commission will have to acquire an awful lot of experience to determine who or what is a vexatious or litigious complainer, and to get some idea of what is commensurate and proportionate. Our worry is that the amount of any award has to be determined using such aspects of the law of negligence as foreseeability and a duty to minimise loss. Currently, amounts are ultimately determined by recourse to the court. If a claimant feels that he has been offered a ridiculously low amount of money, he has the facility to go to court, but that facility will not exist under the proposed commission.

Maureen Macmillan: Do you feel that there will be a lack of expertise in the commission when it starts?

Douglas Mill: Any organisation would find it difficult to come up with expertise from a standing start. At least we have the advantage that we have been doing this—or a variant of it—for about 57 years, but it will take a while for the commission to build up expertise.

Maureen Macmillan: There has been some evidence that there are unacceptable delays in getting claims processed through the master policy. Do you accept that? The fact that there are undue delays is the reason that is suggested for giving the complaints commission oversight of the process.

Douglas Mill: I do not accept that and I do not think that there is any evidence that that is the case. The situation is dealt with in the Marsh and RSA responses, to which I have referred. I do not think that the evidence goes beyond what the Scottish Consumer Council's submission calls anecdotal evidence. There is no solid evidence that there is any delay. It is simply not in the interests of any party throughout the chain of master policy to delay things. The committee should realise that there is nothing more stressful for a solicitor than having a negligence claim against him or her. They want it to be dealt with as quickly as possible.

Colin Fox: I have two brief points. I will focus on the current £5,000 compensation level and leave aside the £20,000 completely. One of the remedies that are available to the Law Society in disposing of a complaint is to order the solicitor to charge the client no fee. You have already said that the maximum compensation that you have declared so far is £3,200. Have there been occasions when the penalty that was levied against the solicitor might have been more than £3,200 by virtue of the fact that the solicitor had to do their own work?

Philip Yelland: Yes, that is quite right. There have been occasions where the combination of an award of compensation—even under the limit of £1,000—and an order to refund all fees or even a significant part of a solicitor's fees has far exceeded that amount.

Colin Fox: Is it fair to say that there have been occasions where the total has exceeded the current £5,000 limit?

Philip Yelland: Oh yes. I can certainly think of occasions when that has happened. The biggest refund of fees that I can think of was somewhere in the region of £24,000.

Colin Fox: Right. That is clearly beyond the penalty proposed in the bill.

Could you give us an idea of where the majority of disposals fall? I take it that compensation seldom settles at the £3,200 level. At what level are the majority of disposals settled?

Philip Yelland: Last year, the average compensation payment was £474. A total of 452 compensation awards were made last year. There was an abatement of fees in 168 cases. In 14 cases, we asked a solicitor to do something to rectify matters, and there were 31 cases in which we asked the solicitor to do something else. For example, if a solicitor has not wound up an executry very well, one of the options is to instruct the solicitor to give it to someone else to finish off. The second solicitor finishes off the case and the original solicitor has to pay for it. Obviously, each year is different. If the committee wants more information about that, we will be happy to provide it.

Colin Fox: Just to clarify, my maths shows that half of the complaints resulted in a disposal along the lines of ordering a solicitor to do extra work, and so on.

Philip Yelland: Of the matters that go to committees, it is fair to say that something like 30 per cent result in an inadequate professional service award.

Colin Fox: Thank you. I am grateful.

15:15

Jackie Baillie (Dumbarton) (Lab): I wish first to ask a supplementary question following on from something that Maureen Macmillan raised. Mr Mill was definitive in his rejection of the notion of any delays at all to claims against the master policy or the guarantee fund. Given the evident complexity of some negligence cases, I find that line hard to swallow whole. Having not yet ploughed through all 600 submissions—although I promise faithfully to do so—I would ask Mr Mill to indicate the average time taken and the longest time that it has taken to resolve a case.

Douglas Mill: I simply cannot do that, but I know who could: the Royal & Sun Alliance, the lead insurer. It is the claims-handling body. I will define my terms slightly more accurately. I am saying that undue delay on the part of the lead insurer or its panel solicitors does not particularly happen, rather than that there is no delay at all.

I would like to make a supplementary point, too. Perhaps I should have said this when Mrs Macmillan asked me about it. We should not confuse the payments for inadequate professional service with claims under the master policy. The average annual payment over the past couple of years has been about £10 million, which is a significant amount of money. The figures are assessed against the law of negligence.

Caroline Flanagan: Of course, the Law Society does not handle the negligence complaints that are made against the master policy. Those complaints go to the insurer, and the Law Society does not deal with them. There is nothing that we can do at that end of things that can be overseen.

Jackie Baillie: I understand that. I was just concerned that a definitive statement had been made. The matter has now been clarified. There could be a delay, but it will perhaps not be an undue delay. That is excellent—I like to understand things.

Mr Swinney: I am interested in what the witnesses have just said about the Law Society having nothing to do with the arrangements for handling negligence claims. I have in front of me a memorandum in connection with the case of one of my constituents. It was issued by Mr Mill on 5 July 2001. I do not know whether it is available among the committee's papers, but I know that the convener has a copy. I am happy to pass it on.

The Convener: The committee has it.

Mr Swinney: That is fine. Mr Mill's memo was written to the then president of the Law Society, Mr McAllister. It refers to the broker of the master policy. Mr Mill suggests that it would be good if he and the others involved all got together and had a "summit meeting" to discuss how to dispose of my constituent's "several valid claims". Mr Mill and I have discussed the matter at length over the years, but I find that a rather strange memo if it is to sit comfortably with the statement that the president has just made.

Caroline Flanagan: For reasons that are clear, I will ask Mr Mill to answer that. That was before my time.

Douglas Mill: Mr Swinney and I have indeed discussed this matter on several occasions over the past few years. I would say that it goes a long way towards proving that we do not dabble in individual claims. I will go on oath and on record, and I will swear on my granny's grave, that never once have I, any member of my staff or any office-bearer dabbled in a claim.

My point is that there are various parties involved. Let us say that Anne Hastie represents the Law Society. She tenders the master policy brokerage on a five-year rolling programme with Philip Yelland, who represents the broker, Marsh. Each year, he in turn buys that on the market from me, the RSA, as lead insurer, and from the other insurers. When necessary, they would instruct Caroline Flanagan, representing the panel solicitors. That is the sharp end of claims being dealt with.

The layer of insulation between the Law Society and claims handling is Marsh the broker. Our then president, Martin McAllister, got a letter from Mr Swinney's constituent, Mr Mackenzie. The committee will accept that many letters that our president gets do not have the same degree of foundation as lies behind Mr Mackenzie's issues. I was asked to give a briefing on the matter. I quite properly inquired of Marsh, "I seek an assurance that these claims are being progressed quickly." That is what I do in such situations. I give my president an assurance that I am satisfied, having been satisfied by Marsh. That is all set out in the Marsh response, to which I refer the committee. I will say, "I have been satisfied by our broker that our insurer and its solicitors are acting expediently." That particular message was relayed back. That is the sum and substance of the matter. If we dabbled in claims, that would have been a very different memo.

Mr Swinney: The memo of 5 July encourages

"a summit meeting on the up-to-date position"

to be held to look at

"both the complaints and the claims aspects."

That rather suggests that the Law Society has been involved. The claim remains unresolved to date and yet the memo is dated 5 July 2001. I appreciate your indulgence in allowing me to put that on the record, convener.

Douglas Mill: I really feel that I require to respond to two of the points that were made. If the claim remains unresolved, it is a matter for Mr Mackenzie and for the guarantee fund. There may be a plethora of reasons why the case remains unresolved. In the inquiry that he made to our fairly recent president, Mr Mackenzie raised a mix of issues. From the client's perspective, it can be difficult to separate out claim issues from matters of complaint. It is perfectly valid for me to inquire of Philip Yelland and his team whether Mr Mackenzie has complaints and, if so, whether they are being dealt with expeditiously. That is very different from dabbling in the merits of the case, which we would never do. I give my personal assurance to the committee that that is and will always remain the case.

The Convener: Obviously, the committee is not in the position to arbitrate in the matter, but that has now been put on the record.

I will let in Mr Purvis, if it is on the point and he is brief.

Jeremy Purvis: I return to the matter of the £20,000 limit. I will be brief. I understand that if someone goes to a court on a point of negligence, for example, there is no limit to the compensation that the court can decide.

Douglas Mill: None whatever. The court will recompense to the full value of the claim.

Jeremy Purvis: That is helpful. In our oral evidence taking and in the written submissions, we have heard that insurers could use the bill as a threat to put up insurance premiums, which could cripple small firms, especially those with tight margins. However, surely insurance would also be against the prospect of complaints being made to the commission.

Mr Yelland quoted statistics from the Law Society's annual report. Although there was a 4 per cent reduction in the number of complaints in 2001, there was a 14 per cent increase in 2002; a 19 per cent increase in 2003; and 30 per cent increases in both 2004 and 2005. The number of complaints rose from 2,112 in 2001 to 4,849 in 2005. Would the rise in the number of complaints not have a much bigger impact on any insurance broker who was looking at trends than any rise in the level of compensation? Surely the brokers will look at the figures and say, "There is something wrong with this profession."

Philip Yelland: I do not think that it would, because the reason for the significant increase in the number of complaints over the past two or three years comes down to complaints about the profession's alleged mis-selling of endowment policies. Those complaints will come to an end in the next two or three years. If the figures for those complaints are stripped out of the totals, there is still a small percentage rise in the number of complaints that are received each year, but it is nothing like the percentages that are in the annual report. We can provide the committee with information on the number of endowment complaints, if that would be helpful. Although those complaints have skewed the figures, it is also fair to say that most financial services regulators are suffering the same difficulties.

The Convener: We would be grateful if you would do that.

Jackie Baillie: I will be brief. Nobody will need to swear on their granny's grave to answer this question, which is on the complaints levy. We heard from the bill team last week that, irrespective of whether a complaint is upheld, a complaints levy will be charged. We were told that the reason was to remove the financial incentive for the commission to charge solicitors inappropriately. What is your view of that and how would you fund it?

Caroline Flanagan: I noticed that the Executive said that it did not want to find that the commission felt obliged to try to uphold complaints. That was an extraordinary thing to say about a commission; it suggests that it will not be able to make its own decisions.

However, I also noticed that the committee quickly picked up on the fact that the same pressure will arise in relation to the hurdle that vexatious and frivolous complaints must cross. One view is that an imperative on the new commission should be to get complaints over that hurdle.

The Law Society has no problem with the proposal that someone who has polluted the system—in other words, someone who has done bad work and failed to sort things out with the client—should pay towards the handling of a complaint. However, we have a problem with the proposal that someone against whom a client makes a complaint even though they have done work well should still have to pay for the handling of the complaint simply because they could not satisfy the client that the work had been done well and in spite of the commission agreeing that the work had been done well. We would prefer the system to be skewed in such a way that a true polluter had to pay more than someone who merely sought to answer a complaint.

There is a proposal that complaint handling should be funded by a combination of the imposition of a levy on the whole profession and the use of case fees or a polluter-pays system to pick up a percentage of the amount required. We think that funding should be skewed towards the whole profession, but an element of it could come from a true polluter-pays system. What is proposed is a solicitor-pays system, not a polluter-pays system; the two are not the same.

Jackie Baillie: Thank you. That was clear.

Lastly, I turn to the issue of non-lawyers. It appears that, at stage 2, the Executive intends to lodge amendments that will enable the Scottish Legal Aid Board to provide grant funding for non-lawyers, as well as case-by-case funding. Do you support such a change?

Oliver Adair (Law Society of Scotland): We have always agreed that other providers can provide as good a service as the one that solicitors provide. Our difficulty with the bill is that it proposes a case-by-case funding system, which we do not think would be practical for the other providers. You will note from our submission that we favour a grant or contract-based system. We have no difficulty with non-lawyers receiving funding.

Caroline Flanagan: I have a supplementary to that. We are concerned about the fact that the bill will not create a level playing field. The bill does not make it clear whether such new registered advisers, who would be paid by SLAB, would be covered by the new commission. Given that solicitors and advocates will be covered by the commission, it would be extraordinary if the new, subordinate level of adviser that is being created was not.

Furthermore, it is extraordinary that people such as will writers and claim handlers will not be covered in any way. The bill will subject to more regulation areas of the profession that are already fairly heavily regulated but will leave unregulated practitioners alone. I do not think that that is in the public interest.

The Convener: It is fair to say that yours is not the only organisation that has drawn attention to that issue.

Mr Swinney: I return to the idea of a general levy. If the bill's proposals are implemented, does the Law Society plan to reduce the cost of the practising certificate for solicitors?

Douglas Mill: We probably will reduce it, simply because about 50 per cent of the work of the client relations office will be reconfigured. Although that cost might well reduce over time, the reduction will in no way reflect what the additional cost of the commission will be. There may be a £50 to £60 saving on the practising certificate fee, whereas we calculate that the economic impact of the commission on the average solicitor may be about £500.

In reply to Jackie Baillie, I wanted to say that, sadly, the commission's independence has been lost sight of when it comes to payment. Although it is fine that the commission should be independent of the profession, it seems that the profession will pick up the entire bill for it. The Executive will save about £400,000 per annum as a result of the abolition of the Scottish legal services ombudsman's office. The society thinks that that commitment should continue for a range of reasons, not least to enforce the independence of the new commission. It was difficult to respond to the proposals in the financial memorandum because it contains no solid targets. Perhaps the funding could be structured in such a way that the Executive funded the head-office costs and the profession picked up case fees and on-going operational costs. That would be more equitable. The point about payment and independence should not be lost sight of.

Mr Swinney: Are the estimates that the financial memorandum makes about the number of staff that the commission will have either too large or too small? Mr Yelland is probably best placed to answer that.

Philip Yelland: The difficulty is that it is hard to tell from the bill and the financial memorandum exactly what the structure will be. When you asked Executive officials about that at last week's meeting of the Finance Committee, you obtained some helpful information. My concern is that given that individuals with relatively small case loads will be doing the work, the estimates for the number of staff and therefore the overall salary costs are probably on the low side.

Douglas Mill: We followed Mr Swinney's questioning. We have a range of financial concerns about the commission, one of which relates to the fundamental lack of financial accountability. Any suggestion that the fact that the commission will refer its budget to the professional body once a year amounts to adequate control is nothing short of daft. We think that a body such as Audit Scotland must have a role to play. Many of our members are exercised because at the moment it looks as if the new body will be able to write itself a blank cheque, without being accountable to Parliament, the Executive or the profession that will fund it, either wholly or principally.

The Convener: I have no doubt that, in time, the Finance Committee and perhaps even the Audit Committee will comment on that.

Thank you for your contribution to what has been a reasonably tight session. I welcome your offer to send supplementary information. As we proceed with our analysis of the bill, we may need additional material, so I am glad that you have said that you would be willing to provide it.

We will resume with our next panel at 25 minutes to 4.

15:31

Meeting suspended.

15:36

On resuming—

The Convener: We now move to the second panel. I welcome Valerie Stacey QC, the vice-dean of the Faculty of Advocates. She is supported by Carole Ferguson. Would you like to add anything to your submission on behalf of the faculty?

Valerie Stacey (Faculty of Advocates): No. I will introduce my colleagues. As you said, I am the vice-dean of the Faculty of Advocates. I am supported today by Carole Ferguson. She is not a member of the Faculty of Advocates but is a member of our staff who is here to assist me with my papers. I was going to bring Kenneth Campbell, who is a member of the faculty, but unfortunately he is in court up the road, so I have brought Carole with me.

Mr Swinney: Someone has to be there.

Valerie Stacey: Yes. Someone has to mind the shop.

The committee has our written submission. I have watched the video clip of the previous evidence, for example from the Executive. I also listened to part of what Caroline Flanagan and the

other representatives of the Law Society of Scotland said. I know that committee members have asked other witnesses a number of questions that they may also wish to ask me. I will try not to repeat too much of what members have heard already, when the issues do not apply differently to the Faculty of Advocates. I will concentrate on the issues that affect us in a different way.

Of course, our submission is on behalf of the Faculty of Advocates. I emphasise at the outset that the faculty is a different organisation from the Law Society and that we work in a different way. That has consequences for complaints and for how we handle them. The most obvious point is that we are very much smaller than the Law Society. The number of practising advocates is 466; our non-practising membership takes the figure up to more than 700. Our non-practising membership includes a large number of judges and sheriffs but also people who have retired and various tribunal chairmen. The number of advocates who represent clients in court and give written opinions is about 466, whereas Mrs Flanagan is the president of the Law Society, which represents more than 11,000 lawyers. The two organisations are entirely different sizes.

The type of work that we do is also different, in that we do not handle clients' money. Therefore, we do not have accounts rules, because we do not need to have them. We do not have a guarantee fund, because we do not need to have one as there is no way in which an advocate deals with clients' money. In contrast, a great deal of solicitors' work involves conveyancing, executries and such like, so they certainly handle clients' money. The fact that the type of work that we do is different has consequences for the regulation that is required for advocates.

If members have had the opportunity to read our submission, they will have gathered that, despite the Executive's view on the matter, we state that the bill will not be compliant with ECHR. We also say that we do not agree with various aspects of the bill anyway. If it is of any assistance to the committee's consideration of the bill and its reporting back to the Executive on it, I am happy to answer any questions that the committee might have, expand on anything in our written submission or, indeed, address anything that we did not write about but on which the committee would like my view.

The Convener: I can assure you that you were invited here to represent the Faculty of Advocates because we recognise the differences between the professions and their different roles and methods of operation.

As with the previous panel, members will pick up on certain areas and other members will ask questions on the back of that. I will start in the same way as I did with the Law Society. The public's confidence in complaints against the legal system seems to be low. The Faculty of Advocates said clearly in its written submission that it believes that it is far wiser to have self-regulation. Perhaps you can explain why the faculty says that.

Valerie Stacey: We say that because we think that it is vital that, as a society, we have independent lawyers; that is, lawyers who are independent of the executive and who will represent their clients without fear of any consequence that that might have for the lawyer. What the Scottish Executive proposes in its bill would, in effect, end that independence and mean that the executive would have some control over the profession. Our view is that that would not be a good thing for clients because it is important that a member of the public who becomes a client can go to an advocate—through a solicitor, as members will know—who will represent them whether or not their case is attractive and whether or not it is a case that the advocate can see is likely to annoy or go directly against the executive. It is important that a client can find a lawyer who is not in any way controlled by the executive.

That is the widest point about the independence of lawyers that I would make. The independence of the profession is vital. However, I also recognise that people must have confidence in a complaints system. Such people include the clients who wish to make the complaints and the lawyers about whom the complaints are made. In order to have a good complaints-handling system, we must have confidence from both parties.

Now, I appreciate that there are people who feel that lawyers stand up for one other and do not have a good complaints system—I am constantly being told that in newspapers and elsewhere, so I accept that there are people out there who feel that. There will always be some people who feel that, no matter what. I am not saying for a moment that my part of the profession has always been perfect or, indeed, that it will be perfect in future. No doubt, like everybody else, there are things that we could do better and things in the past that we could have done better. However, complaints are now dealt with by complaints committees, of which half the members are lay people and half are advocates.

I submit to the committee that that is a good system for confidence. From the client's point of view, it means that it is not just lawyers looking after lawyers—if the client feels that that is how lawyers act. The committee will appreciate that I do not concede that we act like that and I will tell you why in a minute, but I concede that there are clients out there who say that that is what they

think, so I accept that that is what they think. When they discover that there are two lay people on the complaints committee, I submit that that should give them confidence that it is not just lawyers looking after lawyers.

We must take an holistic view of a complaints system and consider the position from the other point of view, which means that lawyers, too, must have confidence in the system and believe that the people who deal with complaints, to put it bluntly, know what they are doing. That matters from the client's point of view as well because in order to make a decision about whether somebody has done something right or wrong, we must know what they are supposed to have done.

The Convener: Do you feel that there is any need for an external review of the procedures or external guidance on them?

Valerie Stacey: We certainly feel that there is a need for the lay members that we have. We are pleased to have them and we feel that they are helpful.

As vice-dean of the faculty, I am quite often one of the members of a complaints committee. There are four people on the committee and each one has an equal vote. If I was on the committee, I would be the chairman, but I would not have an extra vote. My experience has told me that the lay people are very useful. I listen to and am interested in what they say. I accept that they bring a perspective that is different from mine. The faculty thinks that there is certainly a role for lay people.

If you are asking me a wider question about the whole system, you will know—or perhaps you will not know—that our submission to the Executive suggested that there should be a completely independent appeals body to which either the practitioner or the person making the complaint could appeal after the matter had been dealt with by the profession. You will appreciate that such a body would be different from the ombudsman.

15:45

The Convener: You said that you, or a member of the faculty, might chair a committee, but that you would have no casting vote. How would you come to a decision if there were two votes each way?

Valerie Stacey: In such situations, in which we have been, we try to discuss the matter further to see whether we can all come to a view. If we cannot do so, the complaint will not be upheld.

Colin Fox: I welcome your introductory remarks and your acceptance that the public often feel that lawyers protect one another in the complaints system. Such fears, anxieties, perceptions or perspectives—call them what we will—are part of the committee's deliberations.

I want to focus on a couple of points in the faculty's submission. There is the category of service complaints and the category of conduct complaints. Given that there were 47 complaints against advocates in the years 2004 and 2005, which is a small number of complaints, and given that the public might not be able to distinguish between the categories, is there not a case for putting all complaints against advocates together?

Valerie Stacey: Are you asking whether we might put them all together in the future?

Colin Fox: Yes.

Valerie Stacey: Would all complaints go to the commission?

Colin Fox: Yes.

Valerie Stacey: We would not be in favour of that. The faculty does not make the distinction that the Law Society makes between conduct complaints and service complaints, which I think it is rather difficult to make. I have looked at the complaints that we have dealt with recently and asked various colleagues who serve on committees whether they thought that particular complaints were about service or conduct. We have had discussions about that.

Let us take the example of delay, which I accept is something that the public think goes hand in hand with lawyers. For an advocate, a complaint about delay might be a service complaint, but it shades into conduct too, because we deal with the court. The courts have diets and people have to turn up on a specific day. If an advocate has not done the work, they are not able to assist the court. That might have service consequences for the client, but it also has conduct consequences. The faculty is concerned that the distinction is not easy to make. There are other examples, but I think that you understand what I am saying.

However, the fact that the distinction is not easy to make would not in itself make me say that all complaints should go to the commission. In my opinion, if they all went to the commission, the independence of the profession would be weakened. I understand the Executive's proposals to mean that conduct complaints, however they are defined, are to stay with the profession, but the Executive will have the opportunity to do a variety of things, which my colleagues said in our submission and I say to you give the Executive some control. There is perhaps a question about creeping control there, but at least the proposal is that the conduct complaints should be left with the profession at present, which I think is a good idea.

I would not be in favour of conduct complaints going to the commission, but you will appreciate

that I am not in favour of anything going to the commission. The reason for my view is that conduct is a matter for a profession. We must keep up our standards—we have an interest in that. It is not in the faculty's interest to have members who are not performing to an appropriate level of conduct. That reflects on us all.

Colin Fox: It is interesting that you say that the faculty does not make a distinction between service complaints and conduct complaints.

Valerie Stacey: We do not do that in the way that the Law Society has to.

Colin Fox: That is valuable, as is your point that if the bill is enacted, making that distinction will remain difficult—you gave the example of delays in court. Would the faculty not oppose putting all complaints together if the profession continued to examine complaints? You are against putting complaints together if the commission considers them together, but you would not be against that if the profession considered complaints.

Valerie Stacey: Essentially, that is what we do at the moment. We simply receive and deal with a complaint, without spending too long thinking about what kind of complaint it is.

Colin Fox: That brings us back to the beginning. What you describe is what you do at the moment, but that involves a system in which the public have little confidence.

Valerie Stacey: I hear what you say. I have said that I accept—as I must, from reading newspapers and so on—that some people say that they have no confidence in lawyers. As it happens, such comments are mostly about solicitors, but that is simply because there are far more of them. I am not trying to say that there are no people out there who say that they have no confidence in advocates, because I am sure that there are.

Colin Fox: My final point is designed to obtain some free advice from a QC. You think that QCs cannot work out the distinction in the bill between conduct complaints and service complaints, so whoever takes on the duty of establishing that in due course will have a hell of a problem on their hands. Is it fair to say that?

Valerie Stacey: That is what I am saying.

Colin Fox: Great. Smashing.

The Convener: That could have been construed as a leading question, Mr Fox.

Mr Maxwell: In response to questions from the convener and Colin Fox, it is clear that your main concern is independence.

Valerie Stacey: That is my major concern, although you will appreciate that I have other concerns.

Mr Maxwell: Could the bill be amended to deal with that concern effectively? Is the concern caused by the fact that ministers will appoint members of the commission? We discussed with the Law Society other possibilities that would create a more independent commission.

Valerie Stacey: Ministers will appoint members and will be able to get rid of them. One very wide provision says that a person can be stood down because they are thought unsuitable.

Mr Maxwell: Do you object to the creation of the commission per se or to the creation of a commission as envisaged in the bill, because of the perceived possibility of political interference?

Valerie Stacey: I am sorry; I understand the question now. The objection is to the commission as it is described in the Executive's bill. It is unsuitable. The faculty says that the profession ought to deal with complaints, but we understand that people for some time have had the ability to approach the ombudsman if they think that a complaint has not been handled correctly. Our suggestion was a little more radical—it was to have an appeal to a completely independent body, which would take only appeals. Complaints would stay mainly with the profession but an appeal to a completely independent body would be available. That is a long way away from what is suggested, especially for the Faculty of Advocates.

One difference between how we and solicitors work might not be obvious. I understand from the Executive's bill and its policy memorandum that it wants issues to be resolved at source; the bill has provisions on prematurity and so on. It is difficult to see how such a system would work with the Faculty of Advocates, because we are all sole practitioners. The Law Society has, properly, a standing order that says that its member firms must have complaint-handling or client-relation partners—Michael Clancy is sitting behind me and he will tell me if I am wrong, but I think that I am right. Advocates do not have such a system because we are sole practitioners.

Of course, we have a discipline code. The office bearers of the faculty—I am the vice-dean and we have a dean and other office bearers—have certain duties in relation to our complaints rules, which we carry out along with the lay people I mentioned. We do not have firms in which there are three partners and two assistants, so it is difficult to see exactly how that would be dealt with. We do not speak directly to most of our clients without a solicitor being present. Members will appreciate that clients generally come to us through a solicitor, although there are exceptions to that. Some people can instruct an advocate directly, but that tends to be people from other professions, such as chartered surveyors and not members of the public. Generally, I get a letter

from a solicitor on behalf of his client asking me to do a particular piece of work, which, I hope, I will do and that will be that. The solicitor may instruct me again, or they may not—that is up to them. It is difficult to see how the proposals in the bill would work for us.

Maureen Macmillan: Earlier, in response to either Stewart Maxwell or Colin Fox, you said that the complaints commission will not be able to deal with conduct cases, but you said later that appeals to an independent body would be a good thing. I presume that that independent body could deal with conduct cases. I am not sure why you think that an independent appeals body could deal with conduct cases, whereas the commission could not.

Valerie Stacey: That body would deal with appeals only. There would be a funnelling up, so there would be far fewer appeals than conduct cases.

Maureen Macmillan: Yes, but basically you are talking about lay people dealing with conduct cases.

Valerie Stacey: I beg your pardon, but I was not.

Maureen Macmillan: Perhaps you could elaborate on who should be on the appeals body.

Valerie Stacey: It would be essential to have lawyers on it. We suggest a mixture of lawyers and lay people. Our point is not that we should have lawyers on it to protect other lawyers, although I appreciate that Mrs Macmillan is not arguing that that is our aim. The point is that a person needs to know what lawyers are supposed to do before they can make a sensible decision about whether a lawyer did something well, badly or indifferently.

Maureen Macmillan: Indeed, but there must be a trade-off between that need and the need for transparency, so that the public agree that complaints are considered properly. One of my concerns is that, as you said, a large proportion of the complaints against advocates are about conduct. If they are seen to be dealt with by the Faculty of Advocates, the public might not perceive that to be transparent.

Valerie Stacey: To be frank, we need more than just a perception that the process is transparent. The lay members that we have do not simply give the impression that they are involved—they actually are involved and they are useful. I accept that some members of the public will say that the complaints are really dealt with by the Faculty of Advocates, because the complaints committee meets in the faculty's premises and the chairman is the vice-dean of the faculty. I understand that people will wonder how independent that is, but actually, half of the members are lay people.

Maureen Macmillan: I agree, but I am talking about perception. The fact that there are many conduct cases might lead people to think that the complaints committee is not doing a good job of impressing on other members of the faculty what good conduct should be.

Valerie Stacey: I cannot agree with that. Although I would like there to be no complaints at all, it would not be fair to say that we have a lot of complaints. There have been 47 in each of the past two years, but let us say that the figure is about 50 a year, which is a little higher than the actual figure. Given the number of practitioners and the type of work that we do, I cannot agree that that is a lot of complaints. It is hard to say what would be a lot of complaints, but I cannot agree that we have a lot.

You have touched on one reason why it is important that the profession deals with conduct cases. It is important for the profession to know what is going wrong if something is going wrong, and it is important for me as vice-dean to know what complaints arise. As a member of a committee myself, I deal personally with some complaints, but I make it my business to know about other complaints. I know that other people on the committees deal with these matters but, as vice-dean, I am certainly entitled to find out what is going on and what complaints have been made. However, other counsel cannot just go to Carole Ferguson, who does a lot of the work on this matter, and ask her about complaints. I am working on ways of telling counsel about recently upheld complaints without breaching confidentiality. After all, having a complaint made against you is an important matter for a lawyer. As Michael Clancy said earlier, it is a horrible thing to happen. I am not saying that the experience is not horrible for the complainer—I have no doubt that it is—but lawyers and members of the Faculty of Advocates take any complaint made against them extremely seriously. Our rules cover the publicity—or otherwise—of a complaint, because we do not think that everything should be publicised. As a result, I need to be careful what I tell other counsel in case I breach a person's confidentiality.

On the other hand, as vice-dean, I have an educational role, and it is important to tell newer or younger counsel about the sorts of things that have been happening to educate them about these matters.

16:00

The Convener: How do you appoint the committee's lay members?

Valerie Stacey: They are appointed by the Executive. I do not know the nuts and bolts of the

process, but we end up with a list of people and simply have to see who will be available for service on a particular day.

The Convener: Are you quite happy to accept that input from the Executive—which basically amounts to Government telling you how to operate some of your systems—instead of from an independent body?

Valerie Stacey: I am happy to accept the list that the Executive produces. However, I do not think that it is necessarily telling me what to do.

The Convener: So it is not directing you.

Valerie Stacey: No.

Mr Maxwell: You have been very fulsome in your praise of the lay members who sit on your committee. However, in your written submission, you oppose the establishment of the new commission because you think that it will

"lack the necessary expertise to determine complaints against advocates fairly and effectively."

The new system will be based on a mix of lay and legal members. Will you tell us why you feel that your current system, which contains a similar mix, is worthy of praise but the proposed commission will, in your opinion, lack the same level of expertise?

Valerie Stacey: The bill does not make it clear exactly to whom the complaints will be delegated. I might be wrong but I do not imagine that, given the terms of the bill, the nine proposed commissioners—four lay representatives, four legal representatives and a non-legal chairman—will sit as a nine-member committee to hear every complaint. The only provision in that respect simply allows the commission to delegate its work to any person, and there is no suggestion that the person to whom the work is delegated needs to be qualified in anything.

Mr Maxwell: So you are concerned by the fact that you are unsure or unclear about the process of investigating complaints.

Valerie Stacey: I am unclear about that, and I am troubled by it.

Mr Maxwell: Earlier, you said that the committees in the current system comprise two lawyers and two lay people. However, in response to the convener, you also said that, if there is a split decision and agreement cannot be reached, the complaint will not be upheld. Is that correct?

Valerie Stacey: Yes.

Mr Maxwell: But is that not the crux of the problem? Under your current system, the legal profession effectively has a veto, because the two legal members of the committee can block any complaint simply by refusing to reach agreement. I am not saying that that happens, but do you not appreciate that, given the problem of perception that others have highlighted, it would be appropriate for the commission to have a non-legal majority?

Valerie Stacey: I appreciate that you could, in theory, say that and I understand the importance of knowing what could happen under a system of rules, even if it never does.

First, the proposed commission will offer to the lawyer or the complainer an appeal to the tribunal. The tribunal will be independent of the commission. Secondly—and this will not answer your process point—it does not seem to happen that the lawyers line up on one side, whichever side it might be, and the lay people on the other. The lawyers tend to be somewhat harder on their colleagues than the lay people are. I cannot prove that to you, but it is often the way that lawyers take a dim view of incorrect behaviour by other lawyers. I do not feel that what you describe happens in reality.

Mr Maxwell: Thank you. You seem to be concerned about a lack of expertise among commission members.

Valerie Stacey: Yes.

Mr Maxwell: Although the lay members might not be legally qualified, do you not think that they would have an appropriate background to serve on the commission and that they would have skills and expertise in areas that cut across many different professions, which would give them the ability to be effective on the commission? Also, it would not be necessary for them to have a legal background, as some members would have to be lawyers, so a lack of legal expertise would not be a problem.

Valerie Stacey: I disagree; I think that it would be a problem. It would be a problem in other professions too. If I wanted to know whether my doctor had treated me negligently, I would not ask an accountant; I would ask another doctor.

Mr Maxwell: I appreciate that: that is why the lawyers would be on the commission. Surely there are common standards for the type of service that would be offered?

Valerie Stacey: Perhaps I can put it this way: I do not mean to be pejorative about anybody other than my own members, but some regulation equates to a file check. That might be the case with some complaints against solicitors. It might also be the case with the Financial Ombudsman Service. It can be asked, "Did you tell the client such-and-such? Did you give them a particular leaflet? Did you give them an explanation of something in writing?" and boxes can be ticked to show whether those things were done.

The trouble for advocates is that that is not how we work. We do not keep files such as those that are found in solicitors' offices. We cannot produce a file and say, "Here you are: here are all the letters that we sent out. Here are the cheque entries," and so on. That is not the way we work. We are sent papers by a solicitor, we do a particular piece of work and then we send them back. Determining whether we did something wrong would sometimes be a little more complicated to work out. That is partly what I was talking about earlier—the shading between service and conduct complaints is a little more difficult for us than it is for some other professions.

I am concerned not only for me but for the public. I honestly do not think that without legal knowledge a person would be able to say, "That advocate has given the wrong advice or has done the wrong thing." You would need to have some legal knowledge to know whether that was the case.

Some members of the public might have a complaint that I and my colleagues on the complaints committee would recognise, but it might not be obvious even to someone who has a background in complaint handling. I certainly recognise that there are people with such a background. I have worked with the outgoing legal services ombudsman and others and I know that there are people with complaint-handling skills; since I became vice-dean, I have learned a lot from them about the right way to handle complaints. They need to have technical knowledge, which is why I used the example of a doctor's negligence—there is no use asking your accountant about that.

The Convener: I will bring in Bill Butler to raise the ECHR issue.

Bill Butler: Ms Stacey, I will not begin with ECHR; I will lead up to it. In your introductory remarks to the committee, you said that the bill would end the independence of the profession. A little later on, you said that it would very much weaken the independence of the profession. Which is it?

Valerie Stacey: I do not think that something can be a bit independent—it is either independent or it is not.

Bill Butler: That is my point. Are you saying that the bill would end the independence of the profession or are you resiling from that and saying that it would weaken it?

Valerie Stacey: I am saying that it would end it. There are no shades of independence—you are either independent or you are not.

Bill Butler: I am grateful for that, because you said both things, so I wanted to sort out which it was.

Valerie Stacey: I am sorry about that.

Bill Butler: That is fine. Are you saying that you are against the proposed commission as it is described in the bill? Are you really saying that the bill is not open to remedial action?

Valerie Stacey: Amending the bill to make it ECHR-compliant would turn it into a different bill.

Bill Butler: It would be the bill at which you hinted when you said the process should be as it is now with the Faculty of Advocates and that there should be an appeal to an independent body. Is that what you would prefer?

Valerie Stacey: Yes.

Bill Butler: However, given that your preference is not contained in the bill, and we are looking at the bill today, let us turn to it.

Mr Clancy referred to paragraph 2 of schedule 1 and the Law Society's concerns about issues of appointment, removal, remuneration and direction of a general character. For the sake of argument, let us say that you are not against the commission per se. What would you do to improve the bill and make it comply with article 6 of the ECHR?

Valerie Stacey: There would need to be an appeal to something other than an internal appeals committee—either a court or a body that has the vital characteristics of a court.

Bill Butler: What about remuneration, appointment and direction of a general nature? Would they all have to be elided?

Valerie Stacey: It would depend upon who did the appointing and what the rules were on appointment to the commission.

Bill Butler: Would you prefer the appointment system to use a list? You seemed to be content with that when you talked about the lay people who are part of the process that you described. Would that address your concerns about appointments? In other words, individuals would not be directly appointed; there would be a list.

Valerie Stacey: No. The individuals whom we have as lay members are a part of our system of regulation, but they are not the system of regulation. That is the difference.

Bill Butler: On the external right of appeal, I will ask you the same question that I asked the Law Society. What do you make of the Scottish Law Agents Society's view that a right of external appeal against a decision of the commission would be costly and cause unwelcome delays, and that it would be preferable to focus on addressing the independence of the commission? Do you agree with that?

16:15

Valerie Stacey: The two go hand in hand. In order to have an independent body—whatever we might call it—you must have a right of appeal. The commission would, at least in part, determine civil rights and obligations. In order to do that, it would have to be independent or there would have to be a right of appeal to an independent body. If I understand you correctly, the two go hand in hand.

Bill Butler: I am a lay person, so you will have to bear with me, although I am sure that you are used to lay people within the process that you have described. If the Executive said, "Okay, we have listened, we have reflected and we are going to introduce an external right of appeal," would that satisfy you, or would the whole bill have to be changed according to the concerns raised by Mr Clancy and the Law Society?

Valerie Stacey: I did not hear everything that Mr Clancy said, but I can say—

Bill Butler: He talked about schedule 1 and issues of appointment, removal, remuneration and directions of a general character. I think that I have got it right.

Valerie Stacey: I agree with him that all those matters are important. Just having the independent appeal body would not cure the ECHR contraventions that we have identified.

Bill Butler: So, in your opinion—speaking for the Faculty of Advocates—everything would have to be changed. In other words, there would have to be a new bill.

Valerie Stacey: That is what I said. It would look like a different bill altogether. The problems cannot be cured simply by having an independent appeal.

Bill Butler: So we could not cure the bill; in your view, we would just have to kill it.

Valerie Stacey: I suppose that that is what I am saying—start again.

Jackie Baillie: I turn to questions about the complaints levy. You were listening earlier. In essence, there seems to be a choice between the Executive's view, which is that the complaints levy should be levied on all, irrespective of whether complaints are upheld, and the view that emerged earlier, of a polluter-pays principle. What is your view of those options? Do you have an alternative mechanism?

Valerie Stacey: The Executive's suggestion is unfair. Let us take the illustrative amount of £300, which I appreciate is just an illustration. If a complaint was made and was found by the commission not to be vexatious or frivolous—which would be quite difficult for the commission to determine—it would proceed. Even if the complaint was found to be completely unfounded, members of the Faculty of Advocates would have to pay the £300. That does not seem fair, and it might have unfair consequences. Members of the Faculty of Advocates range from those who are quite young and are just starting out on their legal careers to senior QCs. It is not a case of the polluter paying, for the reasons that you have been given already.

The Executive's funding proposal is that there should be a general levy as well, which every practitioner would have to pay. If there is to be a commission that is independent of the profession—although you will appreciate that I am not saying that it is independent of the Executive—it seems a bit thick that the profession should have to pay for it with no control over what it does. I am concerned about the bureaucracy and cost of the whole thing. Douglas Mill mentioned that it was perhaps a matter for Audit Scotland. No controls seem to be built in.

I am not an expert on how much it costs to run an office, so I cannot tell you whether the estimates that the Executive has given in the financial memorandum are right or wrong, but they do seem a bit light. The Law Society knows more about that than I do; I work in the advocates' library, so it is difficult for me to know exactly what it costs to run an office. It is proposed that a lot of people be employed. I do not understand there to be proper controls. The fact of the matter is that the people who will do the work will not pay for it, somebody else will, and that somebody else will be us, the practitioners.

First, I do not think that what the Executive is proposing amounts to a polluter-pays approach, because everybody would pay, whether they are a polluter or not. Secondly, the way in which the commission is to be funded is fundamentally wrong, in that it is to be funded by people who do not have any control over it. Whichever witness said earlier that it is a bit like a blank cheque is right.

Jackie Baillie: Does it not strike you as slightly odd that, in everybody's desire to have independence, they are willing to have the Executive fund the proposals, at least partly?

Valerie Stacey: The Faculty of Advocates proposes that it continues with funding most complaints against its members, with the possibility of independent appeals. We do not expect there to be an appeal in every case; there are always fewer appeals than there are cases at first instance. The majority of complaints handling would continue to be done by the Faculty of Advocates, which we, as members of the faculty, effectively pay for. Those who sit on complaints and investigating committees—counsel also investigate complaints—do so voluntarily. We have staff, whom we of course have to pay, who

do various things for us, not just complaints. Complaints are handled at no cost to the client, however. We do not charge people for making a complaint. We pay for it ourselves. I do the work for nothing.

Under the new provisions, my members would pay the general levy—the illustrative figure of £120 has been given. If somebody complained about one of my members, the member would then have to pay £300, whether or not they had done anything wrong. They would also have absolutely no control over what was happening in the commission that it is proposed be set up. At the moment, faculty members have some control over what the office bearers do, in that we are a democracy and they can vote us out.

Jackie Baillie: Likewise.

Colin Fox: You seem to be telling the committee that you are opposed to a complaints levy, for the reasons that you have outlined. Do you support having a general levy as well as public funds, or are you saying that there should not be a general levy at all and that everything should be paid for out of public funds?

Valerie Stacey: It depends what the Scottish legal complaints commission is going to do. If it is to be the commission as proposed by the Executive, it will be funded by the profession. The Executive says that it will take complaints away from us, so we will have less to do in that regard. I think that the Law Society witnesses said that that might be true for them—I think that Mr Mill said that about 50 per cent of his staff could be deployed doing things other than handling complaints—but it would not be true for us.

Colin Fox: Even if very little is done, how do you suggest the work should be funded? The Law Society suggested that, according to its figures, £400,000 would be saved by winding up the office of the Scottish legal services ombudsman.

Valerie Stacey: That is right.

Colin Fox: Are you suggesting that that would be the source of funding for the new commission?

Valerie Stacey: Yes, that would be one way of funding it.

Colin Fox: So there would be no levy of any kind.

Valerie Stacey: Yes. That is Government money. If there is to be public regulation, as opposed to our private regulation, it should be funded publicly.

Jeremy Purvis: My questions are about negligence and claims and the new maximum compensation level of £20,000, as discussed by the previous panel.

First, I have a question about the role of lay members, which follows on from a question from Mr Butler. Your written evidence discusses the Scottish Solicitors Disciplinary Tribunal, which is an internal appeals committee. It says:

"The Disciplinary Tribunal is chaired by a retired senior judge".

It adds that two counsel are appointed by the faculty and that there are three members from a panel appointed by the Government, with one of the disposals being

"a fine not exceeding £15,000".

You said that you are not aware of the nuts and bolts regarding the Government appointees. Are you aware of how they can be removed, what their tenure is and who they should be?

Valerie Stacey: This might sound pernickety—forgive me if it does—but the tribunal is not an internal committee. It is not a Faculty of Advocates committee, but a separate tribunal, headed by a judge. At the moment, that is generally Lord Coulsfield. The membership consists of counsel and laypeople. The laypeople are on a list of laypeople who are appointed by the Executive and they serve on the tribunal for five years.

Jeremy Purvis: That is similar to what is proposed. Your responses to Mr Butler's questions were black and white but, in your written evidence, I see shades of grey. The tribunal is not part of the Faculty of Advocates. Some of its members are counsel, but most of its members, other than the chair, are from a panel that is appointed by the Government and they serve on the tribunal for five years. We might find that, if they prove to be unsuitable to serve on the panel, they can be removed by a letter. That is similar to the proposals in the bill. To say that the bill's proposals are absolutely beyond the pale is to take a black-and-white approach but, with regard to appeals, there appears to be a halfway house.

The bill might be amended at stage 2. For example, the minister might say that, after consideration, it has been decided that the legal members will be appointed by the Lord President. That would result in something that looks far more like the existing disciplinary tribunal. If similar alterations were made to the appeals committee—with the Lord President appointing members and the membership being put together in a slightly different way—we would, again, end up with something that looks far more like your existing mechanism.

Valerie Stacey: But it would not feel like it. As I understand the bill, it suggests that the commission would be made up of nine members plus staff, and that the commissioners could delegate any of their functions. I envisage there being a bureaucratic office in which people deal

with the work as it comes in. As I have said, I do not think that the first decision to be made, which is whether a complaint is vexatious or frivolous, would go to the nine commissioners.

Our disciplinary tribunal is very much like a court. The faculty instructs counsel to draw up a complaint that looks a lot like a criminal complaint and counsel appear at the tribunal. Generally speaking, the advocate about whom the complaint has been made also has counsel—they do not have to, but that is usually the case. We are a small organisation, and these things do not happen every day of the week. It is relatively unusual for us to require to have a tribunal although, lately, there have been one or two—I am not trying to say that it never happens.

The Convener: Can we bring the discussion back to the subject of your original question, Mr Purvis?

Jeremy Purvis: With regard to the maximum level of compensation, which it has been suggested should be £20,000, we have been hearing about whether it would be better to allow the courts to set the amount of compensation, which could mean that there would be no limit on the amount.

As a matter of public policy, do you think that it would be better to have a simple, inexpensive and straightforward route for a complainer, involving going through a complaints body, rather than a route that required them to go through what might be a difficult and intimidating process in the courts? Further, do you think that having such a system would be better than simply having the procedural safeguards that the profession currently enjoys?

16:30

Valerie Stacey: I think not. There is some confusion in the minds of the bill's drafters about the £20,000. A court action in respect of negligence could be against a lawyer or it could be against a driver with whom a person has been in a car accident. It is the same type of thing. The court has to decide whether there has been negligence. Lots of negligence case law has been developed over the years. That has happened not to make work for lawyers, but because life is complicated. That is one of the reasons why law can be perceived as complicated.

Once it has been decided that the person who is said to have done something wrong did act negligently, the amount of money that is due to the other person is calculated by the court, using a set of rules or laws that we have passed and which we have all signed up to. That procedure includes showing that there has been a loss, which need not consist of hard goods. For example, someone does not need to show that their car was written off and that it was worth £10,000. The court recognises that as a loss, but it also recognises that people suffer personal injury, inconvenience and distress. All those aspects are recognised as appropriate heads of damage. However, a person must explain what their loss is and show that they have incurred it.

People also have a duty to mitigate their loss. If something bad happens to someone and they incur a loss, they are not entitled to sit back and say, "Well, that's it. I'm not doing anything to help myself ever again." The person must mitigate their loss. The principles to which I have referred are all recognised in the courts. As I said, we have all signed up to them. Some of them have been passed as statute law and some as common law, but they are the law.

The Faculty of Advocates currently has in its rules the ability to order compensation of up to £5,000, but the Executive is proposing to change that limit to £20,000. If I understood them correctly, the Executive's representatives explained to the committee last week that one reason behind the proposal was that they thought that going to court was too uncertain and complicated and that it would be better if compensation could be paid in another fashion. Well, what do they mean by that? What will this compensation be for? Will someone have to show that they have suffered loss? The bill does not make that clear, because it says that compensation may include a sum in respect of loss incurred, distress and inconvenience. Including those things implies that there may be other things. In addition, compensation will perhaps be tested against a different test from the one that the courts have developed for negligence. The Executive's proposal involves a policy decision. It can implement it if it wishes, but it must consider the consequences.

I heard what the Law Society said about the insurance question and I can give you the faculty's point of view. We, too, carry personal indemnity insurance, which means that if an advocate makes a mistake that costs a client, a claim can be made against his or her insurance. We want to have that protection for clients. Frankly, when dealing with big claims for millions of pounds, it would be difficult for an advocate to sleep at night if they did not have personal indemnity insurance. None of us can say that we are immune to making mistakes. We might make a mistake, so we need insurance.

On the £20,000 limit that the Executive proposes, I think that the insurers have responded to the committee on that and the committee might take evidence from them on it. However, it would be interesting to know what their position is

because, as I understand it, they cannot say definitely that they will be able to cover potential claims of £20,000 or, if they were able to do so, on which basis they could do so. The reason that they cannot say definitely—they will tell you this better than I can—is that they need to work out what risk they are covering and set a premium accordingly. That is what they do.

The Convener: We have had evidence that they would do that.

Valerie Stacey: Is that so? Well, I am not surprised. I was not aware of that from the video broadcast of the meeting, but I am not surprised to hear it. Of course, we have asked the insurers what their position would be, but they have not been able to tell us definitely. Frankly, the last thing that we want to hear is that there is now this somewhat easier system where you have only got to make one claim. You do not need to make a complaint and then raise a separate court action—you just make the one claim. However, we do not know whether the claim will be covered by insurance or what will be taken into account in the claim, and we cannot predict how much a person would get. Frankly, that does not sound particularly useful to me.

The Convener: Could you drop a note to the committee on the outcome of any discussions that you have with the insurance people with whom you deal?

Valerie Stacey: Certainly.

The Convener: That would be helpful.

Jeremy Purvis may ask his last question.

Jeremy Purvis: Before I do so, I want to ask about the fine that has been mentioned. A fine that does not exceed £15,000 can be handed out by your tribunal. How many £15,000 fines has the tribunal handed out?

Valerie Stacey: I would need to check the records. I had a look before I came here and I would be reluctant to say that we have never handed out such a fine, but I do not know of one in recent years. I could write to you about that, too.

The Convener: That would be fine.

Jeremy Purvis: Finally, I ask you to expand on points that you raised in your submission. First, you raised concerns that complaints could be made about the quality of representation. That issue is probably particular to your profession rather than to those that are represented by the Law Society of Scotland. The second issue is confidentiality, which you mention in paragraph 56 of your submission. The committee will produce a report on its consideration of the bill at stage 1, and it would be helpful if you could explain your concerns.

Valerie Stacey: I will try to do so. I am aware of the hour and I appreciate that I have perhaps taken up a lot of the committee's time.

It is difficult to encapsulate the point about quality of representation, but I will try to do so. In our written submission, we are trying to say that courts would not be acting in the public interest if there were to be a rehearing of a trial, particularly a criminal trial, in the context of a complaint. If a person is tried and convicted—those who are acquitted will not complain—he may complain afterwards and say that his trial was not conducted properly. That is a good ground of appeal and has been so since 1996; before then, it was not a ground for appeal. That is as it should be, because we do not want people to be wrongly convicted. We do not have an interest in wrongly convicting people; we have an interest in ensuring, as best we can, that there are no wrongful convictions.

However, I suggest to the committee that it would not be useful for the question whether the lawyer had asked the right questions, or had put forward the right defence, to be dealt with as a separate matter from the criminal appeal, which focuses on whether there has been a miscarriage of justice. If we had what we would call satellite litigation, that would not be good for the law and for the administration of justice. The issue is complicated. Forgive me if my comments do not make it appear any less complicated, but it is difficult to encapsulate the issue.

What troubles us in relation to confidentiality is that the proposed commission would have the power to demand that documents be sent to it. From time to time we receive complaints from the complainer—the complainer is the other side in litigation—who writes in and says, "I went to court and lost the case. The lawyer on the other side, Mrs Stacey, said such and such and she was wrong to say that. She must have been wrong, because what I said was correct and what she said was different." We receive complaints of that nature. People get very upset when they feel that a lawyer on the other side has said something that is wrong. Emotions run high.

When we deal with those complaints, we do not say, "You do not have any right to complain about somebody else's lawyer." However, in my view it would not be correct if the proposed commission was able to demand, from the lawyer who has been complained about, his client's papers. After all, the person who is doing the complaining is the other side in the litigation. One is not entitled to say to the other side in the litigation, "Empty out your briefcase and let us have a look at your papers." There is a confidentiality problem.

The Convener: That is clear.

Jackie Baillie: I understand that you are opposed to section 45, which will enable the Scottish Legal Aid Board to pay non-lawyers on a case-by-case basis. We hear that the Executive is likely to lodge amendments at stage 2 to provide for grant funding for non-lawyers, but I assume that you would still be opposed to the provision. Would your position change if non-lawyers were subject, as the Law Society suggested earlier, to the same complaints-handling system as lawyers?

Valerie Stacey: That would be better. The faculty believes that people who give out advice need to be regulated. I always say that there is more to regulation than complaints handling; there is having standards in the first place, which both the Law Society and the Faculty of Advocates have. Maintaining the standards that people are supposed to reach involves training, education and admission, all of which need to be considered. Representing people in court or giving people advice is a privilege and someone should not be doing that unless they have been properly trained and regulated in what they do. As the member has identified, our concern is lack of regulation.

The Convener: Thank you for making yourself available to give evidence, Mrs Stacey. I also thank the colleague who accompanied you.

Valerie Stacey: Thank you.

The Convener: On our third panel, I welcome Craig Bennet, the president, and Ken Swinton, the ex-president, of the Scottish Law Agents Society. I also welcome Robert Sutherland, the convener of the Scottish Legal Action Group. I apologise for the previous sessions running on a little longer than we had anticipated—when we are getting quality evidence, it is hard to cut it short. We have to be perceived to be doing our job.

Consumers seem to have a low level of confidence in complaints handling. Why should the professional bodies retain responsibility for considering complaints about conduct?

Ken Swinton (Scottish Law Agents Society): There is a difference between conduct and service complaints. Part of the essence of a profession that sets standards for itself is that it should enforce those standards as a matter of discipline. Service complaints are a different breed from those that involve conduct; I can see that Colin Fox has difficulty with that. I also heard what Valerie Stacey said on the matter.

In most cases, the difference is reasonably clear. However, as the committee has heard in all the evidence today, there is a degree of overlap in certain grey areas. My view is that there is definite public interest in service complaints being dealt with externally to the Law Society. The Scottish Law Agents Society welcomes the introduction of a new commission to deal with the service side of complaints.

Craig Bennet (Scottish Law Agents Society): I reiterate what our immediate past president, Ken Swinton, said. We have always been of the opinion that service complaints and the Law Society do not go together. I will explain why I say that. By virtue of being solicitors, we are all members of the Law Society of Scotland. The Scottish Law Agents Society is an independent beast, as it were. We act as a voluntary society with about 1,800 solicitor members. We have been around for a lot longer than the Law Society—since 1884—and we have acquired a considerable body of experience over that time. As our submission shows, we have thought for some time that service complaints should be taken away from the Law Society and given to a different body, whereas the Law Society should retain conduct complaints, for reasons that the society advanced today.

16:45

Robert Sutherland (Scottish Legal Action Group): With professional services of whatever type, the professional body's function is to set the standard for the professional service. It determines the admission of persons into that body, regulates people's ability to continue to provide services, supervises training and generally sets standards. Given that, it is still appropriate for the professional bodies to retain control of conduct matters. If conduct matters are removed from professional bodies, that will gut an essential part of their function.

The Convener: If the proposed commission had a committee whose members were split 50:50 between lawyers and laypeople, would you still feel that it could not undertake conduct inquiries properly?

Robert Sutherland: If the commission did such inquiries, the reason for having a professional body would be undermined. If a professional body cannot regulate itself and its members or set standards to meet needs from time to time, as situations develop, why have a professional body?

Craig Bennet: My society has no difficulty with a lay majority to deal with service complaints. I will comment on an issue that Valerie Stacey, but not the Law Society, raised. I am not a QC or a member of the council of the Law Society; I am, in effect, a general practitioner in Dunfermline who does a bit of everything. We have only anecdotal evidence, but people at the coalface tell us, whether in pub talk or otherwise, that lay members are—dare I say it—softer and more understanding of the position that the solicitor has got himself or herself into than are solicitor members.

Colin Fox: You talk about separating complaints on services and conduct. The convener suggests

that if the committee's members were 50 per cent lawyers and 50 per cent lay members, it would still have the expertise of lawyers. The Law Society's proposal and current system is for 100 per cent lawyers. Do you see the attraction to the wider public, whom we must consider, in having the commission take conduct complaints, which would make the entire system independent? Otherwise, half of it would be independent and the other half would still be self-regulating.

Craig Bennet: I appreciate where you are coming from. Professional conduct is a fundamental tenet of the legal profession. The standard of proof is different in each case. For service complaints, it is the balance of probabilities, but a conduct complaint is treated as a criminal case and requires proof beyond all reasonable doubt.

As Robert Sutherland from SCOLAG said, because the removal of a person's livelihood is involved, the majority of members should be lawyers of some description—be they solicitors or advocates. Such people should judge their colleagues, although I admit that some lay input might be required; my society has no problem with that. Our position is that a lay majority should deal with service complaints, but that the Law Society should continue to deal with conduct complaints, for the reasons that have been given now and earlier.

Colin Fox: But there is no suggestion in the bill or in what the convener proposed that a complaint would be dealt with without lawyers being represented. The service complaints committee will have a majority of lay members, but it will also have lawyer members; the members of the conduct complaints committee will all be lawyers. Further, the proposal that we are discussing suggests a 50:50 proportion of lawyers and lay people. Nobody is suggesting that a committee will have no lawyer members.

Ken Swinton: It is not the case that conduct complaints will be dealt with entirely by lawyers. The discipline tribunal, the constitution of which is provided for in section 39, will have equal numbers of lawyers and lay members. That tribunal will make determinations on solicitors' misconduct.

Colin Fox: That is precisely what the question is driving at. The proposed committee is based on a current Law Society model, but the overriding driver of the committee will be the commission rather than the Law Society.

Ken Swinton: Our arguments about the commission are ECHR focused rather than anything else. We are happy that there should be a commission to deal with service complaints.

Colin Fox: My colleagues will press you on ECHR, but I have a question on a point in your submission. You mention your anxiety that solicitors in certain parts of the marketplace might be driven out of business because of the financial penalties that the commission could impose. Other than what is included in your submission, what data and research can you offer us to back up your worry?

Craig Bennet: Our evidence is anecdotal. I am a solicitor in Dunfermline and I know of a firm in Cowdenbeath that is the only legal firm in the KY4 and KY5 postcode area, which has 36,000 people. I cannot speak for that firm and I am not saying that it would withdraw from civil legal aid work, which is where the bulk of complaints come from, but if it were to withdraw, that postcode area would definitely have an unmet legal need; the situation would be similar to that which applies with NHS dentistry. I submit that there is a current unmet legal need there, because there is only one firm with two solicitors to deal with the immediate demands of 34,000 to 36,000 people.

We could issue a letter to our membership asking for stories about the kind of situation to which Mr Fox refers. However, we made only our written submission because we are a small society that has a secretary for only two days a week. Unlike the Law Society, we do not have a battery of solicitors. We are a 10-man-band council, which tries on one day a month to do its best to help both the public and our membership of solicitors. However, we can undertake to do our best to give you more details, within a reasonable timeframe.

I have given you just one anecdote, but there are plenty of anecdotes about people in the sticks who find that they cannot get solicitors because solicitors are just not going out to work there. Because of a variety of Government proposals, solicitors now work more in Glasgow and Edinburgh, and perhaps in Aberdeen. In Dunfermline, where I work, there were about 82 solicitors in 1990, according to the white book—"The Scottish Law Directory"—but in 2006 we are dealing with 61, so over that period there has been a reduction of 20-odd solicitors in a fairly wee place such as Dunfermline. That has happened because people prefer to work in places such as Glasgow, Edinburgh and Aberdeen because, among other reasons, there is better money there.

Rural areas are starting to experience a haemorrhaging of young lawyers. As we say in our submission, with the removal of the baby boomer generation of lawyers over the next 10 years, we might find that there will be a serious problem with having solicitors in the sticks at all, while the solicitors who are there might not do certain types of work. The Executive and the legal profession will have to address that problem quickly.

Colin Fox: I understand the picture that you are painting about rural solicitors and sole businesses

in the context of the proposed £20,000 penalty. You mentioned Cowdenbeath, though, which I probably would not consider to be rural. However, given that 0.4 per cent of all cases result in a complaint, where is the evidence to suggest that rural and sole businesses are more likely to receive complaints or to carry the current burden of complaints?

Craig Bennet: I can speak only for myself, but I have received three complaints in my life. My firm responded to all three complaints timeously and on every occasion—unless another complaint is waiting for me when I return to the office—the complainer has disappeared because the matter was resolved by explanation.

Colin Fox: Why is there such anxiety about firms going out of business? Is that because of the £20,000 penalty or the complaints system? What will put such great pressure on rural and sole businesses?

Ken Swinton: People make business decisions on a variety of grounds, so the £20,000 penalty will not be the sole criterion on which someone will decide to take down their plate. However, the issue is the total risk reward ratio. People might not take on certain types of business or they might contract out business that was previously carried out by their employees. I would not scaremonger by suggesting that if the bill were to be passed tomorrow half of Scotland's practices would close, as that will not happen. However, over five or 10 years, firms will contract out specific types of business and fewer providers of certain services will be available in a range of locations. That is what we are saying.

Craig Bennet: The areas of concern are civil legal aid, matrimonial law and, to some extent, residential conveyancing. In those areas—perhaps not so much in domestic conveyancing, but certainly in matrimonial and civil legal aid cases—people might find problems. Anecdotal evidence from our council members who represent firms from all over Scotland—including Inverness, Dumfries, Glasgow and Ayr—suggests that colleagues believe that, if they receive a complaint after the bill is passed, they will be better to write a cheque for £400 and compromise with the complainer. If the complaint passes the frivolous and vexatious test, they will be better to compromise with the complainer and then stop doing that type of work for fear that another complaint might come along.

Such problems will affect firms on the ground at the sharp end rather than the big Edinburgh or Glasgow firms. If Scottish Power is rattled because a solicitor at Dundas & Wilson or Shepherd and Wedderburn has made a mistake, Scottish Power can just up sticks and move elsewhere. The matter will just be a note on the company's balance sheet. The problem will be experienced in the small rural areas.

I do not wish to fall out with Mr Fox, but for me Cowdenbeath is a rural area. Edinburgh and Glasgow are the big smokes, but places such as Cowdenbeath and Dunfermline are rural areas where the problems will be experienced. I know that colleagues in Falkirk and Stirling are in a similar position. For example, when the Law Society sends out cost of time questionnaires, we are dealt with as rural practices so we need to regard ourselves as such.

Colin Fox: I can assure Mr Bennet that we will not fall out over Cowdenbeath.

Bill Butler: We are all delighted to hear that.

I want to return to the issue of ECHR compliance, which we discussed with the previous two panels. My first question is for Mr Bennet or Mr Swinton. To address the ECHR concerns that were raised by Lord Lester's recent opinion on the bill, the Executive has said that it might strengthen the commission's independence, which is the option that the SLAS favours, or provide an external right of appeal, which the SLAS does not support. For the record, can the SLAS explain precisely how it would change the bill? What is the thinking or rationale behind its position?

Ken Swinton: For the bill to be ECHR compliant, either the commission—or, to be more precise, the body within the commission that deals with appeals—must be seen to be an independent and impartial tribunal or there must be a right of appeal to an external body. Both those things would not be required.

Lessons could be learned from the Financial Services and Markets Act 2000, which established a framework for the Financial Ombudsman Service. Appointments to the board of the Financial Ombudsman Service are by way of a process that is similar in nature to that of the proposed commission. However, to ensure that hearings are compliant with article 6 of the convention, decisions are made by an embedded ombudsman or adjudicator who is independent. As the adjudicator does not have a five-year term of office but has security of tenure and a salary that is guaranteed, the adjudicator is not subject to the directions of the Government. So, a lesson and a model exist. The Executive has said that, to an extent, the proposed commission is modelled on the Financial Ombudsman Service, but the Executive seems to have taken the bits that suit it and rejected other pieces.

17:00

Bill Butler: Do you have anything to add to that, Mr Bennet?

Craig Bennet: Nothing at all.

Bill Butler: The point is clear and is obviously different from what the other panels said.

What does Mr Sutherland think needs to be done to make the bill ECHR compliant, if he thinks that it can be made ECHR compliant?

Robert Sutherland: The bill could be made ECHR compliant. I think that all the witnesses have made similar points about what is required to comply with article 6 of the ECHR.

Bill Butler: The witnesses from the Faculty of Advocates did not, but on you go.

Robert Sutherland: Either the commission would have to be fully independent and exercise functions similar to those of a court—I recollect Ms Stacey saying something along those lines—or, alternatively, there would have to be a full right of appeal to a court. That requirement would not be satisfied by a right to judicial review, which is a limited review by the courts. People would have to have a right to have the merits of their case examined, so that anyone who was dissatisfied with the commission's decision could take the matter further.

Bill Butler: For clarity, are you saying that, if the perceived problems about the commission's independence can be dealt with, and if there is an external right of appeal, the apparent faults in the bill can be remedied?

Robert Sutherland: The apparent faults can be remedied, but the situation is also—

Bill Butler: That is slightly different from what the witnesses from the Faculty of Advocates said—they said that the issue cannot be remedied.

Robert Sutherland: That is their view. We have had a brief discussion on the issue and our view is that action can be taken to remedy the bill. Our written submission highlights measures that could be taken. We are concerned about the Scottish ministers' ability to appoint, direct and remove the members of the commission and the fact that there will be no minimum term to be served. The bill indicates the maximum period of appointment to the commission, but there is no guarantee of how long people will serve on it. We suggest that appointment could be done by the Judicial Appointments Board for Scotland, which would give separation and would solve the problem of Scottish ministers having the ability to make appointments and give directions. There may be good reasons for the Scottish ministers to have the power to give directions, although I am not sure what they are.

Bill Butler: What do you make of the views of the SLAS that an external right of appeal would increase costs and cause delays and that it would be better to strengthen the commission's independence? You say that both are necessary, whereas the SLAS says that we need only to strengthen the commission's independence.

Robert Sutherland: Other aspects of the bill that relate to those issues cause us concern. The issue is about not only the appointment of members of the commission, but the procedures with which the commission will operate. As matters stand, we have no idea what those procedures will be, so we must take it on trust that they will be ECHR compliant, if the commission is to be considered the final tribunal. However, we have no guarantees on that in the bill.

Another issue is about mediation. When a body such as the commission gets involved in mediation, everything else goes out the window—it does not matter who appointed the members and what their terms of service are. The commission is then no longer independent of the two parties—the complainer and the practitioner—because it has already got its hands dirty. If the mediation provision remains, aspects of that should be considered further. That also means that there has to be a full right of appeal.

Jeremy Purvis: All committee members are concerned about access. Promoting young solicitors in the area that I represent is important, so not calling such areas "the sticks" is probably the way forward.

SCOLAG commented on disaggregation in its submission. If we were to accept your suggestion of disaggregating technical breaches of conduct, would not members of the public be rather confused about a new complaints body overlooking breaches of conduct?

Ken Swinton: The problem is with low-level breaches of rules. The Law Society has a large number of professional practice rules and it is easy to breach them. For example, we might receive a consumer complaint about lack of communication, which sounds like a service complaint, but as it is covered by the client communication rules it is also a matter of misconduct. If it is only a complaint about someone failing to reply to one or two letters, surely that is a service matter. If, however, a pattern develops of that person failing to respond to correspondence over a long period, it ceases to be a service complaint and shades into being a conduct matter.

One of the reasons why we have supported separating out service complaints from conduct complaints for some time is that it is natural for a lawyer to defend his professional practice. If there is a question of misconduct, a lawyer will take a defensive attitude towards it. It is apparent from the ombudsman's reports over the years that she

sees that a different hat is required to be worn when dealing with service complaints.

By disaggregating complaints as far as possible, solicitors ought to adopt a more co-operative attitude in dealing with service complaints. In the case of a service complaint, it is much more likely that they would negotiate a settlement or take up the mediation offer. However, I suggest that solicitors will adopt a more defensive attitude if the same circumstances are applied to both conduct complaints and service complaints. It is for that reason that we suggest that the commission is given discretion to treat such complaints as service complaints and to decide not to refer them to a professional body as conduct complaints. We have confidence that the commission will make sensible decisions. If someone does not respond to a complaint for two years, the commission will refer the matter as a conduct complaint to the Law Society.

Many of the hypotheses about the proposed commission are misplaced. It will operate professionally and will deal with matters in a professional complaints-handling manner. We do not believe that it will be an amateur body, but even if lay people are appointed to make decisions, they will quickly build up expertise over a year or two. I accept that there might be teething difficulties in the first couple of years, but thereafter, the commission will be able to operate competently and make sensible decisions about service complaints and what courses of conduct would cause the Law Society to take up complaints. If such conduct complaints were upheld, they would be referred ultimately to the Scottish Solicitors Discipline Tribunal.

Jackie Baillie: As far as the complaints levy is concerned, the Executive's current position is that everyone pays, irrespective of whether the complaint is upheld. However, it has been suggested that, in addition to the general levy, the polluter should pay. Which option do you favour? Can you suggest a third way?

Ken Swinton: The bill will principally introduce an annual levy and a complaints levy—the Financial Ombudsman Service operates both mechanisms. I accept that there must be some flexibility; for example, when the service was established in December 2001, it was funded 50:50 by the annual levy and case fees. Now, after four or five years of operation, the service is funded 30 per cent by the annual levy and 70 per cent by case fees.

We would accept a funding mix of case fees and annual levy. However, as Mike West mentioned last week, with the Financial Ombudsman Service, people get two free hits a year before they have to pay any case fees, and the cost of those complaints is covered by the annual levy. That important measure discourages people who were referred to by a Law Society witness as blackmailers, who are simply looking for a pay-off or a reduction in fees. If they know that the complaints levy is £300 or £500, they might accept a lesser amount just to go away. However, that tactic will not work if they do not know whether the solicitor has used a free hit.

Free hits are also important as insurance against wholly unfounded complaints. We are particularly concerned about unfounded complaints made by third parties. For example, with regard to the polluter pays principle, we should not forget that, as Valerie Stacey pointed out earlier, the person complained against might be one's opponent, so we would not be talking about a solicitor-client relationship. A person might be exonerated of a complaint made by an opponent, but they might still have to pay a case fee, even though they owed no duty of care to the complainant. Such situations are difficult to justify, and we think that free hits could be used to deal with them.

Craig Bennet: If there are no free hits, firms specialising in no-win, no-fee, endowment-type complaints will start telling people that if they complain about their solicitor they will be guaranteed a minimum of £400 or £500. We would discourage such activity, because it does no one any favours and simply leads to frivolous and vexatious complaints. Giving practices two free hits would remove the possibility of that happening.

Irrespective of its size, the average legal practice ordinarily attracts—for want of a better phrase—about two complaints a year, and allowing two free hits would provide a reality check. Obviously, if a practice receives more than two or three complaints a year, it needs to take a look at itself and find out whether it is getting something wrong. We do not want to batter the public—far from it. We appreciate that there are bad solicitors who need to be sorted out. However, with regard to a point that Colin Fox made last week, it is a bit unfair to make solicitors bear the costs all the time, especially if they have been vindicated of any charges made in a complaint that has passed the frivolous or vexatious test.

17:15

Robert Sutherland: We have a number of concerns, which we have highlighted in our submission. We have heard evidence about the distinction between solicitors and advocates and the types of complaint that are made about them. The proposal would have a differential impact on them. Certain groups will end up paying more than others, despite generating only a small proportion of service complaints. I seem to remember that

last week's evidence from the civil servants was that there was scope in the bill for differential levels of fees to be charged, which should perhaps be considered, so that solicitors, advocates and licensed conveyancers would pay different fees according to the level of service complaints that they attract, which is what the commission will be there to deal with.

Some of our members have expressed the view that there is a case for central Government funds to pay for at least some of the core costs of running the commission. Some of its functions will have nothing to do with investigating and dealing with service complaints. There is scope for using the money saved by abolishing the legal services ombudsman to fund the commission in part.

We are also concerned that, for whatever reason, certain areas of business attract more complaints than others. If, for example, Scottish Power was unhappy with work that I had done for it, it would instruct its solicitors not to use me again. If the solicitors thought that I had provided a bad service, not only would they not use my services for Scottish Power, but they would not use them for any other client. In some areas of work, clients are more likely to want to complain. Scottish Power will not complain; it will simply use its cheque book.

We know from experience that certain types of work attract more complaints than others. We are concerned that there will be a differential impact on legal aid practitioners, law centres and sole practitioners. Some of the administrative costs of setting up the commission might impact on such practitioners; we do not want that to reduce access to justice.

Craig Bennet: The principle of free hits should also apply to lawyers in the public sector, such as Scottish Executive lawyers, local authority lawyers and fiscals, who I do not think have been mentioned today. Those lawyers have rights too and, although they rarely receive complaints, they will be brought under the same umbrella, which has to be considered when dealing with the levy issue. Fiscals working in Glasgow sheriff court are a perfect example. If word got out about the levy among a particular fraternity, that could cause difficulty. We confidently expect that the Lord Advocate would tell the fiscals to withdraw from the roll of solicitors but remain fiscals and that he would grant them a commission to act as such. On that basis, 650 Crown Office and Procurator Fiscal Service fiscals would be removed from the roll straight away, which would mean that a bigger levy would be imposed on the smaller number left, causing increasing difficulty for the profession.

Maureen Macmillan: There has been a suggestion that solicitors will give up their practising certificates.

Craig Bennet: I stress that SLAS is not the Faculty of Advocates or the Law Society of Scotland, so we are able to speak more independently than most. We think that solicitors will resign their practising certificates, then start up will-writing businesses. That brings me to the part of our submission that refers to level playing fields. At the moment, the playing field is like the pitch at Easter Road. Will writers and immigration advisers are not affected by the proposed provision, but we are. We ask the committee to consider that carefully when it makes its decisions. We are not against what you are doing. We want to make sensible but substantial amendments to assist the Executive and the committee. We are not creating media attention or anything of that sort, but we want to make you aware that if you give this dose to us, it must also be given to other people.

This year I have had two problems professionally with will writers not doing things correctly. Other people have had to deal with the same issue, but will writers are not regulated. Because they are not regulated, they get away with things, whereas we are left to pick up the pieces a lot of the time. If the bill is passed as it stands, you may find that pro bono work will go. Last year, through the Scottish Executive, I handled the first land acquisition from the Coal Authority of a place in Crossgates for my local community council. No doubt Anderson Strathern, which was on the other side, received a good fee from Scottish Coal. I did the work pro bono, as an obligement for my community. I may not be able to do that when I have to watch everything that I do on the basis that a complaint, vexatious or otherwise, may be made.

The Convener: Your point is well made.

Robert Sutherland: I support Craig Bennet's comments. Although we do not have figures to indicate how many people are withdrawing from legal aid work—no one has looked at the matter for five or six years—we are aware from speaking to people that practitioners are withdrawing from legal aid work on a regular basis. Every month I am pointed to examples of big firms in Edinburgh and Glasgow and small firms around the country withdrawing from legal aid work. Just a short time ago, a sheriff explained to me that only four solicitors were covering criminal legal aid work on a duty roll for the whole of south-west Scotland. Those four solicitors travel around a vast geographical area, covering different sheriff courts. As matters stand, people are actively withdrawing from legal aid work. The bill will increase that number.

The Convener: If there is evidence of people withdrawing from work already, perhaps you could write to us about that.

Craig Bennet: We have included some examples in our submission. The Public Defence Solicitors Office in Inverness now has to do the duty work in Kirkwall because, for better or worse, no one in Orkney will do it. I do not think that it is right that the PDSO should have to send people to appear in Kirkwall, at taxpayers' expense. The flights, if nothing else, are very expensive.

The Convener: Is that information contained in your written submission?

Craig Bennet: Yes. It is just one example. Irrespective of what you think of solicitors, it is not right that a car mechanic at my local garage should get away with charging £60 an hour, but a civil legal aid solicitor should charge £42 or £44 an hour.

The Convener: We are fairly time constrained, so I ask for tight questions and answers.

Colin Fox: With talk of free hits, this sounds a bit like "Pop Idol".

I draw the committee's attention to the increase in the level of compensation from £5,000 to £20,000. In its submission, the Scottish Law Agents Society says that it sees no reason for the increase. Why should an aggrieved client not receive £20,000 compensation if the loss can be quantified at that level?

Ken Swinton: I would answer the question by starting at a different point. We are concerned about what constitutes inadequate professional services. Section 34 extends the definition of "inadequate professional services" to negligence. If the maximum compensation level of £20,000 relates to negligence claims, I do not have any problem—and I do not think that the Law Society has any problem—with solicitors paying up for their mistakes. We have no problem with an alternative dispute resolution system with a maximum compensation level of £20,000.

Our problem is that we do not know what the £20,000 will be payable for and what inadequate professional services are. The bill does not take us much further, other than to say that inadequate professional services are services that are not of the quality that could be expected of a reasonably competent practitioner.

Perhaps the issue is negligence. Most professional negligence claims are not strictly negligence claims at all; they are claims for breach of contract. An implied term of every contract for services is that the services offered will be of a reasonable standard. Perhaps the maximum compensation level of £20,000 for inadequate professional services is a problem, because although it has been around for 17 years, the definition of quality legal services has not been satisfactory.

We do not have a problem if there is negligence, but we do have a problem with £20,000 compensation for inconvenience and distress, for which we think £5,000 is a more-than-adequate sum. Negligence is someone not doing something that they ought to have done in the first place. Consumers across a broad range of services now have access to alternative dispute resolution mechanisms. We would like there to be clarification in the bill. We would like negligence not to be a sub-heading of inadequate professional services but to be an independent heading. We would like "inadequate professional services" to be redefined in a way that covers inconvenience and distress, with the payments capped at a lower level. The Financial Ombudsman Service has a very useful paper about inconvenience and distress payments and it will pay out a maximum of £1,000 for inconvenience and distress.

That is our position, Mr Fox. Perhaps what I have said clarifies what we said in our submission.

Colin Fox: It certainly clarifies things. It seems to me that you are drawing a distinction. You have issues about the definition and about adequate financial recompense. However, presumably if the proposed Scottish legal complaints commission adjudicated that £20,000 was an appropriate sum for inconvenience and distress, you would be happy.

It has been suggested that the maximum compensation figure of £20,000 has been proposed because the same figure has been set in England and Wales. You will have heard the Law Society of Scotland's evidence about a number of disposals that it has made. It gave evidence today that it had instructed a solicitor against whom a complaint was upheld to carry out work for the client without charging a fee that would have amounted to £24,000. You seem to have a problem with the definition of "inadequate professional services", but do you have a problem with the financial package of £20,000 itself? It seems to me that the Law Society does not.

Ken Swinton: According to case law, inconvenience and distress payments are generally fairly modest. It is not clear in the bill on what basis the proposed commission will make awards; I endorse what Valerie Stacey said about that earlier.

The Financial Ombudsman Service was confronted with a similar gap in legislation and it made awards on the basis of common law. Therefore, if the common law says that a modest amount should be payable for inconvenience, expense and distress, that is what the Financial Ombudsman Service will award. I suggest that the new commission will also be forced to look at the common law and to consider the level of

compensation for inconvenience and distress in court cases when it awards sums in that regard.

The issue will be less of a problem if the commission acts in a proper way. If it does not, I expect that someone will initiate a judicial review, because the commission will be seen to have acted in an irrational and unreasonable way and will not be supported by the courts. Thereafter, the situation will be guided by that court decision.

There will be a training exercise for the new commission. If practitioners or claimants do not like what is happening, they will be able to seek a judicial review. Of course, that is only a limited review, as it reviews the rationality of the decision, not the merits of the case. However, it would address the amounts that are awarded. We do not have a particular problem in that regard and I do not think that the legislation needs to reflect the matter that we are discussing. The Financial Ombudsman Service has an internal paper that suggests that £1,000 is usually enough to cover inconvenience and distress but reserves its position in respect of exceptional cases in which it might be demonstrated that that sum is insufficient. I would expect the new commission to establish a working set of rules along similar lines.

17:30

The Convener: I would like to wind up on this angle. We are time constrained and we need to cover one or two other points. I would appreciate shorter, sharper questions and answers.

Jeremy Purvis: I have a question for Mr Sutherland. The Scottish Legal Action Group has expressed concern that there might not be sufficient professional knowledge and experience on the commission, especially in cases such as those that we have just been hearing about. Why are you not reassured by the fact that four lawyers, three of whom must have at least 10 years' experience, will be members of the commission?

Robert Sutherland: The concern is that, although those people will be members of the commission, we do not know how the commission will operate. The indications are that decisions will be delegated down. That is one thing that is apparent from the scheme that is set out in the bill. There might be situations in which staff are making decisions without being aware of exactly what procedures the commission will operate and what decisions the commissioners will make themselves. Therefore, we cannot answer the question of the relevance of the experience of the legal members of the board.

In any event, the legal members of the board can be out-voted by the lay members. We take the view that that would be inappropriate in cases of professional negligence. Although we do not object to the principle of having the commission deal with service complaints, we do not think that it is appropriate that professional negligence cases should be dealt with by the commission in the form in which the bill envisages that it will be set up.

Having said that, we recognise that the bill is intended to create a consumer-friendly situation and to provide remedies that will enable people to avoid litigation where possible. I do not know whether we have come to any particular view on the way forward. One suggestion is that the commission's powers to deal with negligence cases should be limited to the self-insurance level. I think that the self-insurance level of solicitors is £6,000, or is about to be set at that level. Therefore, the commission could involve itself in matters up to that level and the courts could deal with matters involving sums greater than that amount.

Maureen Macmillan: I want to ask about the master policy. The submission from the Scottish Law Agents Society says that firms self-insure up to an amount of £5,000 and suggests that, consequently, the increase in the maximum level of compensation to £20,000 will result in more claims relating to negligence being run by the master policy insurers rather than by the practitioners. What would be the disadvantages to the client? Would those disadvantages be offset by the benefits of fair reward—if in fact £20,000 was a fair settlement—for loss suffered and by avoiding the expense of going through the court system?

Ken Swinton: There is no doubt that the client benefits from alternative dispute resolution. In relation to the master policy, my understanding about the excess that solicitors pay is that it is £3,000 per partner but that in the case of any finding of inadequate professional services it is extended to £6,000 per partner. Inevitably, with the commission, there would be a finding of inadequate professional services, because negligence is subsumed under inadequate professional services. Therefore, in a three-partner firm, the deductible would be automatically doubled. That is one of the reasons why we think negligence ought to be a separate head, in which case the self-insured amount would be halved.

Maureen Macmillan: There has been anecdotal evidence about delays relating to the settling of claims under the master policy. Is that less likely in the future if the commission has the power of oversight over the master policy?

Ken Swinton: I am not quite clear what the power of oversight over the master policy is. I do not see how the commission has any reach over an insurance company or basket of insurance companies operating a master policy. The Law

Society has to have in place a scheme by which solicitors have adequate professional indemnity insurance, but it is not obliged to organise the running of the master policy. It could simply make a rule that each practice must obtain its own professional indemnity insurance; there would then be nothing for the commission to supervise. I am still not clear what the commission does. Does it ask Royal & Sun Alliance to come and have a cup of tea and discuss how it is handling claims? The Royal & Sun Alliance is not subject to its jurisdiction.

Jackie Baillie: Mr Swinton and Mr Bennet, in your written evidence you express concerns about the lack of regulation of non-lawyers and earlier on I believe you mentioned the question of a level playing field. Would you be reassured by the bill team's evidence, which suggested that the new complaints handling system would apply to non-lawyers who had rights to conduct litigation in Scottish courts?

Craig Bennet: There is more to law than appearing in the courts with a gown on. Financially, something like 20 per cent of all the income—and therefore presumably the work that is carried out by the legal profession—comes from the courts. Although we are quite happy with what you suggest, the difficulty is that it needs to apply to everybody. Our request here would be a broad-brush approach.

You may have had this problem in your surgery, but many people have been affected, and not just by solicitors doing things wrong. Nobody is perfect, and we hold up our hands and admit that things do go wrong, but there are other people who are getting away scot-free with those things. Those people need to be treated in the same way as we are to be treated. We are frightened—that is the phrase I have used in an article in a magazine, a copy of which we will be sending you shortly—by what is proposed. Lawyers are traditionally beasts that do not like change, but we want to assist here. We want to make sensible but substantial amendments to the bill, if that is possible. One of those sensible but substantial amendments would be to bring in will writers, immigration advisers and so on—people who do not necessarily just deal with litigation. Non-qualified litigation people should be brought in as well—we are all for that.

Jackie Baillie: I look forward to receiving the magazine. Mr Sutherland, you express concerns about the extension of Scottish Legal Aid Board funding to non-legally qualified advisers on a case-by-case basis. Will you tell us what those concerns are?

Robert Sutherland: We would be concerned about having guarantees of the quality of work that was provided. We would be concerned that the case-by-case funding approach may simply reflect the difficulties that are experienced by solicitors at the moment in applying for civil legal aid funding. I would have thought that project-type funding or panel funding is a more appropriate course to follow for those advisers, to let them take on whatever work is considered appropriate. We are concerned that people who are appearing in court should be accountable to somebody to a professional standard that is equivalent to the standard to which solicitors and advocates are accountable for representations and misrepresentations that they make in the court.

Jackie Baillie: That is helpful. Would any of you welcome it if the Executive were to lodge an amendment at stage 2 that delivers grant funding for non-legally qualified staff?

Robert Sutherland: We would.

Jackie Baillie: You would?

Craig Bennet: Yes. We are all for access to justice.

The Convener: Thank you for participating in such a long afternoon.

17:41

Meeting continued in private until 18:25.

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