JUSTICE 2 COMMITTEE

Tuesday 9 May 2006

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

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JUSTICE 2 COMMITTEE
13th 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:

William Burns (Scotland Against Crooked Lawyers)
Kaliani Lyle (Citizens Advice Scotland)
Eileen McKenna (Citizens Advice Scotland)
Professor Alan Paterson (University of Strathclyde)
Stuart Usher (Scotland Against Crooked Lawyers)

CLERKS TO THE COMMITTEE

Tracey Hawe
Alison Walker

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 6

Scottish Parliament

Justice 2 Committee

Tuesday 9 May 2006

[THE CONVENER *opened the meeting at 14:03*]

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

The Convener (Mr David Davidson): Good afternoon, ladies and gentlemen, and welcome to the Justice 2 Committee's 13th meeting in 2006. The first agenda item is evidence on the Legal Profession and Legal Aid (Scotland) Bill. I welcome our first panel of witnesses and our adviser on the bill, Margaret Ross.

Comments have been made about the fact that my son is a lawyer. As I made clear last week, he is not privileged to practise in Scotland and is not a member of any Scottish legal professional body. The bill will have no effect on his work, which is now in England and was latterly in the West Indies.

Maureen Macmillan may want to repeat what she said last week.

Maureen Macmillan (Highlands and Islands) (Lab): The declaration that I made when we first met to discuss the bill still stands.

The Convener: Our first panel is made up of Kaliani Lyle, the chief executive of Citizens Advice Scotland; and Eileen McKenna, from the Airdrie citizens advice bureau.

I will begin the questioning. CAS has raised difficulties, for its organisation and more generally, with the proposed system of case-by-case funding for non-lawyers. Will you comment on that?

Kaliani Lyle (Citizens Advice Scotland): Thank you for inviting us to give evidence. We will confine our evidence to the strand of the bill on legal aid and assistance. Can I set the context for your question on case-by-case funding and for the rest of the evidence session by giving an overview of the problems that people bring to the bureaux?

The Convener: Yes, but briefly, please.

Kaliani Lyle: In 2004-05, bureaux dealt with slightly fewer than 750,000 problems, of which 430,000 were new issues. More often than not, the problems were linked in clusters and the vast majority of them had legal content. Bureaux clients have lost their jobs, have no money, are in debt, have relationship problems or cannot pay their rent and are threatened with eviction. Bureaux have a lot of experience of delivering advice with a legal content, but they are not given money from the Scottish Legal Aid Board for that. We know that, for every person a bureau assists by stopping an eviction, negotiating a debt or defending an unfair dismissal and thereby stopping the downward spiral into further hardship and despair, many other people do not receive the legal information and advice that they need to help them.

We want funding that will allow bureaux to get involved. We want increased access to justice, not only through bureaux, but though other advice agencies. The proposed system of case-by-case funding simply will not achieve that, because it is alien to the service and the voluntary sector. As we are used to operating with grant-based funding, we would have to put in place a process and systems to access case-by-case funding. More important, the proposal goes against one of our 12 principles: our services are free to clients, regardless of their means. Therefore, we could not recommend that bureaux access the case-by-case funding. The proposal will not deliver and is not what the Scottish Executive recommended in its strategic review of legal aid, the conclusion of which acknowledged that case-by-case funding is not the way forward. For the reasons that I have given, which the Scottish Executive has accepted, the proposal would increase only marginally the capacity to deliver advice and, in some cases, might even reduce the available advice.

The Convener: So you are worried about the bureaucracy and the costs that would be involved, but also about possible delays in the provision of advice.

Kaliani Lyle: If people have to fill in forms and submissions, that will detract from the advice-giving process. We are not used to working in that way and we do not have the systems in place to do so. Principally, the measure does not conform to the service's ethos or to how we work and will therefore not help with the delivery of advice. The issue is not only for citizens advice bureaux; it applies to many other advice agencies, which will not apply for such funding. Therefore, the proposal will not meet the objective of increasing access to advice.

Maureen Macmillan: The CAS submission notes that, if legal aid is to be made available through non-solicitors only on a case-by-case basis, advisers will need to fill in forms and subject people to a means test, which would exclude some people. I think that small businesses and voluntary organisations are currently excluded from legal aid. If legal aid is made available on a case-by-case basis, those organisations will probably still be excluded. If assistance were covered by grant funding, might citizens advice

bureaux be able to deal with such people, who often have little spare cash but may find themselves in difficulty?

Kaliani Lyle: Absolutely. In our experience, lots of people on low incomes are unable to access legal aid. Also, legal aid is not available to people on disability benefit, which takes them just above the threshold. The proposals in the bill will replicate some of the current problems with legal aid. Another is that the availability of such an income stream might distort the services that an agency provides because people might aim at accessing the income stream rather than providing the advice that is required. Therefore, the service that agencies provide might no longer be based simply on need.

Maureen Macmillan: I was asking specifically about groups such as voluntary organisations and small businesses. Do citizens advice bureaux help them?

Kaliani Lyle: Yes.

Colin Fox (Lothians) (SSP): I will return to the idea of grant funding in a second, but first I have a question about the CAS submission. On page 2, the submission states:

"We are … disappointed that the limited powers in the bill will not increase access to civil justice to any significant extent."

Will Kaliani Lyle elaborate on what she means by that?

Kaliani Lyle: We are disappointed because, as I mentioned, we expected that the strategic review and the consultation paper, "Advice for All: Publicly Funded Legal Assistance in Scotland—The Way Forward", would result in a form of grant funding being made available to voluntary agencies in the short to medium term, with case-by-case funding being used only in exceptional circumstances. The feeling that such funding would happen in the short to medium term was shared not just by citizens advice bureaux but by many other people. We are disappointed because we feel that the bill is a missed opportunity to kick-start a process of reform in the delivery of civil justice.

For us, the issue is that there is a huge unmet need for advice. All the research demonstrates that. Unmet need exists because funded advice and assistance is generally available for areas of civil justice that involve matrimonial and relationship problems, rather than those areas that would not be profit making. Assistance on social welfare law is a kind of Cinderella service that is provided by bureaux and advice agencies, which do not have the money to deal with it. For many bureaux, funding is precarious. As service delivery depends on funding, we have advice deserts in certain subject areas and in certain locations. We do not always have the advice provision that people need.

Eileen McKenna can describe the position of advice agencies, such as that in Airdrie, which try to deliver advice with a precarious funding base.

Eileen McKenna (Citizens Advice Scotland): I hope to provide the committee with some understanding of how we work, as Kaliani Lyle suggested.

Last year, Airdrie CAB dealt with more than 16,000 inquiries. Many of those demanded representation or negotiation to prevent further hardship or to resolve difficult situations for clients. To help us in that, we have set up or have been partners in several innovative projects over the past six years. For example, we provide an in-court advice service that is located in Airdrie sheriff court. Our Macmillan and CAB partnership, which seeks to advise and represent people who are affected by cancer, managed to achieve about £1.75 million in gains for clients. Our welfare rights and employment law service, which has been established for several years, helps clients with representation at tribunals and also deals with emerging legislation, such as by making representation on homelessness. We also operate with the commissions by providing expertise on legal aspects. We have partnerships with the Ethnic Minorities Law Centre and other CABx in order to increase access to advice for the black and minority ethnic community. In a similar way, we have a disability legal advice project in partnership with disability forums and other CABx. That, too, is about advice and increased access.

14:15

Lack of funding is our key concern and a barrier to our meeting the needs of our communities, which is why we have had to go outwith our normal source to try to get money. In 1998, our income was 100 per cent core funded by the council; in 2006, our income from the council represents only 20 per cent of our budget. That means that 80 per cent of our funding is either time-limited or very insecure. As Kaliani Lyle said, that is very precarious when you are delivering services to vulnerable people.

All our projects are successful, but I would like to tell the committee briefly about some of the situations that we deal with when offering in-court advice. The examples will demonstrate the value and complexity of our work.

A lone parent with two children was facing eviction proceedings. She had arrears of £600 and was very distressed. An open decree was being sought by the landlord, so she came to the citizens advice bureau. We referred her to our in-court adviser and he, through various processes,

succeeded in getting the case continued for 12 weeks so that he had time to resolve the situation. He worked very hard and discovered that she had an entitlement to back-dated housing benefits of £350. She also had rights to apply for arrears direct, which meant that she ended up having to pay only £6 a fortnight. That figure was deducted from her benefits. The result was that her arrears were reduced and she received full housing benefit, which alleviated her poverty. The sheriff was very happy with the provisions that were put in place and said that there would be no award of decree. That was a happy resolution.

Another client had purchased a second-hand car that had various and continuous problems. He had sent numerous letters but had become very frustrated. He came to our bureau and we wrote letters to the trading standards people and then referred him to the in-court adviser, who sent another letter but to no avail. A small-claims form was submitted and the adviser helped the client through all the stages. The outcome was successful. The sheriff granted decree, and expenses were also awarded.

Those are just two examples, but there are many more examples of people who are frustrated and in real distress.

The Convener: Those examples were helpful and you make your point well. If there are other examples that would throw light on our consideration of the bill, would you send them to us in writing? I know that committee members would like to question both of you on other aspects.

Eileen McKenna: I will just finish off. I hope that the examples that I gave show how we deliver services in a holistic way, and show how the work of CABx can lead to resolutions because CABx have skills and expertise in benefits, money advice and debt and because they can work well with other agencies. A local solicitor said:

"I refer litigants on a regular basis, especially those with needs involving debt, money advice, consumer problems or housing matters."

The solicitor continued:

"The In-Court Advice Service is friendly and informal and lends itself to resolving disputes in court."

That is our value.

Colin Fox: I am grateful to the witnesses for what they have told us. You expressed your disappointment at the case-by-case nature of the funding that the bill proposes. I do not know whether you are aware of this, but the bill team has been in front of the committee within the past fortnight and has said that it intends to introduce amendments to the bill. Their suggestion is that the funding will be grant funding for services. I assume that you would welcome that change.

Kaliani Lyle: We would welcome that change. The in-court advice project that Eileen McKenna was talking about could be funded through grant funding. That would allow us to do a lot more preventive work and early intervention, and hopefully to core fund some needs in areas where there is no current provision. Grant funding would allow us to do things that case-by-case funding would not.

Colin Fox: I understand. In the event that we introduce grant funding, do you feel confident that the bureaux would cope with the extra demand for advice and assistance?

Kaliani Lyle: The problem is that bureaux cannot cope at the moment because of a lack of resources. If they had more resources they could do more.

Colin Fox: Provided that the grant was big enough.

Kaliani Lyle: Absolutely. A lot of bureaux are working part-time or simply do not have the resources to meet the demand. The grant funding would certainly allow more to happen.

Eileen McKenna: Airdrie citizens advice bureau is an example of that. In 1998, it was very small and offered a limited service, but as a result of being able to access other resources we are now one of the largest providers.

Colin Fox: Good for Airdrie.

Bill Butler (Glasgow Anniesland) (Lab): Good afternoon, colleagues. I think you would agree that if the Scottish Legal Aid Board is to provide grant funding for advice agencies, effective quality control of the advice provision will be important. Taking that as agreed, will you tell us how you currently ensure quality control in your organisation?

Kaliani Lyle: We have a comprehensive and robust membership scheme, which is also a quality assurance scheme. It has two aspects to it: one is about the sustainability of the organisation and the other is about the quality of the advice. The auditing of the quality of advice is not done simply against transactional criteria, which is when you look at the process. The audit considers the case records against a set of criteria to determine whether the correct advice was given. There is peer assessment by other bureaux, but we also have a lawyer who provides independent verification of every audit. That ensures that there is an independent aspect to the assessment.

We have had our membership scheme for three years and every bureau has been audited. Every year, we have reviewed the audit and increased or changed the standards. What we are doing now is trying to align our standards with others, such as the HomePoint standards. While I recognise the

need for a national framework to be put in place, the standards of our membership scheme can be used in the interim to ensure that public money is being used to fund quality advice.

Bill Butler: I am grateful to Kaliani Lyle for explaining what is in place at the moment. It seems fairly resilient and fit for purpose. However, to play devil's advocate a little, somebody might say that the fact that the advice service is reliant on part-time volunteers might present a particular challenge to quality control. I do not agree with that point of view, but how would you answer that?

Kaliani Lyle: I do not accept that statement. There is a big difference between whether you are a volunteer or a professional, but they are not opposites. You can be a volunteer and be extremely professional. Sometimes there is a misunderstanding about that, which means that we have to try that much harder to ensure that the quality that is being delivered is recognised. The service runs a competence-based scheme, which assesses the level of competence of every adviser and refers them on when they have reached a certain level. Every adviser has to be trained in that scheme.

All our evidence backs up what I am saying. We go to MORI every three years to find out what the public is saying about the CAB service. About 94 per cent of people say that they would recommend the CAB service to friends or family. There is a high level of satisfaction with the service. In its partnership pilots in Argyll and Bute, Fife and Glasgow, the Executive looked at satisfaction levels among people who used CABx rather than other advice providers. In every case, people who used CABx were more satisfied, and the differences were quite big. I am not sure whether our clients know that the service is run by volunteers. It is a professional and high-quality service.

Bill Butler: I am grateful for that answer. I have one final question. Do you share quality standards and methods of quality control with other advice agencies? Would you say that other advice agencies ensure quality control to the same degree that you have helpfully explained to us?

Kaliani Lyle: We work closely with the Executive and Shelter on developing quality standards. We have worked with the Money Advice Trust on money advice standards, and we run the matrix project jointly with Money Advice Scotland. We are also working with Communities Scotland and the Executive on housing standards and housing competencies. We are trying to establish a system that anybody could use, but one that is shaped by the CAB service because of the way in which we work. We have therefore been involved in the setting and development of standards throughout Scotland.

My answer to your second question, about whether other advice agencies ensure quality control, is that it depends. The Executive has considered the evidence. HomePoint undertook a mapping of housing advice and found that there are hundreds of agencies that provide housing advice. I do not know exactly what that means—whether that includes community groups that give advice. I would say that that is very different from the CAB service, which is bounded by our membership scheme.

Maureen Macmillan: My question is about national standards. I note what you say in your written submission and what you have just said. National standards exist for advice provision in several areas including housing, money, immigration and consumer matters. Are there national standards for advice provision in other areas?

Kaliani Lyle: I think that they are being developed. There is general advice—holistic advice—and advice in specific subject areas. We are looking at standards for the next level up from general advice. National standards for advice on benefits and employment are currently being considered, and a national framework is being developed that will sit alongside the different advice streams. The SLAB and Communities Scotland are working together on that, and we are helping in some ways.

Maureen Macmillan: Judging by your answer to Bill Butler's question, I presume that there is no compulsion on advice agencies to sign up to those standards?

Kaliani Lyle: I think that there is for some of them. For example, an agency cannot deliver immigration advice unless it is of a certain standard.

Eileen McKenna: There are certain levels of service and advisers have to be accredited.

Maureen Macmillan: But not in all areas of advice.

Kaliani Lyle: No.

Maureen Macmillan: Would it be a good idea to have national standards for all advice agencies?

Kaliani Lyle: Yes. That would make referrals much easier. At the moment, CABx do not know who to refer cases on to. A study found that 21 per cent of solicitors who gave assistance on social welfare law contacted CABx to ask for assistance with particular issues. What I thought was good about the strategic review and "Advice for All" was that the objective was to find a system in which someone could get the right advice from the right expert, regardless of whether that person was a solicitor. In other words, a mixed model of advice provision was advocated. In such circumstances, standards are necessary.

Maureen Macmillan: Yes—and the public must be aware of them and know where to go to find them.

Kaliani Lyle: Absolutely.

14:30

Jackie Baillie (Dumbarton) (Lab): I know that your position is to welcome any move by the Executive away from the awarding of legal aid on a case-by-case basis to the provision of grant funding, but it has been suggested that a risk is attached to that. Should the Executive rush to put into legislation the desirable outcome of grant funding, in spite of the absence of a national framework that would provide assurance across all advice sectors and the lack of a co-ordinating body to oversee the framework that was envisaged in the strategic review? Would there be a risk in doing that or should the Executive press ahead?

Kaliani Lyle: I definitely think that the Executive should press ahead. My understanding of how development would proceed was that the setting up of an overarching, strategic body was always going to be a longer-term activity. There is local authority involvement in bureaux and they are subject to a great deal of regulation. That is true of consumer support networks and money advice services. If we could wipe the slate clean and start again, we would probably do things differently, but there are sufficient standards out there. The CAB service has a scheme that delivers quality that would allow grant funding to be used without the risk that people think exists.

Although the delivery of quality will not depend on the existence of a national framework, such a framework would help because it would examine the interface between different standards and would provide a less burdensome system. At the moment, bureaux have to meet separate sets of standards, such as HomePoint standards and money advice standards. It would be better to have a comprehensive system that meant that a provider could be audited once on its remit and the standards to which it was working. At the moment, separate audits are conducted. Grant funding could be applied in such a way that people would deliver to a standard. I do not think that that would be impossible.

Jackie Baillie: I will develop my point. There is an acknowledgement that we are talking not just about bureaux. After all, in some areas of Scotland there are no bureaux, which is most unfortunate.

How could the funding be allocated in such a way as to ensure that there was no risk? Would that be done through local authorities or specific agencies? Would it be awarded to bids for specialist projects?

Kaliani Lyle: I have not thought through the mechanics of the process, but let us consider the principles. There would have to be a set of criteria to ensure that the quality of a service was of a certain standard; we would have to consider how to determine that. An assessment would have to be made of whether there was a need for that service. Consideration must be given to how that need could be determined in the absence of a strategic oversight. Intelligence could be gathered from people working on the ground. It is not possible to assess need by sitting in a building somewhere. We must have people on the ground.

I accept your point that CABx are only one provider, but a condition is attached to our membership scheme, which is about working in partnership with others. The needs in a particular area and the organisations that are there must be examined. Consideration must be given to how other advice agencies can be worked with to ensure provision. The issue is not just about CABx. The information and the intelligence are there; it is simply a question of pulling them out. A system for the provision of grant funding could be designed in such a way that we could ensure that it was meeting need and was being delivered to the required standards.

Eileen McKenna: I have a comment to add. Our in-court advice project is grant funded and has worked highly successfully. We collaborated on the statistics, information and evidence that should be fed back. The fact that the set-up was non-bureaucratic allowed us to get on with the job. Arrangements were obviously satisfactory because the project has delivered.

Jackie Baillie: Of course, that was a pilot that was established under part V of the Legal Aid (Scotland) Act 1986.

Eileen McKenna: It was a pilot, but pilots are there to gather evidence on that kind of thing.

The Convener: Ms Lyle, once you have had time to consider the question that Ms Baillie asked, perhaps you could reply to the committee in writing. Further, Ms McKenna, it would be useful if you could give us a note of the scheme that you mentioned.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Ms Lyle might wish to answer my question in writing as well, as it takes forward the issues that Jackie Baillie raised.

We heard about the change in funding profile in Airdrie. In my constituency, there will be, effectively, a reduction in service because the funding that the CAB offices wanted to be available to provide the services will not be available. From some quarters, there has been a call for national funding of all the CAB offices, which would take them away from the local

authorities. I wonder whether Citizens Advice Scotland and the local offices across the country have a view on that.

Kaliani Lyle: I think that there is a problem for the policy makers in aligning policy and delivery if the sole mechanism is through local authorities or other agencies, which have their own priorities. That is an issue in a range of areas, not just in relation to advice. Of course, that does not mean that the answer is to set up single-issue agencies.

There is also an issue about planning delivery in the local area. Some thought must be given to how to ensure that there is not a postcode lottery and that there is a certain standard of provision in any area. How does one ensure that someone can walk into an office in Harris or the Borders and get the advice that they need while also ensuring that the office is flexible enough to consider the particular issues in that area? In that regard, the National Assembly for Wales is considering top slicing some of the money that goes to local authorities and giving it directly to advice agencies. I am not sure what the position of Women's Aid would be on such a suggestion—perhaps Jackie Baillie could say—but I know that consideration has been given to top slicing money and giving it to particular national networks.

I understand that national Government funds nationally while local government funds locally. However, there could be a way to use funding to ensure that there was a certain national standard across the service. I am attracted to the idea of dealing with the issue of disparity across the country in that way. On the other hand, there are problems relating to the need to consider local requirements. I do not have a simple answer.

The Convener: If you have any further thoughts, you could add a postscript to the letter that you are already writing.

Mr Stewart Maxwell (West of Scotland) (SNP): We have been talking about grant funding and case-by-case funding. What about the idea of regulation? Nothing is free in this world.

The Scottish Legal Action Group, among others, said to us that that there is currently not a level playing field in Scotland for the provision of legal services, with lawyers being heavily regulated and non-lawyers being largely unregulated. It suggested that the new complaints handling system should be applicable to any non-lawyers who receive funding from SLAB. Do you agree?

Kaliani Lyle: There is an issue about regulation and an issue about complaints. I do not think that those issues are the same thing.

It is not true that non-lawyers are not regulated. CABx are regulated in a number of ways—by their funding authorities, and by the Office of the Immigration Services Commissioner, the Office of Fair Trading and so on. CABx have a complaints procedure that has the same principles: we try to resolve the complaint as early as possible, then it goes through a number of stages and either comes to us or goes to an independent arbiter.

We would not be averse to being subject to some kind of independent complaints process. There are issues about how proportionate that would be in terms of the CABx, as well as cost issues and so on. However, I am not averse to the principle of an independent complaints process, although I will have to think about it a bit more.

Mr Maxwell: I presume that you would accept that members of the public who wanted to complain would get easier access to the process if there was only a single door to go to. There is a lot of attraction in that, whether it is lawyers or non-lawyers.

If non-lawyers are incorporated into the new complaints system, should other parts of the bill apply to them? I am thinking about the fees system. If non-lawyers are caught by the same system as lawyers, should they have to pay the same levy that lawyers have to pay?

Kaliani Lyle: There are huge issues around the levy and fees. I did say that I would limit my comments, but I understand the connection between both those things. Publicly funded advice services ought to be accountable and should be subject to a complaints procedure.

There is a problem with the fees. The cost is huge and the CABx are poorly funded; it would be burdensome for them to have to pay the levy. I am not sure that they could do it. We would have to consider how they could afford to pay the fees. We are not talking about the private sector or being able to get money from people coming in through the door. We do not have the income stream that would allow that to happen. The money would have to be given with one hand and taken away with the other.

Mr Maxwell: If I understand your comments, you are not averse to non-lawyers being dealt with through the same complaints system, but you have many caveats about some other aspects of the bill.

Kaliani Lyle: We would have to look at the detail of the procedure, but in principle I do not think that there would be a problem. As is often said, the devil is in the detail.

Eileen McKenna: It might also be helpful to say that the current CAB service does not depend on a complaint being dropped on us before we are aware that there is a problem. Every case is monitored each week and records are examined to check that there are no issues. That is a daily preventive measure.

Mr Maxwell: There is no question about the quality control that the CABx have in place. This is about whether people who complain should have a right to a single system that deals with lawyers and non-lawyers. The point has been covered, and I understand that there are quality control systems in place.

Kaliani Lyle: It might be a single system, but there might be ways of making it more appropriate and flexible.

Maureen Macmillan: Does Citizens Advice Scotland carry professional indemnity insurance?

Kaliani Lyle: Yes.

Maureen Macmillan: Is that done on a bureau-by-bureau basis?

Kaliani Lyle: Citizens Advice in England and Wales and Northern Ireland, and Citizens Advice Scotland carry indemnity insurance for all bureaux throughout the United Kingdom.

The Convener: Are the schemes similar for all bureaux throughout the UK?

Kaliani Lyle: They are the same.

14:45

The Convener: I thank you both very much for coming this afternoon, for the written evidence that you submitted in advance and for the concise nature of your responses. We look forward to receiving your letter, which I hope will be brief.

I welcome Professor Alan Paterson from the University of Strathclyde school of law. I gather that you have come on your own as your colleague could not attend, but I am sure that you will do your best to answer the committee's questions.

You appear to favour an ombudsman that would act as a single gateway for all complaints but which would pass most complaints to the professional bodies for resolution. Given the perceived low confidence in the complaints handling system, would the public accept a system in which the professional bodies still dealt with most complaints?

Professor Alan Paterson (University of Strathclyde): I thank the committee for the welcome opportunity to give evidence. I stress my independence. I wear many hats, but today I appear as an independent academic.

Would the public have confidence in an ombudsman or commission—I am not worried about which it is—that acted as a single gateway and passed on the great bulk of complaints? Yes. First, the bill proposes a single gateway—that is exactly what the Justice 1 Committee wanted and what I have argued for. The question is what happens after that.

I will explain why the Justice 1 Committee's model is better than what is in the bill. We have had ineffective co-regulation. We have lots of regulators, but they cut across each other. The system is ineffective. It is not quite as bad as Clementi's description of the English system as a regulatory maze, but it still involves much ineffective cross-cutting co-regulation.

The bill proposes instead a move from ineffective co-regulation to probably ineffective external regulation, without trying the middle road of effective co-regulation, which is the Justice 1 Committee's model. That committee's model represents a win-win situation. It would involve an external body, which could be the commission or the ombudsman—I am happy for that body to be the commission. That body would be independent, do the sift and give direction. It could monitor how complaints were handled and give directions on how they should be handled. If necessary, it could review the professional bodies' decision and substitute its own decision, subject to not being able to substitute a decision on misconduct. It could deal with service complaints and pass them on and it could give guidance. Such a body could perform many of the functions that the bill proposes to give to the commission, but I suggest that it would do them better, because it would have more powers.

Another advantage of that system is that it would be cheaper. It would probably be quicker and it would be likely to be more effective. The system that the bill proposes splits conduct and service complaints. For the reasons that I gave in my submission, I regard that as not entirely helpful.

There is a range of reasons why the middle way of effective co-regulation is a better solution than that in the bill.

The Convener: I am interested in the use of the word inefficiency. By what standards do you determine efficiency or inefficiency? Are you talking about outcomes or process?

Professor Paterson: Under the bill, if a complaint is both a service and a conduct complaint—a significant number of conduct complaints will also be able to be service complaints, given the overlap between service and conduct—the commission will handle the service element and the professional body will deal with the conduct element. The same behaviour will be dealt with in two different forums, to different timescales, with different costs, using different standards of proof and different evidence from the complainer. The complainer is unlikely to find that understandable.

The Convener: You are saying that there needs to be absolute clarity for the user of the complaints process.

Professor Paterson: Certainly. Complainers do not experience the behaviour of the solicitor as three different things: negligence, behaviour that gives rise to a service complaint and behaviour that gives rise to a conduct complaint. We have developed three sets of regulations in Scotland and England, and one piece of behaviour by the solicitor can fall foul of all of them. Lawyers understand that, but I do not think that it makes sense to expect complainers to understand it or to set up a system that reflects the three different sets of regulation instead of having one forum that can deal with all three elements of behaviour.

The irony is that, currently, the professional bodies can consider all three elements—albeit that they cannot consider negligence directly. If the commission was given the powers of oversight, monitoring and review that I would like it to be given, that could be retained. The system would be less expensive because, currently, the professional bodies rely on a mixture of lay and legal expert volunteers and all complaints are considered under one process.

The Convener: Thank you. I welcome John Swinney to the committee.

Mr John Swinney (North Tayside) (SNP): Thank you. I am interested in your challenge to the provision in the bill to separate conduct and service complaints. If I understand your argument correctly, you are saying that that is a false separation from the client's perspective and that it might result in a rather artificial separation of caseload for members of the profession. Is that correct?

Professor Paterson: Not quite. The elements are separable. Many service complaints will have no conduct element whatever and not every conduct complaint will have a service element, but a significant number of forms of behaviour will fall foul of both standards. Therefore, it makes sense to have a procedure for dealing with such behaviour and, if possible, to have the same behaviour dealt with by one body at one time. The bill proposes to have at least two separate procedures at different times, with different sets of evidence, possible outcomes, standards of proof and costs.

Mr Swinney: I will park the issue of costs for the moment. By your logic, is there not a case for having the commission deal with conduct and service complaints—which the bill does not propose—and not having a false distinction between the commission and the professional bodies?

Professor Paterson: I accept that that would be an improvement in one sense. Giving the commission both service and conduct complaints would be less worth while and potentially more dangerous for the public and the profession than trying the model that the Justice 1 Committee suggested.

If we took conduct and discipline away from the profession—and focused on the core values and the public interest—and shifted them to another body, rather like the General Medical Council, we would leave the Law Society and the professional bodies in the model of the British Medical Association. According to my observation of the medical profession at the moment, that model is increasingly coming under question. The GMC is not thought to provide the ideal model. The BMA, as far as I can tell, gives its members a very good service, but it is not required to focus on the public interest. By being a membership organisation, it does very well, but it does not necessarily have to push the public interest. The GMC has the public interest in mind, but I do not think that doctors look to the GMC as their leaders and as the preservers of their core values. They do not regard the GMC as their leaders; they regard the BMA as their leaders.

Mr Swinney: If we take that distinction between the BMA and GMC models, which I think also interests the convener, does not that recognise a natural separation of functions to avoid conflicts of interest? The roles of the GMC and the BMA strike me as very clear and distinct from each other, without conflict of interest.

Professor Paterson: Section 1 of the Solicitors (Scotland) Act 1980 includes what some people have regarded as a conflict of interest. Under the statute that set it up, the professional body, the Law Society of Scotland, is required, on the one hand, to look to the interests of the profession and, on the other hand, to look to the interests of the public. That certainly creates a tension, but I do not think that it creates an irreducible conflict of interest. Some people have said that we have to abandon section 1 of the 1980 act. I am not of that opinion. I think that the essence of a profession is that it has to grapple with both the public interest and its core values. Its outlook must be towards both the public and its own interest. If a profession is told that it no longer has to worry about the public interest, that moves it towards being more like a business occupation than a profession. That explains part of my definition of what a profession is.

Colin Fox: You state in your submission that, over the past 25 years, the trend has unmistakably

"been to move from self-regulation towards independent regulation."

What would you say are the main drivers behind that 25-year trend? Why are we moving in that direction?

Professor Paterson: You are in danger of asking for a theoretical answer from an academic.

I operate with a model in which professions behave as though they have a tacit social contract with the community that they serve and exist in. In return for status, rewards, autonomy and some constraints on competition, the community expects the profession to give it expertise, some form of service ethic and some form of access, to the justice system in this case, as well as public protection and ethics.

Over the past 25 years, the consumer movement and the Government—oddly enough, it was Mrs Thatcher who made the biggest push in this respect—increasingly took the view that the professions were getting the status, the rewards, the limits on competition and the autonomy, but were not delivering enough on the other side of the equation, to the community. In my view, the past 25 years has seen a shift of power or focus from the profession side of the equation to the community side of the equation, and communities are now getting more in terms of experience and expertise. They get mandatory continuing professional development—CPD—and they are getting more in the way of public protection. They have had a code of conduct and a lay observer, and they now have an ombudsman. They will probably be getting a commission now, too, as well as a beefing up in ethics.

More is now being delivered on the left-hand side of the equation—that is, the community side—with less on the profession side. I think that that is wholly right. Professionalism is constantly renegotiated over time. People should not think that the approach represents the death of professionalism, as some alarmists suggest. It does not represent the death of professionalism; it represents professionalism's move into the 21st century. However, a balance must still be struck and in my view a move to wholly external regulation of a profession is ultimately not good for the public interest.

15:00

Colin Fox: You say that during the past 25 years there has been a move towards independence. Has the profession welcomed or resisted that move?

Professor Paterson: I do not talk about a move towards independence; I talk about a move towards greater focus on the community side of the equation as opposed to the profession side—if you follow me. That shift has been welcomed externally and many people in the profession also think it is right.

Colin Fox: I would have asked Professor Seneviratne this question, but she is not here. Can you shed light on how the current complaints handling system in England and Wales compares with the system that is proposed in the bill?

Professor Paterson: I understand that the proposals for England and Wales were contained in the Clementi review—

Colin Fox: Is that what you described as a regulatory maze?

Professor Paterson: Clementi referred to the regulatory maze. He said that the maze of regulators must be sorted out. Clementi's solution on complaints was not dissimilar to the approach in the bill. Indeed, he went as far as to say that he saw no need for a single gateway. However, when civil servants grappled with the details they quickly realised that there must be a single gateway—I argued that all along. It is therefore likely that in England and Wales there will be a single-gateway model and a commission that will consider service complaints. Consideration must then be given to how much oversight of conduct complaints the commission should have—the position in England and Wales is similar to the position in Scotland in that regard.

Work on the matter in England and Wales started earlier than did work in Scotland, but the procedures in England and Wales take longer than do ours. A white paper has been produced and the pre-bill procedure is starting, which will be followed by the introduction of a bill. No doubt people in England and Wales are considering the approach in Scotland and are taking a view on it. However, the approach in England and Wales has already shifted away from the basic Clementi model, because problems with that model have been identified. I hope that there will be a shift in approach in Scotland, for similar reasons, because the model that is proposed in Scotland contains flaws.

Colin Fox: The committee has considered the types of complaint that would fall into the categories of service complaint or conduct complaint, but—just to make life easier—I was surprised that in responses to the convener and Mr Swinney you talked about a third category: negligence. Why is negligence not one of the categories of complaint in the bill?

Professor Paterson: Negligence is in the bill; it is in the definition of inadequate professional services. In Scotland, negligence is governed by the law of delict and can be handled by the courts or dealt with out of court. A solicitor's behaviour might constitute both negligent conduct and IPS.

A client relations committee of the Law Society of Scotland can deal with the conduct and service elements of a case. In dealing with the service element in some cases, the committee might also be dealing with a matter that would otherwise be dealt with under a negligence action in the courts. In such circumstances, the committee would not be dealing with a negligence action, because no

one would have raised such an action before the committee. However, the committee, which can grant compensation for loss, could in effect recompense for a matter for which compensation would have been granted if a negligence action had been raised in the courts. Therefore in some cases a client relations committee can achieve the same effect as a negligence action would have achieved.

Colin Fox: Would you recommend that there be three categories?

Professor Paterson: No.

Maureen Macmillan: I have a lot of sympathy with what you say about the Justice 1 Committee report, considering that I sat on the committee that produced it, but I now have to be neutral.

I will ask about your views on IPS. You say in your submission:

"there is a need for greater clarification of the application of the principle in practice."

How exactly can we clarify it? Should there be more guidance in the bill as to what constitutes IPS?

Professor Paterson: No, I do not think that there should be. The trouble is that all the tests are fairly opaque. The tests for misconduct, IPS and unsatisfactory conduct refer to

"the quality which could reasonably be expected of a competent solicitor"

or other legal professional, which does not tell us a great deal. That is why there is such an overlap.

Nonetheless, we could do more to provide guidance outwith the bill. The Law Society now has 12 client relations committees that deal with IPS cases and we need mechanisms to ensure greater consistency between those committees. It seems unhelpful to have a test that allows for each committee—indeed, each member of a committee—to come up with its own solution every time it goes back to the test and asks whether the service was

"in any respect not of the quality which could reasonably be expected of a competent solicitor".

We need clearer guidance to be given through a database and clearer standards—which we must be prepared to enforce—of what would constitute such service. The commission is likely to want to do something of that sort when it comes into being.

Maureen Macmillan: So the standards need to be objective rather than subjective.

Professor Paterson: Yes. They need to give more consistency. The sort of consistency that I am looking for involves coming up with examples of what has typically been regarded as IPS so that it will normally be regarded as IPS unless there is some good reason why it should not.

Bill Butler: The Scottish Law Agents Society suggested to us last week that there might be merit in making IPS and negligence separate heads of complaint with differing maximum compensation levels. I think that you began to refer to that proposal in an answer to Colin Fox but, for the record, what is your view on it?

Professor Paterson: I must confess that I had not seen it. There are problems with giving negligence to the commission rather than to the courts as a straight action. It could be done, but it is probably not the right route to go down. We would be better to deal with it as the bill proposes—if a complaint involves a service element that overlaps with negligence, the commission is able to deal with it.

Bill Butler: I hear what you are saying. Will you go into a little more detail about why you think the Scottish Law Agents Society's suggestion is not the best way to go? You said that it could be done but that you prefer the other approach.

Professor Paterson: My main reservation is that it would probably raise more issues under the European convention on human rights. Whatever way we go on that issue, one of the questions about how effective the service jurisdiction will be in future is what role the master policy for solicitors will play in it. If the master policy excess for each partner is set above the level of compensation that is contained for the commission, that will change the efficacy of the service jurisdiction.

Jeremy Purvis: Let us take a step back and look at what might lead to an increase in the excess levels. The maximum compensation pay-out is set at £20,000. I wonder whether you saw the evidence that we took last week from the Law Society of Scotland. Mr Fox asked about the amounts that are paid out both in compensation and for fees and expenses. We heard that there are already cases in which more than £20,000 is paid out, including one current case in which £23,000 is being paid out. That has not had an impact on the excess levels, has it?

Professor Paterson: You will need to check whether the excess has now been set beyond the £5,000 level. The pay-out in the case to which you refer was mainly for the rebate of fees, not for compensation, and the rebate of fees is not covered by the master policy. That is not the issue; compensation is the issue.

Jeremy Purvis: But the financial impact on a practice would be the same.

Professor Paterson: If the practice was not covered for that under the master policy, the impact might be considerable. I have some

concerns about setting the limit for compensation at £20,000, as that might have an impact on firms that undertake civil legal aid and on firms that work in rural areas. So much will turn on whether they are covered by the master policy.

Jeremy Purvis: As I understand it from your written submission, the financial impact is in two parts. First, the level of compensation is set at a certain figure; secondly, there will be an impact on excesses—the financial burden of paying the insurance for that. On the £20,000 compensation limit, you state:

"This is a very substantial rise from the newly introduced £5,000 and I am concerned that it may have an inhibiting effect on practices in rural areas or those doing civil legal aid work."

What evidence is there for your view on that? I asked the same question of the Law Society witnesses. They could produce no evidence, but that was their gut feeling.

Professor Paterson: The bill has not come into force yet, so we cannot give you any evidence. At a recent meeting, a respected civil legal aid practitioner told me that if the proposals go ahead she may choose not to continue to work in that particular area of legal aid work. She said that more in relation to the complaints handling fee, but I suspect that she also had in mind the new compensation limit of £20,000. That worries me. It is difficult to see clearly what effect the new compensation limit will have, but it may have an effect.

Jeremy Purvis: You will appreciate the position that the committee is in: you say in your written submission that you are concerned that the new limit will have "an inhibiting effect" on our most vulnerable constituents, but when asked what evidence there is of that, you say that it comes down to some conversations with lawyers.

The conversations that I have had with lawyers about legal aid work have been to do with the large amount of bureaucracy that will be involved in processing a small percentage of a practice's work and the disproportionate cost of that for the practice, not the fact that up to £20,000 in compensation might have to be paid in the case of a complaint. We have heard that the rebate of fees and compensation could easily go beyond that at the moment.

Professor Paterson: Yes, but that would not happen often. The case to which you refer was probably not a legal aid case.

I do not think that anyone can give you hard evidence on what the effect of the £20,000 limit will be. I would have gone for a lower figure to begin with, but that is what is in the bill. It is the figure that is in the English proposals.

Jeremy Purvis: Other members will ask questions about complaints but, on the types of work that solicitors undertake, you point out in your submission that if the excess per partner

"is raised to beyond £20,000, then some practices may cease to undertake certain types of work which commonly give rise to IPS complaints"

because of the impact on the master policy. What types of work are you talking about?

15:15

Professor Paterson: Perhaps my use of language was not exact. Work that attracts a relatively low legal aid fee—such as providing advice and assistance—is unlikely to attract a very heavy £20,000 penalty. Nonetheless, if, as the bill suggests, a solicitor has to pay a complaint handling fee of the order of £300 irrespective of whether the complaint is upheld—for advice and assistance work that cost, say, £150—he or she will carry out a risk assessment on whether such work is worth doing. In my submission, I make it clear that there must be a risk in that respect; however, there are ways of countering it.

Jeremy Purvis: I appreciate that, and other members will want to ask about the complaints levy, but the levy is nothing to do with the maximum level of compensation.

Professor Paterson: That is right.

Maureen Macmillan: Why are people so worried that solicitors will stop taking civil legal aid work? Are there a lot of complaints about how such work is dealt with?

Professor Paterson: No, not particularly.

Maureen Macmillan: So why are solicitors saying, "Oh dear, we're going to have to stop our civil legal aid work"? I would have thought that most people complain about conveyancing, for example.

Professor Paterson: Well, quite a few complaints are made about conveyancing.

Civil legal aid practitioners might take that view because they feel that their fees have fallen considerably behind private client work rates. There are a number of reasons why such a gulf has appeared. As a result, those solicitors already feel that they are not as well remunerated as they would like to be, and the bill makes them even more concerned.

I am not saying that solicitors will stop civil legal aid work; I have simply suggested in my submission that there might be a risk of that.

Maureen Macmillan: I do not understand the logic behind that view. Either solicitors are backing away from civil legal aid work because there are

already many complaints about how it is carried out and they will have to face stricter penalties, or they are thinking about jettisoning work that is not well paid in case they receive complaints about it.

Professor Paterson: Some might well adopt such an economically rational approach. I am not saying that many will do so; I am simply highlighting a risk that the Executive needs to deal with.

Maureen Macmillan: But there is no evidence to suggest that a lot of complaints are being made about civil legal aid work.

Professor Paterson: No.

Mr Maxwell: Given your evidence, is it fair to say that you think that a compensation level of £20,000 for service complaints is too high?

Professor Paterson: I would not have set that level myself, but it might be livable with.

Mr Maxwell: But if an aggrieved client's complaint is upheld and the compensation that they can be fairly awarded is, for example, between £5,000 and £20,000, do they not have a right to be awarded that higher level of compensation?

Professor Paterson: Yes, but what is the best mechanism for achieving that? I must point out that I am now slightly in danger of going against what I have already said.

As I understand it, the idea is that the complaints procedure provides summary justice whereas the courts deliver a more Rolls-Royce service. The problem is that Rolls-Royce services cost more. If we choose a model that recompenses every complainant, several questions arise. Will we allow representation? Will we allow elements of the Rolls-Royce service to come in, which will boost the cost, or will we carry on with the summary model for dealing with complaints?

If we choose the summary model, we can say that complainants should not have to pay even if there is an appeal. I am quite happy with that, but the more Rolls-Royce we make the complaints service and the more we build in appeals and protect the complainant, the less distinction there is between that method of redress and the court system. People might well say, "Why should people who complain about lawyers get free access to justice and an appeals system? We do not have those things for court actions against many others."

I believe that the compensation level should be higher than £5,000, but we need to strike the right balance. A fair complaints system will cover the vast bulk of negligence claims, but the higher ones—I would say that a claim for £20,000 was a higher one—should perhaps go to the courts. At the moment, one can go to the professional body about a service issue, which might include an element of negligence by overlap, and get a composition award of up to £5,000. Under the new system, if the level were set at £10,000, one could get £10,000. If one wanted to go further, one could go to the courts for the rest.

Mr Maxwell: So the disagreement is not about the system or what it is trying to achieve; fundamentally, it is about where the level is pitched?

Professor Paterson: Yes.

Mr Maxwell: Many people have said that the proposal to increase compensation levels to £20,000 was influenced by—or copied from—the proposal to do the same in England and Wales. Do you know how the proposed compensation level has been received by the profession down south?

Professor Paterson: Their level was £15,000 for some time, so the change to £20,000 was not such a big increase for them.

Mr Maxwell: In effect, therefore, the £20,000 level has not been badly received in England and Wales.

Professor Paterson: It is difficult to know what to make of the complaints system in England and Wales. It has been under pressure for many years and it has performed ineffectively, with long delays and a lot of complaints. Successive Lord Chancellors have put in troubleshooters and there have been many attempts to restructure the complaints system. I think that the Law Society of England and Wales was probably desperate to get shot of the system because it simply could not find a way of making it work. The levels of compensation were part and parcel of a system that simply was not working. [*Interruption.*]

Mr Maxwell: I have one further question, convener, once the phone stops ringing.

The Convener: Can we find out where the phone is ringing?

Mr Maxwell: In your written evidence, Professor Paterson, you state that section 8 of the bill

"does not allow compensation to be paid to complainers who are not clients, even if the complaint is upheld".

You go on to give an example of that. I presume that you think that the bill should allow such compensation to be paid. If so, how should the bill be changed to achieve that?

Professor Paterson: The bill should not restrict compensation by stating that it may be paid only to clients. In my submission I mention other situations in which compensation awards are allowed, sometimes by tribunals and sometimes

by professional bodies. In some cases they are allowed to give compensation to non-clients but in others they can give compensation only to clients. That weakness in the current system has been replicated in the bill. It should be sorted out.

Jeremy Purvis: I move on to the right of appeal.

In your submission, under the heading "Omissions"—I do not know the page number as the pages of your submission are not numbered—you state:

"The Bill provides no mechanism for appeal (either for the lawyer or the complainer) from the decisions of the Commission on IPS".

My understanding is that the bill provides for an appeals committee. There may be no external complaints procedure, but there is an appeals committee.

Professor Paterson: Yes, I am happy to withdraw that element. I should have said "no external mechanism".

Jeremy Purvis: I am grateful for that clarification. Further on, you state:

"I would not favour allowing appeal to the Court of Session, or to the Discipline Tribunal".

Clearly, as we have established, the bill provides for an appeals committee. You may have seen the Law Society of Scotland's suggestion of an alternative appeals procedure by way of application to a sheriff. What are your thoughts on the appeals committee procedure in the bill?

Professor Paterson: The issue is whether it is ECHR compliant. I am not a human rights expert, but the Executive clearly thinks that the procedure can be made compliant. I hope that that is the case. I am not in favour of an appeals system in which people have to go to the tribunal or to court. If the system is as I described—one of summary justice—the bill will derail the whole process by allowing appeals to be made in court where the issue of representation arises. If, by representation, we mean representation for one side and the complainer having none, the situation will lead to complaints about the system. Unless a way can be found of protecting the complainer from the expense of an appeal—if they are taken to appeal—we are in danger of derailing the objective of the proposed complaints commission.

Jeremy Purvis: As I understand it, especially given Lord Lester's legal opinion, the make-up of the appeals committee will not be independent, given that its members will be appointed by the Scottish ministers. If the committee were differently constituted—perhaps by way of an appointment system under which the legal members were appointed in a judicial manner—would that be a way forward? I am aware of your caveat that you are not an expert on ECHR matters.

Professor Paterson: I am sure that the Executive can find a solution. After all, it has had to find a similar solution in the appointment of members to the Judicial Appointments Board.

The Convener: Do you still wish to come in Maureen?

Maureen Macmillan: No, thank you.

The Convener: I call Stewart Maxwell.

Mr Maxwell: I have a general question on conduct complaints. Will the proposed commission have all the powers it requires in that regard? If not, why not? What powers would you add and for what reason?

Professor Paterson: I hoped that the committee would ask that question. Yes, like the former Justice 1 Committee, I would give the proposed commission the power to deal with conduct complaints. Indeed, it should have the powers that the former Justice 1 Committee recommended, including the ability substantively to review the professional body's decision on a conduct complaint.

My reading of the bill is that the proposed commission has the powers only to recommend that the professional body reinvestigate the case. I am aware that others do not take the same view. I believe that the commission will not have the power to say to the professional body, "We think that the conduct was unsatisfactory. You should find that, too." The professional body can simply continue saying, "No, it is not professional misconduct" and the commission will be able only to reiterate its view that professional misconduct is involved and ask the body to look again at the case. The bill gives no way out of that impasse; it gives the proposed commission no power to make a ruling on the substantive complaint.

If I am right in my interpretation, we will continue to have the problem that the ombudsman had. That said, at the end of the day, the ombudsman had the power to take a conduct case to the tribunal. It was never done—no ombudsman has ever done it—but the ombudsman had that power. The commission, however, has no such power. So—as I read the bill—if the commission forms the view that something is unsatisfactory or that something is a conduct offence, it can merely ask the professional body to look at the situation again; it cannot come to a conclusion.

My view is that the commission should have the power to say, "We regard this as unsatisfactory conduct." If the professional body disagrees, the commission should be allowed to make a ruling to that effect. If the commission comes to the conclusion that an offence is a conduct offence and it cannot agree with the professional body on that, the commission should have the power to

take the matter to the tribunal. It is unlikely that that power would be used very often, but I think it should exist.

15:30

Mr Maxwell: I hear what you say. I am just flipping quickly through the bill, so forgive me if I am looking at the wrong section, but it looks to me as if, under sections 16(2)(e) and 16(2)(f), the commission can order the professional organisation to pay compensation up to a level of £5,000 or

"an amount specified by the Commission by way of reimbursement of the cost, or part of the cost, of making the handling complaint."

Professor Paterson: That refers to the way in which the professional body has dealt with the complaint. If a body has dropped the ball, it can be made to pay compensation, but that does not sort out the other issues.

Mr Maxwell: I am with you now.

Professor Paterson: If I may crave your indulgence, convener, I would like to comment on the legal aid side of the bill, which I have not been asked about.

The Convener: Ms Baillie might be about to ask you about that.

Jackie Baillie: Indeed. I was just waiting for my moment. I have three questions, all covering slightly different areas.

I am aware that you are opposed to the proposals regarding the complaints levy. How, therefore, would you fund the commission?

Professor Paterson: I would probably favour a polluter-pays system, if we have to go to that. The professional bodies will obviously have to pay and, as I have indicated, one of the drawbacks is that the commission will be much more expensive than the current system is, which is unfortunate. There is also the question of what is happening to the money that the Executive has been putting into the ombudsman service. Maybe that money could go to the commission, and not just for its start-up costs—but I am sure that that suggestion will go down like a lead balloon with the Treasury.

Jackie Baillie: The Treasury is at Westminster rather than here, but we will let you off with that one.

Professor Paterson: I mean the Treasury's Scottish equivalent.

Jackie Baillie: I refer you to section 6, which deals with the mediation and resolution of complaints. For the record, will you give us your view on whether resolution at source or mediation at different stages of the complaints-handling process is to be welcomed?

Professor Paterson: It is welcome provided that it is not compulsory. I see no point in saying to a complainer who has had difficulties with a firm, "You must go back to the firm and try and re-engage with it." That is not likely to lead to a positive result. There must be some flexibility in the system. By all means, let us encourage mediation and conciliation, but if a complainer feels that they just cannot deal with the firm any longer, for whatever reason, forcing them to go back to it is not sensible.

Jackie Baillie: Do you think that the commission could both mediate and adjudicate on the same complaint?

Professor Paterson: No.

Jackie Baillie: How do you envisage it being set up if there is to be that separation?

Professor Paterson: One of the complaints handlers could deal with the mediation and a separate division could deal with the adjudication if that fails, so long as the two processes are kept separate. I do not think that the same solicitor can be a mediator and then be involved in fighting a case.

Jackie Baillie: But the commission could effectively do both provided that there was a clear separation.

Professor Paterson: Yes.

Jackie Baillie: Now comes the question that you have been waiting for—the one about non-lawyers. Feel free to expand on this issue. The Executive bill team seems to be suggesting that it will lodge an amendment at stage 2 to allow for grant funding, as opposed to case-by-case funding, of non-lawyers. Do you welcome such a move?

Professor Paterson: I certainly do. The bits of evidence that I read did not seem quite as concrete as that, but I hope that I am wrong about that. All the stakeholders whom I know expected grant-giving powers and were surprised that the bill contains provisions on case-by-case funding, which is precisely the system that the strategic review rejected for most cases.

I will mention another aspect of the bill that is slightly disappointing. The strategic review showed that we are falling behind other modern jurisdictions that have an overarching body with a proactive responsibility for delivering publicly funded legal assistance. The Scottish Legal Aid Board cannot have that role because the present legislation does not allow that, although the board tries its best within the legislation. It is a shame that the bill does not contain more powers for the board in that regard. I accept fully that such powers were never intended to be in the bill, which was clear from "Advice for All: Publicly Funded

Legal Assistance in Scotland—The Way Forward". However, it would have been helpful if the board had been given more proactive powers. The board needs to be able to consider needs in the community and point out gaps that we must try to fill. It could consider whether having salaried lawyers for civil work would be the way forward, although the board hopes for regulation on that, so powers on that may not need to be in the bill. However, there must be provisions on specialist advisers who are non-lawyers, to help the not-for-profit sector. We hope that that system will be grant funded rather than funded on a case-by-case basis.

Mr Swinney: In response to Mr Maxwell's question, Professor Paterson talked about a gap in section 16(2). He said that the new commission should have power to take action in cases in which it does not believe that a conduct complaint has been considered properly, for whatever reason. The suggestion would be a further extension of the commission's powers and would reduce further the involvement or responsibility of the profession. That takes me back to my earlier question about whether it would be better to go the whole hog and create an external regulatory system. You are creeping towards that. Why do we not just get on with it and let the commission handle both conduct and service complaints? I fear that, unless we get the matter right, the new system might continue to be one of ineffective co-regulation, as you described the present system.

Professor Paterson: I think that we are heading for ineffective external regulation, which is what I am trying to head off, although I accept part of your argument. I argue that we should give the commission greater powers in relation to service and conduct complaints but still pass the great bulk of complaints to the professional bodies. The commission should have monitoring, review and oversight powers. Under the current proposals, I suspect that the commission's entire energy will be taken up with trying to make the complaints system work. Under my suggestion, the regulator could stand back and take an overview, monitor what is going wrong and give guidance and suggestions about how to deal with certain complaints.

The New South Wales regulator is a good model and is very like the Justice 1 Committee's proposal in the previous session of Parliament. That regulator sees his role as being to educate, with the aim of reducing the number of complaints. The commission will have powers to do that, but its hands will be full trying to get the service complaints system to work effectively, which will not be easy. I sit on client relations committees that deal with what seem to be straightforward complaints such as ones arising from the building of a greenhouse on a common green. I often wonder whether a reasonably competent solicitor would act in a certain way—I have to wait for the committee's expert on conveyancing to tell me whether that is the case. The process is not straightforward.

The commission will have its hands full trying to come up with an effective complaints-handling system. I would like the commission to be able to stand back, take an overview and operate as a good regulator by educating and cajoling to encourage movement in the right direction. It is important that we have the right relationship between the regulator and the professional bodies. If we get that wrong, we will build in running sores, which will mean that there will be no political peace and the system will need to be considered again. My worry about the bill is that its flaws will result in the system having to be considered again. I want us to sort out the flaws, so that the issue will not come back so quickly.

Mr Swinney: Last week, I was staggered when Mr Yelland of the Law Society of Scotland told me that the proposed commission is much smaller than he thought was required. What is your opinion of that, from your experience of client relations work?

Professor Paterson: The matter depends on what we ask the commission to do. The commission cannot carry out the actual complaints handling; it will have to be the executive body and employ many individuals to be case managers. Issues arise such as whether the commission will operate a committee system and whether laypeople will be involved, as they are in the current system. We just do not understand how the new commission will work. If it is expected to do some of the decision-making work, the proposed size is far too small. However, if it is supposed to carry out only the planning, educative and oversight role that I would like it to have, the proposed size is fine, although it will need to have a large number of people working for it.

The Convener: I thank Professor Paterson for his full answers to our questions, which have been helpful, and for the clarification of the minor errors that he noticed in his written evidence.

Professor Paterson: Thank you for having me.

15:41

Meeting suspended.

15:48

On resuming—

The Convener: On panel 3, we have Stuart Usher and William Burns, from Scotland Against Crooked Lawyers. I have met the gentlemen

before and they have given us good evidence, for which I thank them.

Legal professional bodies have stated that they need to be able to continue to consider and determine conduct complaints against their members in order to maintain their understanding of the problems within their profession and in order to be able to effectively set and enforce the standards to be adhered to. What do you make of that view?

Stuart Usher (Scotland Against Crooked Lawyers): They would say that, wouldn't they? The very fact that this bill has been drafted shows that they do not have that understanding. There are endless problems with the way in which they have been handling the situation. That statement of theirs is misleading, at the very least.

The Convener: The bill has been produced by the Scottish Executive. The committee has been charged by the Parliament to consider the bill, take evidence and produce a report to the Parliament that is about the principles of the bill as opposed to the fine print. We are looking for the views of various bodies, particularly those that have written to us to submit evidence.

I understand that your point is that we should expect the legal professional bodies to take such a view. However, you referred to the way in which the bill has been laid out—something which of course was done by the ministers. Are there any particular issues around that that you wish to clarify?

Stuart Usher: Are you referring to our submission? I would like a point of reference. Where are you coming from?

The Convener: No, the question was based on what we have picked up from the evidence that we have taken from the various legal professional bodies.

Stuart Usher: Right, now I am with you. I did not quite get you at first. I am sorry if I am a bit slow. Could you ask the question again?

The Convener: Legal professional bodies have stated that they need to be able to continue to consider and determine conduct complaints against their members in order to maintain their understanding of the problems in their profession and in order to be able to effectively set and enforce the standards to be adhered to. What do you make of that view?

Stuart Usher: Our view is that they would say that because they want to maintain control of the system, which is palpably not working and is causing immense suffering and stress to the consumers of legal services. We have dozens of tragic histories that people have sent us about what has happened to them. What is going on under this bland and, apparently, respectable exterior beggars belief. That is why those bodies want to retain control of the complaints procedure. If they lost that control—which they will, sooner or later—the lid would be taken off the can of worms and the reality would be exposed.

Colin Fox: When the Law Society and the Faculty of Advocates were here last week, they said that one of their big concerns about the bill related to the need for the commission to be independent of Government. They think that a legal profession that is independent of the state should be satisfied that the complaints commission is also independent of the state. They feel that the bill would mean that the state would be too involved in complaints. What do you make of that?

Stuart Usher: I will give you my tuppenceworth but Mr Burns might also have something to say.

Any sensible person realises that the separation of the functions of the state and matters to do with the dispensation of justice is desirable. However, if a situation arises whereby the administrators of justice or the legal system in a country have become corrupt and concealed, it must be remembered that the Government of the day is the elected power. In Scotland, the judiciary and the senior echelons of the legal system are appointed by a sort of self-appointed college of people who, for centuries, have been accountable to no one. Ultimately, the elected representatives must take the ascendancy. Lord Falconer argues for that, as did David Blunkett. We hope that our elected representatives, too, would argue for that.

The current system is undesirable and it should be removed—it has become utterly corrupt. We heard many fine words just now from Professor Paterson and it all sounds marvellous. However, as has happened many times before in history, something has gone radically wrong beneath the facade. Would you like to say something, Mr Burns?

William Burns (Scotland Against Crooked Lawyers): About inadequate professional service?

Stuart Usher: No, the question is about the state's role.

William Burns: I never got the chance to mention inadequate professional service, but I will move on to the present subject.

I believe that the Government should play a bigger part in the legal system. For example, legal aid is paid through the Law Society, but all our members would contend that the Law Society is almost totally corrupt. The Scottish Legal Aid Board gets its money through the Law Society, but I believe that the Government should control the legal aid money. Public funds would not be

handed out to lawyers so readily in that case and they would not be misused.

Colin Fox: What the Law Society and the Faculty of Advocates are driving at is that they do not want the Government to drive the proposed complaints commission; they want it to stand apart from the Government. Through your reading of the bill, are you content that the commission will be independent of the Government? If not, are you arguing that the commission should work more closely alongside the Government?

William Burns: I would say that the commission should work more closely with the Government.

Stuart Usher: We would say that the commission should be more accountable to Scottish ministers. Any movement away from the legal system as it is currently constituted is not only desirable but vital.

Bill Butler: Gentlemen, you will know that the bill proposes a new complaints-handling system that is based on making a distinction between conduct complaints and service complaints, with different forums dealing with the different types of complaint. I take it that you do not support that proposal. If that is the case, why do you believe that the proposed system would be unworkable or undesirable—or both?

Stuart Usher: By its very nature, the system would be unworkable. There would be endless arguments about what constituted inadequate professional service and what constituted misconduct. Throughout history, the best inventions, generally speaking, have been those that worked most simply. The complaint of inadequate professional service is obviously the hardest one to define. If a lawyer was rude to a client—for example, if he burped in their face—we could describe that as inadequate professional service. Again, if a lawyer robbed a client, that would certainly be described as inadequate professional service. A gamut of actions could be included under the heading of inadequate professional service—even the most trivial. Our view is that inadequate professional service means exactly that and that it covers anything and everything that can happen to a lawyer's clients.

Bill Butler: Mr Burns, would you like to comment?

William Burns: Professor Paterson said that it would be better to have one standard of complaint instead of the three. We have stated for years that complaints should not be separated into different categories and that each complaint should be dealt with on its merits or demerits. Our view is that the proposed commission should look into every complaint because they are all about inadequate professional service.

Bill Butler: I am obliged—thank you.

Jeremy Purvis: How important is it that the complainer understands which body will investigate a complaint, given that that will depend on the type of complaint? Is it not more important that the complainer knows that an investigation into the complaint will be conducted properly at whichever level the complaint is dealt with? My point is that many MSPs and MPs hear from constituents with complaints about reserved or devolved matters, including some that can be dealt with by the Scottish public services ombudsman. We have a mechanism for sorting out complaints to ensure that the complaint goes to the right body. However, our constituents do not necessarily need to know who will deal with their complaint. How important is that information to a complainer?

16:00

Stuart Usher: It is very important to any complainer that he or she knows the gateway or reception body for the complaint. That must be clear-cut. Everything about the present system is obscure—by design, I might add—and that is an enabling factor for criminal activity. To answer the question, it is very important that it is crystal clear which body will deal with the complaint. It is equally important that complainers have faith in the integrity and probity of any new body.

William Burns: The Law Society's in-house guidance manual for all law firms and lawyers states that 95 per cent of people who have a grievance never complain. Such people do not make a complaint because they find it a waste of time to do so under the present system. That has been the case from day one, since the Law Society started.

As things stand, there is no feasible way to complain about a lawyer's conduct because the body that deals with such complaints is inundated with lawyers. However, most people believe that lawyers are pathological liars. Members of this committee may not believe that, but they have not had the experience of lawyers that people in our group have had. We know for a fact that lawyers are pathological liars. I dare say that the people from the Law Society who gave evidence to the committee are pathological liars as well.

However—I will stick to the main point—people do not trust the Law Society's complaints procedures. Even though the society's complaints system might not have 100 per cent lawyer representation on it, lawyers receive an unmerited deference from the public, who look up to them for reasons that I now do not understand.

Stuart Usher: It is for all the wrong reasons.

Colin Fox: On the membership of the proposed Scottish legal complaints commission, the Scotland Against Crooked Lawyers submission makes the interesting suggestion that no lawyers should sit on the commission, although it accepts that it might be necessary to appoint a lawyer to provide legal advice. We heard evidence from a representative of the Faculty of Advocates last week, who said that she was anxious to ensure that the commission had sufficient expertise. The bill provides for a commission of nine members, of which four would be lawyers and five would be non-lawyers. The faculty's argument was that the four lawyers are needed to provide the commission's deliberations with the necessary expertise to consider what a lawyer should or should not have done in certain circumstances. I think that the Faculty of Advocates supports the requirement that four of the nine members should be lawyers, but Scotland Against Crooked Lawyers thinks that none of them should be lawyers. Does the faculty have a case in relation to the need for expertise, or would that point be sufficiently covered by appointing an adviser?

William Burns: There will be no need for expertise. It is not difficult to weigh up evidence, put it into context and come up with a judicious decision. People do not need to be lawyers or have a law degree to do that. It is a simple process.

Colin Fox: Professor Paterson said earlier that when he sat on such committees, he found it immensely complicated to decide what constituted negligent behaviour that should be penalised.

William Burns: With all respect to him, Alan Paterson is a lawyer—perhaps we owe him no respect.

Stuart Usher: Again, lawyers would say that the commission needs expertise. However, as Mr Burns has pointed out, no expertise is required.

Professor Paterson said that the situation was terribly complex. That is a device or a ploy that is used by lawyers incessantly when they want to divert the discourse or make things obscure. However, there is no big deal here. That is why we feel that there is no necessity to have a lawyer on the new commission, except in an advisory capacity.

Colin Fox: If you think that no expertise is needed, why would lawyers be needed to advise the commission?

Stuart Usher: There might be occasions, you know—I cannot really answer that question.

William Burns: When it comes to decision making, a lawyer would not be needed. Anyone can weigh up the evidence, whether they are a lawyer, a baker or a butcher. Anyone can listen to evidence and say that one side is right and one side is wrong, although there might be a few grey areas. A lawyer could pull something out of a book and get someone bang to rights without having to discuss the merits or demerits of a case. It might be useful to have a lawyer that could act in such a capacity, but only occasionally.

Stuart Usher: Also, you should bear in mind the fact that the expertise that the Faculty of Advocates is talking about introducing into this equation is the very expertise that gave rise to the need for this bill and this meeting today. Such expertise cannot be of a particularly high standard.

The question was to do with our objection to lawyers filling four of the nine places on the new commission. Our point is that we are trying to get away from self-regulation. For some years, the Law Society has said that all its committees consist of a mix of lawyers and laypeople. I am sure that you have read that in the papers. However, last year, the Law Society called on me to be its chief witness against a lawyer who had, in no uncertain terms, shafted me. My claim went to the guarantee fund. I made inquiries about the guarantee fund: 10 people were on it, and all 10 were lawyers—I have their names and the names of their firms. That gave the lie to the Law Society's claim, which it has been putting about for years, that it has a healthy mix—a nice little modern phrase—of laypeople and lawyers.

Colin Fox: You know that the bill proposes a nine-member commission, but only four of the members would be lawyers, which would mean that there would be an in-built majority of non-lawyers.

Stuart Usher: I know. However, I told you about that little episode to illustrate why we are trying to get away from self-regulation. Given the situation in which we find ourselves, it would not be desirable to have any lawyers on the new commission.

Colin Fox: It is clear that you would prefer that there were no lawyers on the commission.

Stuart Usher: Deceit is deceit. Mr Burns can spot it, you can spot it—anyone can spot it. With all due respect to Professor Paterson and the other lawyers who have appeared before you, lawyers always say—as Professor Paterson did today—that, in law, they are not sure how to handle this, that and the next thing. However, it is quite simple: deceit is deceit. That is what the new commission should be predicated on.

Mr Swinney: I would like to pursue what appears to be a contradiction in your argument. In your submission, you say that you would be quite happy to have legal professionals acting in an advisory capacity but would not want lawyers to sit on the commission. I do not understand the

distinction that you are making. If you are happy to have a lawyer in the room in order to provide advice, you must accept, in principle, the need for there to be some legal input into those deliberations.

Stuart Usher: In that case, we would withdraw our statement that a lawyer could act as an adviser. We thought that that might be possible, but we would prefer not to have lawyers present.

Mr Swinney: So no lawyers would be involved.

Stuart Usher: None at all. We could have one as a tea boy or something of that nature.

William Burns: The fear is that the new commission would be controlled by lawyers. Even one lawyer would receive unmerited deference from the rest of the commission.

Mr Swinney: The problem with that view is that it is an extreme view and if we have a problem now—

William Burns: It is an extreme problem.

Mr Swinney: Hear me out, Mr Burns.

I accept that there is a problem in respect of public confidence in the complaints handling system, but if there is no legal input into the commission's deliberations the problem will be the profession's confidence in the work of the commission. Therefore, the problem of a lack of public confidence in the system would be exchanged for the problem of a lack of professional confidence in it. That would not take us any further forward.

Stuart Usher: We can see your point, which has merit. This is stage 1 of the process, is it not?

Mr Swinney: Yes.

Stuart Usher: And it goes on to stages 2 and 3. The positions that we have taken are positions of principle. If we find that, for whatever reason, the practicalities defeat the principle, we could change our position. We take your point that there would be no representation for the lawyers.

Mr Swinney: I am talking about the need to design a system that commands confidence. The Government's objective—and the bill's objective—is to create a system that commands confidence. I cannot understand how a system that deals with complaints about the legal profession but has no legal input into its deliberations could have public confidence. I would not have confidence in such a system.

Stuart Usher: You said that the exercise is about building confidence, but I do not think that it is. We think that it is about improving the lot of the Scottish public, or at least the consumers of Scottish legal services. That is what the whole process is about. It is not about building confidence per se. The biggest crooks in the world, who happened to be non-lawyers, could be appointed to the commission. Let us say that Mr Burns and I were the biggest crooks in Edinburgh. You could put us on to the commission. We would look all right and that would build confidence: the object is not to build confidence but to introduce a proper complaints procedure.

William Burns: Any reform would be an improvement, because currently nobody has any confidence in the complaints procedures.

Stuart Usher: Except lawyers.

William Burns: The lawyers love it.

Mr Swinney: You will find that some of them are not too happy with it.

The Convener: To be fair, we have received more than 600 submissions, including ones from lawyers who see an opportunity for reform.

Jackie Baillie: I will move us on to the financial impact of the proposed new system. There have been suggestions that the proposals in the bill might result in lawyers withdrawing from less profitable areas of legal practice. Specifically, some lawyers see the financial risks of having a complaint brought against them as being too great. You will appreciate that there is the general levy, plus a specific levy—irrespective of the outcome—if a complaint is lodged. Do you consider those concerns to be valid?

Stuart Usher: No, although we can understand that there might be apprehension about the system. We are very much in favour of the principle that the polluter pays.

We do not favour a general levy, although we agree that the commission's start-up costs and staff must be paid for. Good lawyers against whom no complaints are made are the last people whom we want to pay an extra levy. That would be most unfair. We are in favour of the polluter-pays principle, which was in the Scottish Executive's consultation paper last year. Does that answer your question?

16:15

William Burns: Decent lawyers would not have a problem with such a system—only crooked lawyers would have a problem.

Jackie Baillie: You have kind of contradicted yourself, Mr Usher. You said that the lawyers' concerns were not valid, but then you described exactly the same concerns. Lawyers are not concerned about the general levy because, like you, they recognise that general administrative costs and start-up costs must be met. The concern is that if, for example, I complained but the lawyer

was innocent of the complaint—imagine that for a moment—the lawyer would still need to pay, irrespective of whether the complaint was upheld. That is not the polluter-pays principle that you are right to support.

Stuart Usher: I am sorry; we were at fault, and I was at fault in particular. We are not in favour of a complaints levy of £400 on every lawyer, because that would persecute or punish decent lawyers.

William Burns: If a complaint had no merit, the complainer should have to pay a penalty.

Stuart Usher: I go along with that. We must watch out for complainants, too. If someone complained about a trivial matter, as parents do in relation to their children at schools—I know that they do that because my wife is a teacher—and talked a lot of nonsense that wasted everyone's time, we would be in favour of a levy on the complainant.

Jackie Baillie: I do not want to misinterpret you. You are saying that you would favour a penalty on a member of the public who made a vexatious, malicious or repeat complaint.

Stuart Usher: Yes.

William Burns: Yes.

Jackie Baillie: At what level should that penalty be set? Should the commission consider that?

Stuart Usher: The level could be considered at stage 2. We have not discussed that and we would need a bit of time to think about it.

Jackie Baillie: That is helpful.

The Convener: You said that you would go away and think about that issue. If you sent in a note about your thoughts, that would help and would be added to the evidence that we are taking.

Mr Maxwell: It is clear from the submission that the witnesses do not support the ceiling of £20,000 on compensation and that you do not think that a ceiling should be set. Is it fair to say that?

William Burns: Yes.

Mr Maxwell: You think that the ceiling should be removed, because the loss could be far greater than £20,000. We have heard from the Law Society, the Faculty of Advocates and others that it would still be open to individuals to go to the courts if their loss was greater than the current limit of £5,000 or the proposed limit in the bill of £20,000. We heard that the majority of cases involve losses that are under those figures and that only a small number involve greater losses.

Stuart Usher: That is nonsense. If the faculty and the Law Society say that only a small number of complaints involve more than £20,000, a visit to our website will soon put them right on that. The faculty and the Law Society are not right.

Mr Maxwell: Do you support their point that it is still open to those who feel that compensation should be higher than £5,000 or £20,000 to go to the courts and sue for a higher sum?

William Burns: Going to the courts is a waste of time. People become frustrated in going to the courts, because the courts are crooked, too. I have witnessed crooked judges and sheriffs, but I will not mention their names because this meeting is being recorded. All in our organisation have witnessed double-dealing when lawyers go to the civil courts.

If a crime has been committed, a person can complain to the chief constable, who will say that the complaint is a civil matter. If the person writes to a lawyer to ask how much can be stolen before a crime has been committed, they will simply be ignored. Members have no idea of the depth of corruption in the legal profession. People have to go through expensive civil procedures, but lawyers do not turn up at proof hearings. Many of our members have gone through a long process, and many cases have been called to court—the gravy train runs on and on and the amount involved comes to a fortune—but the lawyers have not turned up on the day of the hearing. Therefore, the people involved had to get another lawyer—the same thing happens over and over again. One of our members has had around 30 lawyers for one case, which is ridiculous.

Mr Maxwell: So you have no confidence in the court system.

William Burns: No. The court system is not accountable and the whole legal profession is a joke.

Stuart Usher: I will summarise. In civil matters, the option of going to court is not feasible, particularly if the person is pursuing a complaint against a lawyer. Our position is that the new commission should be awarded powers under the bill so that the polluter-pays principle will apply. If a lawyer has defrauded someone of £100,000, say, that lawyer must cough up; if he cannot do so, his house must be sold, although most lawyers are worth far more than £100,000. If the lawyer has stolen £1 million and cannot pay that back, there should be a levy against his firm. The polluter should always pay. Honest lawyers would then be rewarded and polluters would be heavily punished. When lawyers have seen a few people being heavily punished, all the corruption would—I hope—stop. As Mr Burns said, going to the courts is simply not an option.

Mr Maxwell: Okay. I would like to discuss some points that you make in your submission. It makes

a distinction between lawyers who make bona fide mistakes and lawyers who indulge in criminal activity. For the *Official Report*, will you explain the rationale behind your thinking and the distinction between the two types of lawyer?

Stuart Usher: Let us say that a lawyer who was acting on behalf of a client was meant to hand over money by a certain deadline to an estate agent who was acting on behalf of the seller of a house, the lawyer failed to do so, because they clean forgot about it, and the client—the purchaser—lost the property. There would be a loss to the client, but the lawyer would have made a bona fide mistake. Everyone makes mistakes, and we do not think that a lawyer should be punished if he makes a bona fide mistake or if an omission is involved. However, lawyers make many mala fide mistakes; they refer to "mistakes", but it is evident that they are not mistakes. The rest of what we want to say is in our submission. Indemnity insurers would say "All right, you didn't make the mistake on purpose, so that's fine." The chap must be recompensed, so the indemnity insurers would pay.

Mr Maxwell: You propose that the master policy should play an important role in compensating people and, if I understand your proposal, you say that if a lawyer has to pay £1 million but cannot afford to do so, the insurance should kick in to cover any loss that is not covered by selling the lawyer's assets. Do you have concerns about the evidence that we have heard—some of which, I accept, is anecdotal—that suggests that there are lengthy and, some people might say, unacceptable delays in receiving compensation settlements from policies? Is that a sensible approach?

Stuart Usher: I do not follow the question.

Mr Maxwell: Some people say that the long time it takes to get a settlement from the master policy is a problem in itself.

Stuart Usher: We agree.

Mr Maxwell: If that is so, why do you suggest that indemnity insurance is part of the solution?

Stuart Usher: Because there is no other solution when the lawyer cannot pay even when all the partners in the firm have chipped in, as we propose in our written submission. If the indemnity insurance process takes a long time, it can be refined. The state cannot do everything, but the proposed new commission should see to it that indemnity insurers such as Royal & Sun Alliance cough up in reasonable time. Influence should be brought to bear on insurers.

Mr Maxwell: Are you suggesting that the new commission should have a role in overseeing the master policy?

Stuart Usher: We are talking about principles, rather than practical matters. We have to refine our position on that.

Mr Maxwell: Okay.

In your written submission, you say that a lawyer who has engaged in criminal activity that caused a loss for their client should bear the loss

"to the full extent of his personal worth, if necessary".

You suggest that all the lawyer's worldly goods should be sold off to compensate the individual. I am wondering about the practical implications of that. Even when people are convicted of crimes such as drug dealing and some of their assets are sold off, surely not all the assets can be taken, because there might be a wife, a child or other members of the family who must be taken into account. I assume that you are not suggesting that lawyers' families be thrown into the street.

William Burns: Some complainants are made penniless. They lose everything, although they have done nothing wrong. They are thrown out on the street.

Mr Maxwell: The lawyer's wife and children would have done nothing wrong.

William Burns: The wives and children of complainants have done nothing wrong. The lawyer should be punished if he is in the wrong.

Mr Maxwell: I accept that, but I am trying to clarify whether by "personal worth" you mean absolutely everything.

William Burns: It means everything for everybody else.

Stuart Usher: Let us say that a lawyer is worth about £500,000 or £600,000, when we take into account all his assets, including the house. The lawyer relieves someone of £1 million by embezzling, stealing or some other criminal activity, which puts the client out on the street. We do not want to punish his wife and child, but if we do not do that, the lawyer will use his wife and child to complicate the matter. All families are extended families to a degree and I presume that the wife would be shocked and say, "You're a fine chap. You can walk the streets and my family will support me." We do not want people to suffer unnecessarily, but for a start we should get the message across that there can be no messing around and we should keep things simple. If a lawyer behaved in such a way, it would be desirable to sell him up. We would leave him his clothes.

William Burns: It would be the lawyer who had created the problem for his family in a case like that. There are more innocent people out on the street because of lawyers than members of the committee might imagine. Some people have committed suicide because of lawyers.

Mr Maxwell: I just wanted to clear up the point, so that I understand exactly what you propose.

Stuart Usher: Quite so, Mr Maxwell.

16:30

Maureen Macmillan: I notice in your submission that you support the proposals in the bill to widen the categories of people who have a right of audience in court or a right to conduct litigation. At the moment, only solicitors or advocates can appear in court. Have you thought about the people to whom you would like the rights to be extended?

Stuart Usher: Yes. You say that solicitors have the right of audience in court. The word "lawyer" is actually more accurate than the word "solicitor". I know a lawyer and we regard lawyers as people who are qualified in the law. In Scotland, the only solicitors, or lawyers, who are allowed full rights of audience in the courts and who receive payment for exercising those rights are lawyers that come under the Law Society of Scotland and the block policy—the master policy—on insurance. That, in itself, creates a conflict of interest. If lawyer A, who belongs to the Law Society of Scotland, has shafted me, and I ask lawyer B to prosecute lawyer A, he will not do it because, if he is successful and it is a big claim, his premiums will go up.

All people who are qualified in law—that is, lawyers—whether they belong to the Law Society of Scotland or to the Scottish legal practitioners association or whatever, should be allowed rights of audience. That is the kind of situation that has pertained in England for the past few years and has been strengthened by the Clementi review. If others had the right of audience, it would introduce competition. That would help people such as myself, Mr Burns and other members of the public—although some of the people in the public gallery today are our members, there are many people I have not seen before. All our members have complained bitterly that they could never find a lawyer to represent them. I tried 44 before one said to me, "You're wrecking your own case. You're letting everyone know that you can't get a lawyer."

It is essential that the monopoly is broken. Other people would not be frightened of suing Law Society of Scotland members and licensees.

Maureen Macmillan: You think that those people should not be in the Law Society of Scotland but should have to have some kind of legal qualification, such as a law degree.

William Burns: If someone wants a trade union leader to represent them, I cannot see why that should be a problem. Even if the representative is not being paid directly, he could be paid through his union. In a criminal court, if a person has his neck on the line and decides that he wants to represent himself or wants any other person to represent him, I do not see a problem. That would apply in civil courts as well.

Maureen Macmillan: So it would be up to the client to nominate somebody to appear on their behalf.

William Burns: Yes. It would be up to the client.

Stuart Usher: Yes, but we do not want courts' time to be wasted by people who waffle or who cannot speak properly and who just waste everyone's time. We do not want that at all. There must be some sort of sorting process.

Maureen Macmillan: Would it be up to the client to ensure that the person who is asked to represent them has some kind of qualification or expertise?

Stuart Usher: It would be preferable for them to have a qualification, but at the moment there are people with no qualifications who appear in the courts. They have been accepted because they do not talk a lot of rot and they do not waste time.

The Convener: You have spoken about people having the correct professional indemnity insurance—or however you want to phrase it. Mr Burns gave us the example of a trade union leader. For the sake of argument, let us say that somebody in this room went to court and decided that the leader of a particular union would be the ideal person to represent them. Would you expect the trade union leader to have indemnity insurance in case they did not handle the argument properly and something went wrong?

William Burns: I was talking about an unpaid adviser as opposed to someone who was paid to represent a client.

The Convener: In other words, someone who did pro bono work—

William Burns: Yes, for the public good.

The Convener: So no fee would be involved and the client would not expect indemnity insurance to be necessary. They would have faith that their representative would do their best for them.

William Burns: Yes.

The Convener: That is perfectly fair.

Many people have commented orally and in written evidence on the procedure for making appointments to the commission. Should any bodies other than Government be involved?

Stuart Usher: The appointments procedure is not as simple as it seems. Here we enter the field

of perception and what is practical. The best people to appoint to the commission are those with first-hand experience of complaints handling by the Law Society, the Faculty of Advocates and other legal representative bodies, because they would know to look out for the tricks of the trade and could identify whether there had been deceit. It would not be practical for nine out of nine members to be people who had complained in the past, because that would not be perceived to be fair.

William Burns: A parliamentary committee—perhaps a justice 5 committee or whatever—could make the appointments.

The Convener: You are suggesting that a committee of the Parliament should make appointments as if it were a court, which of course, parliamentary committees are not.

Stuart Usher: No. I think what we would—

William Burns: We would appoint them—

The Convener: My question was: if not the Government, who should make the appointments?

Stuart Usher: That is why I said that the procedure would not be as easy as it appears. We revert to our original point that the Government is elected by the people. If anyone has precedence—for want of a better word—it is the Government. The state should appoint the board of the proposed commission. Certainly, there should be no input from any legal representative body—most decidedly not.

The Convener: I thank you very much for coming and being so clear with us this afternoon. As we said earlier, if you wish to send us a short note about any points that you feel you have not covered, we would be pleased to receive it.

Stuart Usher: Before we break up, may I make a short closing statement?

The Convener: We do not usually allow that. We based our questions on your submission. If there is something that you failed to put in it and with which we have not dealt this afternoon, you may write to us and we will consider it.

Stuart Usher: The Law Society was allowed to make a statement, but we are not. That is what happened when we gave evidence to the previous Justice 1 Committee. We take a dim view of it. It will not stop us co-operating, but it does not leave a very nice taste in the mouth.

The Convener: Did you wish to add something that you did not say in your submission?

Stuart Usher: We wanted to summarise the evidence.

The Convener: It is the committee's job to summarise the evidence. Thank you very much for attending.

Annual Report

16:40

The Convener: The next item of business is consideration of the annual report. I suggest that we go through the report paragraph by paragraph.

Jackie Baillie: I thought that the entire report was wonderful, so I do not see the need for us to do that.

The Convener: Thank you. Do members have any other points to make?

Mr Maxwell: I have a tiny point to make about paragraph 11. The second sentence is marginally inaccurate in that we did not meet members of the European Parliament; we met just one MEP.

The Convener: I was not there. In the same sentence, the word "committee" should be changed to "members of the committee", because I gather that only a few members of the committee went.

Mr Maxwell: That is also true.

The Convener: That has tidied up the report. With those minor corrections, is the annual report for 2005-06 agreed?

Members *indicated agreement*.

16:42

Meeting continued in private until 17:12.

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