JUSTICE 2 COMMITTEE

Tuesday 16 May 2006

Session 2

£5.00

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

CONTENTS

Tuesday 16 May 2006

JUSTICE 2 COMMITTEE
14th 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:

Hugh Henry (Deputy Minister for Justice)
Mr John Swinney (North Tayside) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Professor Alice Brown (Scottish Public Services Ombudsman)
Alistair Cockburn (Scottish Solicitors Discipline Tribunal)
Linda Costelloe Baker (Former Scottish Legal Services Ombudsman)
Mark Irvine (Scottish Solicitors Discipline Tribunal)
Judith Lea (Scottish Solicitors Discipline Tribunal)

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 16 May 2006

[THE CONVENER *opened the meeting at 14:07*]

Subordinate Legislation

Public Appointments and Public Bodies etc (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) Order 2006 (Draft)

The Convener (Mr David Davidson): Good afternoon. I open the 14th meeting of the Justice 2 Committee in 2006. I ask all people present, including those in the public gallery, to ensure that their telephones, pagers and BlackBerrys are switched off.

I welcome the Deputy Minister for Justice, Hugh Henry, and his colleagues. We have an affirmative Scottish statutory instrument for consideration today.

The Deputy Minister for Justice (Hugh Henry): Schedule 5 to the Police, Public Order and Criminal Justice (Scotland) Bill makes provision for the Scottish police services authority, which the bill will establish, to be subject to the jurisdiction of the commissioner for public appointments. Obviously, however, the provision will have no effect until the bill is brought into force and the new body comes into being. Therefore, as things stand, the commissioner could not take part in the process of appointing the SPSA's first convener and board members.

However, section 3(3) of the Public Appointments and Public Bodies etc (Scotland) Act 2003 contains an order-making power that caters for exactly such circumstances. The effect of a section 3(3) order is to provide for a body that is in the process of being established to be treated for the purposes of appointment to that body as if it had already been added to the list of public bodies that fall under the commissioner's jurisdiction. That in turn would allow the commissioner to supervise appointments to the body in question before it comes into being, which is the intention in relation to the SPSA. That would ensure that the proper governance arrangements were in place from the moment that the new authority came into being on 1 April 2007 and would allow the SPSA's convener to work with its chief executive in the run-up to April 2007.

I am aware that the Subordinate Legislation Committee raised a question about the vires of the order if it is made before the Police, Public Order and Criminal Justice (Scotland) Bill has been passed by the Parliament. In the Scottish Executive's view, the requirement in the 2003 act that a body is to be established does not require the bill that establishes it to have completed its parliamentary passage before a section 3(3) order can be made. However, even if there is disagreement, we need not dwell overly on that point because, as you are aware, stage 3 of the Police, Public Order and Criminal Justice (Scotland) Bill takes place on 25 May, and I am happy to assure the committee that we do not intend to make the order—assuming that it receives parliamentary approval—until after stage 3.

The Convener: We have had a note from the Subordinate Legislation Committee. Stewart Maxwell is a member of that committee, so perhaps he would like to comment on what it found.

Mr Stewart Maxwell (West of Scotland) (SNP): The minister is well aware of the Subordinate Legislation Committee's concerns regarding the vires of the order if it is made prior to the end of the bill's parliamentary process. That is covered by the Executive's response and the minister's comments today.

However, I will ask about the idea of a body being established. The Subordinate Legislation Committee was concerned that there is no clearly defined point in the process at which it is considered that a body is established. The Subordinate Legislation Committee's legal adviser pointed out that, at Westminster, at a certain point in a bill's passage, it is accepted that a body is established for the purpose of laying orders prior to the bill fulfilling its parliamentary process. Does the minister consider that there is a need for such a point to be identified in the passage of bills in the Scottish Parliament, or does he accept that orders should be made only after a bill has finally passed stage 3?

Hugh Henry: That point is wider than the order and it would not be proper for me to address the wider policy issue on behalf of all ministers and in connection with all proposed legislation. However, Stewart Maxwell makes an interesting point. As he said, I have outlined our arguments. We do not agree with the Subordinate Legislation Committee's interpretation, but perhaps we could consider the broader issue. I am not necessarily sure that we would have to adopt the Westminster model entirely, as the fact that we have bills in process and can determine an end point to that process may be sufficient. However, if a gap or weakness has been identified, we could no doubt consider it.

Given that the question of what is proper process goes much wider than this order, I wonder whether, rather than our dealing with the issue in connection with the order, the Subordinate Legislation Committee should address it to the Executive. I will certainly feed the point back, but it is a slightly different debate from the one on the order.

Mr Maxwell: Do you have any plans to change the order if any amendments to the bill at stage 3 cause problems with it? That point was behind some of the Subordinate Legislation Committee's issues with the laying of the order prior to the bill completing its passage, as any changes that took place during the parliamentary process could affect the order.

Hugh Henry: If the Parliament decided at stage 3 not to proceed with the establishment of the SPSA, we would need to respond to that, because it would be ludicrous to appoint a convener and take other matters forward if there was no body for which that convener would be responsible. We have not detected any significant problems or disagreements on the SPSA's creation, so the point is hypothetical. If something unforeseen were to happen, we would need to revisit the order or consider where the decision on the bill fitted with the decision on the order. It would not be acceptable if we had two conflicting decisions—one as a result of the order and one as a result of a determination by the Parliament.

The Convener: You have answered, in part, the question raised by the Subordinate Legislation Committee. You say that you will raise a point with the Executive and I presume that you will then write to the Subordinate Legislation Committee. Will you copy the Justice 2 Committee into that reply, so that we understand anything that is decided between the Executive and the Subordinate Legislation Committee? You have assured us that you do not want to jump the gun on appointments, but does any other member of the committee wish to express views on this?

14:15

Hugh Henry: I should first clarify that the response to the Subordinate Legislation Committee may come from another minister, because Stewart Maxwell's point goes beyond the justice portfolio. However, I will feed the point back to my colleagues.

Mr Maxwell: I wanted to ask a further question. Why did the Executive decide to publish the draft order before the end of the bill's parliamentary process? I am sure you would accept that that is relatively unusual. Was there a particular reason why it was necessary to publish the draft order before the end of stage 3—for example, speed? If not, why did you not just wait until after next Thursday?

Hugh Henry: We did not expect any significant problems. We wanted to press ahead with what will be a very influential appointment and we did not want to waste any time. It is a matter of judgment. You may see it one way, but we saw it another way. We did not envisage any great difficulties.

Motion moved,

That the Justice 2 Committee recommends that the draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) Order 2006 be approved.—[*Hugh Henry*.]

Motion agreed to.

The Convener: I thank the minister and his colleagues for their attendance this afternoon.

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

14:17

The Convener: We move to item 2. We have apologies from Colin Fox, who cannot attend. I welcome John Swinney to the committee, and I welcome Margaret Ross, who is our adviser on the Legal Profession and Legal Aid (Scotland) Bill. I also welcome Sarah Harvie-Clark from the Scottish Parliament information centre.

Questions have been asked about my son's employment and I say again that he is an English barrister who is registered to work and practise in England. He is also registered as an English solicitor. He is not registered to practise in Scotland, nor does he do so.

Maureen Macmillan may also like to mention her interest.

Maureen Macmillan (Highlands and Islands) (Lab): I simply refer people to the statement that I made at our first evidence-taking session on the bill.

The Convener: I welcome our first witness today, who is Linda Costelloe Baker, the former Scottish legal services ombudsman. Thank you for coming along and for your written submission.

What are the difficulties with making distinctions between service and conduct complaints, and with requiring each type of complaint to be dealt with differently?

Linda Costelloe Baker (Former Scottish Legal Services Ombudsman): Paragraph 26 of the policy memorandum says that the aim of the Legal Profession and Legal Aid (Scotland) Bill is to

"put the users of legal services at the heart of regulatory arrangements."

I do not think that the bill does that. It does not touch regulation, which is a far wider and deeper subject than complaint handling. Complaint handling is only a very small part of the arrangements.

The split between service complaints and conduct complaints confuses the profession and it certainly confuses service users and people who come into contact with the profession. The split that is proposed in the bill will increase the confusion on both sides. It certainly will not

"put the users of legal services at the heart of regulatory arrangements."

The Convener: Was the difficulty apparent to you in your former role?

Linda Costelloe Baker: Always—it was a constant difficulty. Last time I checked, 200 of the 600 complaints per year involved conduct issues and a proportion of those involved both conduct and service issues. Although the Law Society of Scotland's practice changed as a result of the Council of the Law Society of Scotland Act 2003, service complaints were hived off and stopped at the first gate and the conduct bits went on to another committee and potentially a further committee. The split lengthened the process, but it also created confusion for complainants about when the system had ended and when they would get a response to their complaint.

In some circumstances, it is difficult to work out exactly what is what. Between 2000 and 2003, the Law Society operated a much clearer split between service complaints and conduct complaints. I was quite critical of that, because it is a serious matter if a solicitor acts with a conflict of interest but a complaint about that would be categorised as a conduct complaint. That meant that, even if it was upheld, there was no possibility of redress for the complainant.

I accept some responsibility for the Law Society changing its policy to classify almost everything as a service complaint. However, that means that serious conduct issues do not go the full mile to the point at which measures of public protection are taken against the solicitor. I cannot understand why a system that is muddied and confused and which does not work has simply been imported into the bill with the expectation that the legal services professional bodies and the proposed commission will negotiate, consult and liaise with each other. I do not think that that will happen smoothly.

The Convener: You said that 200 of the 600 complaints per year involve conduct issues and that some of those involve both conduct and service issues. How many of the 200 are joint service and conduct complaints?

Linda Costelloe Baker: About 100.

The Convener: So it is about 50 per cent.

Linda Costelloe Baker: Yes.

Bill Butler (Glasgow Anniesland) (Lab): Good afternoon. You favour the proposed commission investigating all complaints about practitioners, but you make an interesting distinction in your written evidence between complaints about the provision of legal services and complaints about what you call private actings. You propose that the new complaints-handling system should be structured around that distinction. Will you explain that distinction? How should it be reflected in the structure of the new complaints system?

Linda Costelloe Baker: In 2002, as a result of an ombudsman's recommendation, the Law Society of Scotland changed its code of conduct so that it applied to all members of the Law Society rather than just to members with practising certificates. Previously, there was a clear gap in that the code did not apply to members who did not have practising certificates. It is perfectly reasonable for a membership organisation such as the Law Society or the Faculty of Advocates to have rules with which its members must comply. The change means that the Law Society now has the facility to use its complaint mechanism in relation to what solicitors do in their own time, when they are not acting as legal practitioners.

Bill Butler: I take it that that is what you mean by private actings.

Linda Costelloe Baker: Yes. The definition of a practitioner is somebody who is a member of the Law Society or the Faculty of Advocates. In private actings, practitioners are doing things in their own time rather than as part of providing a legal service. I give two examples in my submission, but there are others that are perhaps closer to home for those in the Parliament, which you might think about. In the examples, the member of the professional body was not providing a legal service at the time of the alleged incident. It is perfectly reasonable that professional bodies hold on to such complaints, investigate them and mount a prosecution to the tribunal if they wish. They have done that in some of the cases that I outlined.

Bill Butler: In his evidence last week, Professor Paterson favoured an alternative approach, in which the ombudsman would act as a single gateway for all complaints, passing them on to professional bodies for resolution, but would have enhanced powers of direction, oversight and review. What are your views on that approach?

Linda Costelloe Baker: It is modelled on the New South Wales system, which Professor Paterson saw in action and became familiar with when he was carrying out his academic research. The system appears to work in New South Wales, partly, I think, because the person who holds the current post, whom I have met and whose background I know, is an exceptional individual. However, that model has not worked so well in similar jurisdictions, partly because the working relationship between the holder of the post, whatever it might be called, and the professional body can break down.

Bill Butler: Would it be wise to seriously consider introducing such a system in Scotland? Could it be made to work here?

Linda Costelloe Baker: It is a step in the right direction away from the current system, but I am not sure that it is the best solution.

Bill Butler: Why are you so unsure about it, other than because the person who holds the post in New South Wales is an exceptional individual?

Linda Costelloe Baker: What changed things in Scotland was the public consultation, whose results were not available when the Justice 1 Committee undertook its initial inquiry in the previous session. Clearly, Parliament and the Executive have to respond to a consultation that came out so overwhelmingly in favour of complaint handling being removed from professional bodies. I do not think that it has been removed to a satisfactory degree.

However, as I have said, none of this matters unless there is a degree of independence in regulation, which is not the same thing as complaint handling.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): The bill will give the proposed commission only a partial regulatory function, with the ability to put together reports and have a relationship with Parliament on practices that lead to complaints. Should that function be developed more?

Linda Costelloe Baker: As Scottish legal services ombudsman, I had the power to make recommendations to professional bodies under section 34B of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Indeed, my annual report, which is published today, focuses strongly on how I used that power. Nevertheless, I could make only recommendations. The Law Society and the Faculty of Advocates have the power to decide what constitutes adequate practice, short of setting any rules. No matter how much advice I might give on areas that require better scrutiny, tighter controls or different approaches, it is up to the professional body to say whether it agrees with my recommendations.

A complaint can be assessed adequately only when it is assessed against known standards of adequate practice, which, under the terms of the bill, will still be set by the professional bodies. The proposed commission can assess practice only against the standards that could be expected of

"a reputable and competent solicitor."

The bill's fundamental weakness is that it cannot decide those standards for itself.

Although it has hit some stumbling blocks, the review in England and Wales has been rather more coherent as it has examined regulation first and foremost, with complaint handling as an adjunct. In Scotland, we have focused on complaint handling, which is only a small part of the whole picture.

Jeremy Purvis: I hope that I am not misreading the bill, but section 16, which deals with the final

report and recommendations of investigations made under section 15, says:

"the Commission may direct the professional organisation to comply with"

its recommendations. Does that refer to the handling of conduct complaints rather than to the definition of proper conduct and so on?

Linda Costelloe Baker: Yes.

Maureen Macmillan: Jeremy Purvis has already asked the question that I had wanted to ask, but I want to follow up on those issues.

You have stated that the idea of professional misconduct is outdated because it depends on the professional body's subjective interpretation. However, if the professional body is not to define professional misconduct—or adequate professional practice or fitness to practise or whatever else we might call it—who is to define it? Should professional misconduct be defined by the proposed commission or by some other body?

14:30

Linda Costelloe Baker: At the moment, professional misconduct is as defined in a particular court case by the late Lord Emslie. It is not specified in the bill. Under my model, the independent Scottish Solicitors Discipline Tribunal would determine fitness to practise with a view to ensuring the protection of the public in future. In my view, that is a different issue from the provision of redress to a particular person, who may or may not have been a client, who has suffered from inadequate professional practice. I would much prefer that an independent regulatory body made decisions about adequate practice. At the moment, such decisions are made by the two professional bodies, which currently have no non-practitioner membership of their governing councils.

Maureen Macmillan: I find it difficult to see how non-lawyers could determine what constituted professional misconduct. There surely needs to be some input from the legal profession.

Linda Costelloe Baker: Absolutely. I have said all along that complaint-handling regulation cannot be a lawyer-free zone. My standard soundbite—if you will forgive me—is that, if people have a problem with their plumbing, they do not call a joiner to come and have a look at it. There is a need for expertise. The Scottish Solicitors Discipline Tribunal is not a lawyer-free zone. Currently, and as proposed, the tribunal has and will continue to have senior qualified and experienced lawyers as part of its membership. The important thing is to have a balance between the two.

Maureen Macmillan: Would the Scottish Solicitors Discipline Tribunal take a view that was seriously different from that of the Law Society?

Linda Costelloe Baker: It already does so.

Maureen Macmillan: Can we be given examples of that?

Linda Costelloe Baker: At the moment, the Law Society is perhaps more concerned with the tribunal issuing a series of censures rather than taking more radical action, but the tribunal takes a different view from the Law Society. The Law Society does not win every case that it puts to the tribunal.

Maureen Macmillan: If we change the way in which professional misconduct is defined or regulated, is there a danger that the tribunal's existing decisions on professional misconduct might become less useful in the future?

Linda Costelloe Baker: It is helpful that the tribunal has published more information about its decisions, as that has allowed the profession to see what the tribunal thinks is all right and what it thinks is not all right. About two years ago, I made a formal recommendation to the Law Society that it should publish more of its decisions about what it thought was inadequate professional service. The profession is really uncertain about that. I agree with what Professor Paterson said about the lack of consistency but, as I have pointed out before, a complaint can be assessed only against a notion of what constitutes adequate professional service.

Maureen Macmillan: Is the tribunal building up case law because there can be no absolutely objective way of deciding what constitutes professional misconduct?

Linda Costelloe Baker: Yes. The tribunal is there to consider all the circumstances. That is part of the test.

My proposal is perhaps far more radical than the profession is ready for. I question seriously whether there is much use these days in the notion of professionalism. Given the increased consumer protections that we all enjoy more generally, I am not sure that a profession needs somehow to be separately regulated. However, that is probably bigger thinking.

Maureen Macmillan: Indeed.

The Convener: On that point about the regulation of the profession, part of the responsibility of the professional bodies is to set standards of education and training. Do you question their ability to do that?

Linda Costelloe Baker: I am questioning whether it is right that that is done solely within the profession. The Law Society is talking about

having non-lawyer members of council—it currently has observers. The Law Society is not doing that willingly because it thinks that it is a good idea any more than it willingly introduced the undoubted improvements in complaint handling. The change has been driven by scrutiny by this committee, by Parliament and by the threat of the role being taken away from the Law Society. It does not come naturally to conservative and protectionist professional bodies to make the sort of changes for which the modern world is ready.

The Convener: John Swinney has a question.

Mr John Swinney (North Tayside) (SNP): My question is on a different subject.

The Convener: Does it relate to this point?

Mr Swinney: Yes. It is on the manner of complaint handling. I did not understand the import of one of the points in the Scottish legal services ombudsman's annual report. You make a distinction between an inquisitorial and an adversarial approach being taken in the complaint-handling process. I think that I understand the difference between the two, but why do you consider the issue to be significant?

Linda Costelloe Baker: It is one of the issues that cause most grief, upset and confusion to complainants. A table in the annual report shows the classification of complaints that are made to the ombudsman about the Law Society and the Faculty of Advocates. The complaint-handling process causes the most problems. The process was invented by legal services professional bodies, so it mimics court actions. In a court action, each side has to throw in all its evidence, which is disclosed to both sides so that they can fight it out. That is the adversarial approach.

One of the problems with the Law Society's previous system was that the process of fighting it out sometimes went on for two or three years while the solicitor made comments on comments, the complainant put in a rebuttal and the solicitor responded. Only when all the arguments had been exhausted—that is the term that was used—did the Law Society come in and say who had won. That approach mimics a typical court action and has all the problems that go along with it—it is bureaucratic, it takes a long time and it is potentially costly. That approach places a great burden on an individual complainant.

Ombudsmen and, increasingly, some courts, use an inquisitorial model, which means that the ombudsman—I will talk for myself as an ombudsman—gets all the information and decides what issues to look into and what to take into account. All the evidence is considered in one go and the parties do not slug it out in an adversarial contest first. The ombudsman sets the agenda.

For example, if someone complained to me, in my role as the ombudsman, that the Law Society committee had not taken into account a particular letter, I am not limited—as I would be in an adversarial system—to investigating only that issue. I have received a complaint about the handling of the matter, so I can look at the entire investigation and consider issues that the complainant might not know about because they happened behind closed doors.

Mr Swinney: In relation to the bill as it stands, which of those two definitions would you apply to which part of the process?

Linda Costelloe Baker: The commission certainly has the power to be inquisitorial. I would expect the commission to be inquisitorial.

Mr Swinney: What about the processes that are outlined in the part of the bill that deals with the handling of conduct complaints?

Linda Costelloe Baker: The commission can make recommendations.

Mr Swinney: But in respect of the handling of complaints by the Law Society—

Linda Costelloe Baker: The Law Society would still be able to operate an adversarial model.

Jeremy Purvis: My point goes back to Maureen Macmillan's questions on the expertise of the commission. We have heard that it might be appropriate for heart surgeons, plumbers, gas fitters, pilots and so on, with all their different qualifications, to investigate a particular complaint. Inadequate professional service is defined in the bill. Others who have given us evidence have said that a person does not need to be a lawyer to determine whether proper service was provided.

Why is it so important to have lawyers on the commission? Decisions might be taken not by the entire commission but by a sub-group that does not include lawyers. In many cases, decisions about a complaint could be taken without the involvement of lawyers. That would not seem to me to be a disaster.

Linda Costelloe Baker: I do not think that it would be a good idea. I see the commission taking a strategic overview rather than being involved in the handling of complaints—in other words, running the business rather than doing the business.

I have heard people say that one does not have to be a lawyer to determine whether a letter has been sent late or whether a telephone call has been returned. However, complaints are not as simple as that. Quite often, they involve complexities of normal legal practice relating to the transfer of ownership of property and to wills and executries.

As you know, the Scottish legal services ombudsman cannot be a lawyer, but I had nearly 20 years' experience of working in family courts and criminal courts. I had legally qualified staff; half the ombudsman staff have law degrees. The commission has to include people with legal expertise so that it can understand complicated issues. To say simply that one does not need to be a lawyer to check whether a phone call was returned does not take account of how complicated complaints can be.

What matters is who has overall control of the system. I am content that a commission that was composed in the way that the bill proposes would be adequately independent of the legal profession—and separate from the legal services professional bodies—to have strategic command and control.

Mr Maxwell: In your submission you comment on the differing levels of compensation, of which you do not seem to approve. There is provision for £20,000 for service complaints but only £5,000 for conduct complaints. When the Executive officials gave evidence, they said that that was to allow small negligence claims to be dealt with as part of a service complaint. Do you think that that is a satisfactory explanation for the difference?

Linda Costelloe Baker: That is a tricky question, because it involves areas of law and I have just told you that I am not a lawyer. Legal practice, as defined by the courts, and legal responsibilities have moved on slightly. I cannot remember the particular case that determined this, but there is now a duty of care to third parties, which did not exist previously.

I would feel more comfortable with the redress provisions if they were split more clearly into loss, distress and inconvenience. For example, the Financial Ombudsman Service has huge powers of redress, but most of the £100,000 that is available to it, which is about to be increased, is for compensation for loss. Similarly, the ombudsman for chartered surveyors has £25,000 available for loss and £5,000 for inconvenience and distress.

I have opposed, perhaps controversially, the legal ombudsman's powers being increased so that it can award up to £5,000, because it is difficult to see how one of the professional bodies can cause somebody loss—they can cause them £1,500 worth of inconvenience and distress.

Having compensation lumped into one category does not make things clear enough. If it was separated, so that there was £19,000 for loss and up to £1,000 for inconvenience and distress, which is about the going maximum among ombudsmen and complaint handlers, people would understand more clearly that the complaints system is an alternative to pursuing a case through a negligence action. As you have heard, the legal profession is deeply uncomfortable with that, because it would take it away from playing on home ground. Courts are home ground for lawyers; they are comfortable for them, but frightening for the rest of us.

All complaints systems are an alternative to pursuing a case for negligence. The other parallel that I use is with burnt biscuits at the supermarket. Almost all commercial companies have learned that having a user-friendly, low-cost complaints system is a win-win situation: it is better for the company, it is more accessible for the consumer and people get the feedback that they need. However, because the legal profession is so hung up on court actions, which used to be its territory, it is overly upset about the complaints system being used to deal with matters that people used to take to court. I am sorry that that was rather a long answer.

14:45

Mr Maxwell: I am interested in the distinction that you made in your written evidence between loss, inconvenience and distress. Do you understand the reason for the difference between the two maximum compensation levels of £20,000 from the commission and £5,000 from the discipline tribunal?

Linda Costelloe Baker: No. As I said, the courts found recently that there must be a duty of care to third parties, which can now be caused loss.

Quite where third-party complaints fit in is one of the biggest weaknesses of the current complaints system and it is not adequately addressed in the bill. The definition of complaint precludes third-party complaints because it refers to anyone who is "directly affected by" inadequate professional services. That affected person is a third party—it could be a witness, someone who is buying a house or one party in a divorce. The problem is that the redress provisions for a service complaint apply only to a client.

Mr Maxwell: I presume then that you would support an amendment to the bill to change the wording from "the client" to "the complainant".

Linda Costelloe Baker: Yes.

Maureen Macmillan: We heard from the Law Society about its fears that solicitors might withdraw from civil legal aid work because of the £20,000 compensation ceiling that the bill proposes to impose. I know that you do not see all complaints, but have you any feeling for which area of law generates most complaints?

Linda Costello Baker: I think that there was a breakdown of the statistics in my annual report a couple of years ago, although the statistics have changed this year. Some 27 per cent of complaints have been about the misselling of endowments. Remove those from the equation, as will probably happen in about 18 months, and conveyancing and civil litigation are the two largest areas that attract complaints. Typically, civil litigation is privately funded.

Maureen Macmillan: Rather than funded by civil legal aid.

Linda Costelloe Baker: My concern about a comment such as that is that the legal profession might use the bill to strengthen its position on civil legal aid because it is deeply unhappy about the fee rates. That is understandable because lawyers are only human. However, if the complaints system simply provided a more user-friendly, lower-cost alternative to a court action, the practitioner would have to pay the £20,000 through a negligence action if it were found that they had provided a negligent service and caused loss. What does that mean? It almost confirms that the current system prevents people from taking court action.

Maureen Macmillan: Thank you; that is helpful.

Jackie Baillie (Dumbarton) (Lab): I turn to the process of handling conduct complaints. Is it possible to look at how a complaint has been handled without necessarily looking at the substance of the complaint?

Linda Costelloe Baker: I have done that reasonably successfully for the past six years. Seriously, though, the answer is no, of course not. One of my other concerns about the bill as drafted is that the sections that give the commission the power to look at the handling of a conduct complaint do not appear to give the power to obtain documents from practitioners, although I could be wrong about that. The power to access documents was one that I used effectively as ombudsman, particularly when the Law Society investigated a complaint and did not obtain the solicitor's file. The society tends to do that in cases of third-party complaints because it does not want to ask. However, I used my power to get files and found it enormously useful.

More generally, the ombudsman's functions fall into two parts, the first of which is to look at the administrative handling of a complaint, which is very practical. The other is to look at whether the complaint was investigated adequately. In that case, it is necessary to consider the substance of the original complaint and to examine all the evidence, to see whether the evidence was taken into account and whether the decision was supported by adequate reasons. One must be careful as an ombudsman not to say that a decision was right or wrong, as that would be to act as a forum for appeal. However, one can say that a decision was not reasonable, because it was not supported by adequate reasons or because it flew in the face of the evidence.

Jackie Baillie: Would you like the process to be formalised? You are saying quite clearly that, although you report on the handling of a complaint, you also examine its substance. Would you like an explicit power to be given to the commissioner to enable them to do that in respect of the decision of the professional body?

Linda Costelloe Baker: It might be helpful, in case there were problems. The Law Society and the Faculty of Advocates know that we work in that way and that I sailed very close to the wind sometimes—probably too close. An explicit statement to the effect that handling of a complaint refers to administrative handling and the adequacy of the investigation, which includes whether evidence was obtained and how that evidence was addressed, would be useful.

Jackie Baillie: I have noted your point about the power to get documents.

As the ombudsman, you had the power to bring a prosecution before the Scottish Solicitors Discipline Tribunal, but the new commission will not have that power. Is it important that it should? I understand that no prosecutions were taken forward by the ombudsman using the power.

Linda Costelloe Baker: That is right. From 1991, when the first ombudsman took up their post, there have been no prosecutions using the power. Strictly speaking, it is not a power to bring a prosecution. The ombudsman can refer a case—they do not prosecute. The tribunal instructs a solicitor to prosecute.

There are two sets of circumstances in which I would have used the power. I have been careful to check constantly to see whether it was needed. I was fairly close to using it at times and was extremely close to using it a week before I stepped down, which was slightly ironic. The two sets of circumstances are interesting. First, if the Law Society refused to accept a recommendation to reinvestigate or to investigate further a serious complaint about professional misconduct, I knew and stated in my policies that I would refer the case to the tribunal. I suppose that the same applies to the Faculty of Advocates, although to a lesser extent. The Law Society never refused to accept such a recommendation. It came closest to doing so in one very recent case. However, after I left I learned that the Law Society had accepted the recommendation, although it was a bit touch and go. That set of circumstances would not apply under the bill, because instead of being able to

make a recommendation, the commission has a binding power.

The second set of circumstances relates to the ombudsman's power to require practitioners to provide documents. In my stated policies, I indicated that if a firm of solicitors or a solicitor refused to provide me with documents, I would not make a complaint to the Law Society but would go straight to the tribunal. On two occasions, I did not get the documents that I required until I had a sent a third letter. In the letters, I set out what my powers were. The second letter said that if the documents were not provided, I might think that that might amount to professional misconduct. You will notice all the caveats in that sentence. In the third letter, I reminded the firm or solicitor that if I thought that it might amount to misconduct, I had the power to refer the case to the tribunal. That always worked, so I never had to refer a case. Under the bill, it will not be necessary, because there are alternatives. The commission's powers are different from those of the ombudsman when someone refuses to provide documents.

There is an important gap in respect of documents. People who instruct solicitors are entitled to have their advice kept confidential. The Law Society says that if a client complains about their solicitor, they give up the right of confidentiality. That is an important point, given legal professional privilege. I cannot see anything in the bill that makes that explicit. It might be something that the commission would have to say in its information leaflets. However, it is quite important that a complainant formally gives up the right to confidentiality. Without that, the solicitor could quite reasonably say that, under the code of conduct, they have a duty not to disclose anything.

Jackie Baillie: I think that someone else will explore that issue with you in more detail.

The Convener: That person is Maureen Macmillan, who gave notice of a question that she wanted to ask.

Maureen Macmillan: Yes, but I had not expected to be able to ask it quite yet. That is the way it goes, though.

There is a statutory power to require the lawyer to provide documents, the duty of confidentiality notwithstanding.

Linda Costelloe Baker: Yes, the duty of confidentiality notwithstanding.

Maureen Macmillan: We have discussed the fact that the commission will not be given a similar power.

You said that you had had no problems obtaining files. However, you confirmed that you will observe the solicitor's duty of confidentiality. How do you feel that confidentiality should be dealt with in the bill and in third-party complaints to the commission?

Linda Costelloe Baker: I think that third-party complaints are rather missing from the bill. My submission to the committee highlights particular case studies in annual reports. The one on page 32 of this year's report is particularly useful because the complaint was upheld and the complainant was caused quite significant loss, inconvenience and distress with no possible redress.

Right from the start, I was unhappy about the way in which the Law Society was handling third-party complaints. Under the adversarial process, when it received a letter of complaint, it would simply pop it in the post to the opposition solicitor without the complainant necessarily knowing that that would happen, even though they might have disclosed information that they did not want the opposition to know. An early recommendation of mine, which was acted on about six years ago, was that that be put right.

With my encouragement—although it has taken a long time—the Law Society has come up with an entirely separate complaints process for third-party complaints so that there is no cross-copying of information but the Law Society can still do the job that it is supposed to do, which is to ensure that practice has been adequate and appropriate. Now, the complaint goes to the Law Society and the practitioner is notified but the information from the practitioner is not routinely sent back to the complainant. The complainant does not get the report; they simply get the outcome.

I am only just beginning to see how that process is working, which shows that it has taken almost six years to get the process up and running. I felt, quite reasonably, that the opposing solicitor would be reluctant about providing their file to the Law Society without any guarantees about what information would be disclosed. I used to deal with the situation by saying in my opinion that I wrote to the practitioner on such-and-such a date and required sight of their client file, which was provided willingly on such-and-such a date and that it appeared to be a full record of the business. In the couple of cases in which there was information on the file that was relevant to a recommendation that I was making to the Law Society, I wrote a separate letter to the Law Society, recommending that it procure the solicitor's file and drawing its attention to a letter with such-and-such a date. However, in the case that I am thinking of in that regard, the Law Society still refused to get the file.

The issue must be treated with a degree of caution. On the other hand, for the regulator to do its job properly, it needs to consider the issue of third-party complaints. The case that I have

highlighted in this year's annual report is about a solicitor knowingly misleading a court about his client's assets. Of course, his client is not going to complain to the Law Society about that because that client benefited from the act. However, it was a serious breach of the code of conduct—knowingly misleading a court is about as bad as it gets—and the other side of the transaction notified the Law Society that there was a problem. The Law Society initially refused to investigate—it does that quite a lot—and the complaint came to me. I recommended that it be investigated, which it was, and the complaint was upheld.

For me, the bill misses an important part of a regulator's oversight in not covering third-party complaints adequately.

Maureen Macmillan: So you would want the commission to have the same sort of priorities as you have just described that you used or that you have been building up over the past six years.

15:00

Linda Costelloe Baker: Yes. The process needs to be different. Of course, the commission has the power to design and invent its processes, but it might be helpful if the bill made it clearer that that would apply specifically and that the commission perhaps had a duty to protect the client's confidentiality if the complaint was made by a third party.

The Convener: People have different views on whether it is fair that a practitioner must pay the complaints levy when, after a complaint has been investigated, they are found to be clear. What is your opinion on that?

Linda Costelloe Baker: On whether the legal practitioner must pay the levy?

The Convener: Yes. Should they pay if they end up being cleared?

Linda Costelloe Baker: Supermarkets do.

The Convener: Will you expand on that?

Linda Costelloe Baker: Any commercial business regards the cost of complaint handling as part of the business. They are much more relaxed about it. I did quite a bit of research on this some years ago and there are particular reasons why legal practitioners find complaints particularly difficult to deal with. A practitioner provides the service personally, so a complaint feels like a personal attack. Most organisations just absorb the cost of complaint handling and whether a complaint is upheld does not really matter to them—it is all useful feedback.

The Convener: That is in the generality of complaint handling, but what about a specific case in which an individual is charged a fee that is separate to a general levy, because a complaint has been raised against them?

Linda Costelloe Baker: I can understand the concern about paying a complaint-handling fee if the complaint is not upheld. I take some responsibility for that, because the original proposal was that only upheld complaints would attract the fee. That is very dangerous. We talked about governance and accountability in the Finance Committee this morning. If the commission was running out of money it could up its hit rate because it would get more money that way. That is a real danger area. I am very familiar with the work of the Financial Ombudsman Service. The process works for it, so I do not see why it cannot work for the legal profession.

The Convener: Is there any risk of the process becoming a blackmailer's charter?

Linda Costelloe Baker: I would not have thought so. There has to be a specific exemption. The commission has the right to amend the levy rather than the fee. Third-party complaints are different. A third-party complaint should not have a case-handling fee, because that is the area in which it is possible to do mischief. The Financial Ombudsman Service learned from experience. It used to charge everyone but, because the small, independent financial advisers were concerned that that was impacting unfairly on them, the first two complaints are now free.

I have said in all my submissions that the costs of complaint handling fall unevenly on the profession. The big commercial firms pay a lot of practising certificate money but never use the Law Society's complaints system because their clients up business and move elsewhere. Commercial clients do not make complaints to the Law Society, yet the big commercial firms are still paying about £400 per practising certificate for the cost of complaint handling from which they do not benefit directly.

Jeremy Purvis: You said that if we had a polluter-pays principle or if a complaints levy were to be paid only if a complaint were upheld, there would be a financial incentive to the commission. Would there not be the equivalent if part of the financing of the commission were to be determined by how many complaints it sends to mediation? There would be a direct incentive for the commission to have a higher threshold for vexatious or frivolous complaints, because it could simply refer a complaint against a solicitor to mediation and get the complaints levy for it. The commission would not have to investigate, so there would be a direct financial incentive on it to have a higher threshold for vexatious or frivolous complaints.

Linda Costelloe Baker: I dislike the term "vexatious and frivolous"; it makes me very

uncomfortable. I do not use the term in my office and I have fought very hard to stop it ever being used there. Every complaint should be considered on its merits; if the complaint is not very important, a proportionate amount of time should be spent on it in response. A complaint should not be ruled out because it is considered to be vexatious and frivolous.

I am sorry; that does not answer your question.

Jeremy Purvis: It does in a way, because it means there would be a financial incentive to refer everything to mediation.

Linda Costelloe Baker: But as complaints are best resolved at source and by agreement, that might not be such a bad idea. It has been a problem in the past.

Jeremy Purvis: I do not disagree with that as a course of action. My question was about whether there should be a levy on that act, and whether there is an incentive. You stated that you are uncomfortable with the proposal for a levy whether or not a complaint is upheld. There are other proposed mechanisms for a flat levy for everything. We have heard proposals for having two free hits a year. Scotland Against Crooked Lawyers said that anyone who makes a vexatious complaint should have to pay. I am just testing to see what you think would be the right method.

Linda Costelloe Baker: If the fee is a case-handling fee, it is right that it should be charged if the commission has work to do. In my new job, the fee that is charged for a visa is for the handling of the application; it is not dependent on whether the applicant gets the visa.

Jeremy Purvis: What if the complaint is more complex?

Linda Costelloe Baker: The burden would be evened out across the profession. I do not think that the complexity of a case should be related to the amount of fee that is charged. For example, conveyancing tends to be fairly low cost these days, but a case could end up being very complicated.

Everyone has different ideas, which shows that the problem is not easy to resolve. I keep coming back to the fact that the Financial Ombudsman Service has worked successfully with that system for several years now. That is why I commend it. It is no bad idea to learn from other people's experience.

Bill Butler: Several suggestions have been made to the committee that the new commission will not be sufficiently independent of Government. Aspects of the proposals that have raised particular concerns include the lack of a minimum term of appointment for members, the Scottish ministers having the power to appoint and remove members, and ministers having the power to direct the commission in the exercise of its functions. How do those aspects compare to the current arrangements for the legal services ombudsman?

Linda Costelloe Baker: I talked about that quite a bit this morning at the Finance Committee.

Most public appointments these days have a term of office. After Nolan, those terms were relatively short, at three years. With the benefit of experience, that was found to be too rapid a turnover. My appointment as ombudsman was for three years and renewable for three years. Three years is a relatively short time and if someone did leave after the first three years, it would be quite expensive to recruit someone else. More recent appointments have been for five years. If my memory serves, appointments to the Parole Board for Scotland—of which I am a former member—are for seven years because of the quasi-judicial nature of the board members when they are sitting on tribunals. Those posts are for seven years, but they are also not reappointable.

If there is to be a set period for appointments, five years seems reasonable.

Bill Butler: Should there be a set period?

Linda Costelloe Baker: Yes, it is helpful.

Bill Butler: Do you have any concerns about the Scottish ministers having powers to appoint and remove members?

Linda Costelloe Baker: Not if that is subject to oversight by the commissioner for public appointments.

Bill Butler: What about the ministers' power to direct the new commission in the exercise of its functions?

Linda Costelloe Baker: That worries me.

Bill Butler: Why?

Linda Costelloe Baker: The provision is a very brief little note that does not restrict ministers at all. It concerns me because the power might be too broadly cast.

Bill Butler: So, how would you narrow it? How might your concerns be allayed?

Linda Costelloe Baker: I assume that some of the findings of your colleagues on the Finance Committee might be of benefit. That committee is examining governance arrangements for independent bodies and how to balance accountability and independence, which is not an easy thing to do. I also commend to you the criteria for membership of the British and Irish Ombudsman Association. The BIOA has provided a written submission to the committee. If the new commission meets the criteria for membership of

the BIOA, that is almost an independent seal of approval of its independence. There are a number of tensions between the commission's being publicly accountable—which a public body should be—and its being independent and free to establish its own rules and practices.

Bill Butler: Is the new commission likely to be more or less independent of Government than the ombudsman currently is?

Linda Costelloe Baker: The section that says that the appointment of commissioners is subject to scrutiny by the relevant commission is important. As you may know, when I handed in my notice earlier this year, the intention was that the appointment of the ombudsman should not come under the scrutiny of the public appointments commissioner. The intention has changed since then, but the original intention was that the appointment should not be made under the normal appointments procedure. The fact that the minister thought that that was possible for the Scottish legal services ombudsman concerned me, but I am now satisfied that that the ability to scrutinise the appointment of commissioners is explicit in the bill.

Bill Butler: Does that give you a sufficient degree of comfort?

Linda Costelloe Baker: Yes. As I point out in my written submission, if that system is good enough for the appointment of the Scottish public services ombudsman—it is far more important that he or she has the right balance of independence and accountability—it is good enough for the appointment of the new commissioners.

Mr Swinney: I want to pursue the issue of the independence of the commission and the ministers' power to direct, which the Finance Committee is considering. I am concerned that, without there being some power of direction for ministers or someone else, the commission will be able to acquire a bureaucracy and, thereafter, a cost that will become punitive on those who are required to pay the levy. What is your feeling about the need to include in the bill powers of strategic financial control over the size of the envelope, to keep the commission reasonably affordable for those who are required to pay for its work?

Linda Costelloe Baker: I do not think that the legal profession would be silent if it felt that it was having to pay too much; however, that is a slightly different issue.

I am concerned about the figures. The commission will be a far bigger and more expensive organisation than I would have envisaged. One of my fundamental criticisms of the bill is that a lot of necessary research simply has not been done. As I told the Justice 1 Committee, nobody knows how many complaints are made about lawyers because nobody has ever done any research into that. Solicitors are not required to keep a record of complaints and, even if they were, nobody would go around checking those records. The size of the business is, therefore, absolutely unknown. It could have been known, however, if independent research had been carried out to show the level of dissatisfaction.

Last July, the Law Society passed a practice rule that states that solicitors now have to respond to complaints. In the past, they did not have to do that. I do not think that any research has been carried out into the impact that that will have. My instinct is that that might reduce the number of complaints that are made upwards. At the moment, there is an attitude—especially among smaller solicitor firms, two-partner firms and sole practitioners—that part of a solicitor's practising certificate fee pays the Law Society to handle complaints for them. Therefore, if they receive a complaint, their attitude is, "Don't complain to me; go straight to the Law Society." They feel that they have paid the Law Society to deal with complaints. However, in the absence of any good research, nobody knows what will happen.

Mr Swinney: But your gut feeling is that the commission as described in the financial memorandum to the bill is perhaps a larger entity than you would have envisaged.

15:15

Linda Costelloe Baker: If you had asked me six months ago what size I thought it would be, I would not have said as big as this. The commission membership is absolutely right, but the size of the organisation to do the business is certainly bigger than I would have thought necessary.

As we heard this morning, Parliament now has experience of setting up new bodies and then realising that there are consequences. Parliament is learning from its experiences and wants to get this right. I commend the efforts to ensure that the commission is adequately funded and resourced, and is independent but accountable.

Bill Butler: The bill does not include an external right to appeal commission decisions. Should it?

Linda Costelloe Baker: Had it been modelled more closely on the Financial Services Authority and Financial Ombudsman Service model, it would have been all right. One of the committee's other witnesses has said that it appears that bits have been taken from that model, but not the whole thing. It will not make things better if there is a formal route of appeal for solicitors that goes outwith the commission, because that will put

them back on home territory and into the court system.

Bill Butler: So you are content.

Linda Costelloe Baker: I cannot say whether the measures are compliant with human rights legislation because I am not a lawyer.

Bill Butler: I am not asking you that; I am just asking whether you are content in general.

Linda Costelloe Baker: The FOS model has an adequate internal appeals mechanism with an ombudsman, which is the model I commended. However, in the bill the ombudsman has become a chief executive. My ombudsman grapevine tells me that the Department for Constitutional Affairs is having an ombudsman rather than a chief executive; I think that the department's mind has changed. Far be it from me to say that Scotland should copy England and Wales, but—

Bill Butler: Just go ahead and do it.

Linda Costelloe Baker: Well, I am a bit careful, being English. However, I think that having an ombudsman rather than a chief executive—with all the protections that an ombudsman has—would prevent some of the problems that have arisen. The FOS model has been tested by some very powerful and well-funded organisations. I would commend that model as one that could be learned from.

Jeremy Purvis: You may have seen the evidence that the committee has had about concerns that certain types of practice—for example, practices carrying out legal aid, or rural practices—may choose, either because of the compensation that we have talked about, or because of the different complaints mechanism, not to practise. Based on your experience of different types of complaints and different types of practice, do you feel that those concerns are justified?

Linda Costelloe Baker: No, I do not think so. However, as I have said before, the legal profession has a parallel agenda concerning the underfunding of civil legal aid. Perhaps the profession is using the bill to make points about that.

If through poor service—and let us leave out the N-word—a solicitor has caused somebody a loss of £20,000, that loss will be met through a legal claim or through redress under this bill. If it is not met through a legal claim, that will be because people were frightened of that. The route taken will not make any difference to the cost on the firm. Somebody has to pay somehow.

A complaints system should not be seen in isolation. There is assessment against regulation, but a complaints system should not be a burden. It should be a system whereby practitioners learn from experience and use their experience of complaints to improve their service. It bothers me that the legal profession regards a complaints system as a rather unnecessary imposed burden, rather than regarding it—as most commercial organisations would—as a cost-effective method of getting consumer feedback to improve their service. That attitude has to change for this bill to work.

The Convener: I thank Ms Costelloe Baker for her full responses to our numerous questions. Thank you for making yourself available to the committee and for sending in your written evidence.

15:20

Meeting suspended.

15:28

On resuming—

The Convener: I reconvene the meeting and welcome Alistair Cockburn, chairman; Mark Irvine, lay member; and Judith Lea, a clerk, from the Scottish Solicitors Discipline Tribunal.

Under the proposals in the bill, you will lose your appellate function in relation to service complaints because there is no external right of appeal against decisions of the new commission. Should there be an external right of appeal against decisions on service complaints? If so, is the Scottish Solicitors Discipline Tribunal the correct forum for considering such appeals or would, say, the local sheriff court be preferable?

Alistair Cockburn (Scottish Solicitors Discipline Tribunal): A court would be preferable. It seems to me that there would be no purpose in referring appeals from the commission to the Scottish Solicitors Discipline Tribunal because, in effect, we sit as an appellate court. Appeals would have to be referred to an external court. Providing a right of appeal to the court might alleviate any suggestion that there was a failure to meet human rights standards.

For the record, my name is spelled "Cockburn" and Miss Lea's name is spelled "Lea", rather than as they appear before you.

The Convener: Thank you. No doubt the clerking team will note that.

Will you expand on your views on an external right of appeal? The matter has come up in other evidence.

Alistair Cockburn: Do you mean in relation to inadequate professional service or in relation to misconduct?

The Convener: Both, if you have views on them.

15:30

Alistair Cockburn: It is arrogant to say that one never gets things wrong. One should always be willing to have one's decisions tested by an external source. If the appeal is not upheld, that gives encouragement that what one is doing is correct. If the appeal is upheld, it provides a benchmark from which to correct things. It is wholly fallacious for anyone to assert that they can never get something wrong.

Maureen Macmillan: We heard from the former ombudsman that the Scottish Solicitors Discipline Tribunal is the guardian of the criteria for deciding what is and is not professional misconduct, but she thinks that professional misconduct is an outdated concept. Do you agree?

Alistair Cockburn: I cannot think of anything more important than for the members of a profession or society to determine the conduct rules for continued membership. I do not believe that anyone who is not a member of a club, association or society has an absolute right to impose on it empirical standards that have not been agreed by the members. The tribunal places great store by the lay members' views on these matters and they have influence, but ultimately the profession has to set its own standards. Otherwise, it becomes an oxymoron. One will not be dealing with professional misconduct if it is not the profession that sets the standard. It might be something else, but it will not be professional misconduct.

Maureen Macmillan: That is possibly what the former ombudsman was thinking about—that there should be something more objective than subjective about what is required from solicitors. She used other terminology such as "adequate professional practice" and "fitness to practise" as the criteria. Is there any difference between those terms and "professional misconduct"?

Alistair Cockburn: There is a great danger in just changing the labels. As I see it, there is a distinction to be drawn between inadequate professional service and misconduct. IPS is concerned with individual performance standards. Misconduct has overtones of competence and morality as determined by the profession. The two things are entirely separate.

Maureen Macmillan: One of the issues that arose in the consultation was whether the Law Society should be able to make a finding of professional misconduct. Under the bill, only the tribunal can make such a finding. Is it appropriate for the tribunal to retain exclusive jurisdiction to do that?

Alistair Cockburn: There is no point in two institutions having the same right to determine the matter in the first instance. If the Law Society determines misconduct, that is more likely to be subject to criticism. At present, cases are referred to the tribunal, which maintains independence from the Law Society.

There has been discussion about what happens at the lower end of the scale and the need for a mechanism for the Law Society to show its disapproval of conduct rather than simply saying that there will be no prosecution. That is why we have had findings of unprofessional conduct in the past, but they have not been associated with any penalty. They were just a mark of disfavour.

Maureen Macmillan: Are you happy with the distinction between unprofessional conduct and professional misconduct? It is difficult for the layperson to know which is which.

Alistair Cockburn: There are too many labels. If there has been an inadequate professional service in an individual case, that means that the service was not to an acceptable standard. By definition, the person did not deal with the case professionally.

Mark Irvine (Scottish Solicitors Discipline Tribunal): I do not think that there is any misunderstanding within the tribunal when it deals with individual cases, whether the members are lawyer members or lay members. It is always pretty clear whether a case falls into the category of misconduct. Whether we describe it as professional misconduct or misconduct is relatively unimportant. What matters is whether the alleged offence is serious, whether it was repeated, what the facts and circumstances of the case are, and how they are tested by the evidence. That is what it comes down to, and the tribunal debate gives lawyers and lay members the same individual voice, with no one having preference over anyone else.

Mr Swinney: Mr Cockburn, could you tell us what elements of professional misconduct—or whatever we call it—you believe must be determined by the profession?

Alistair Cockburn: When dealing with conveyancing, there is a practice whereby the firm issues a cheque in settlement of the purchase price; the client tenders that and receives the deeds in exchange. What would the commission say if the solicitor was facing a situation in which the client cheque bounced? Is the solicitor entitled to cancel his own cheque? It is a matter of practicality how the profession operates. There is a recorded decision on that very point, but there are aspects of the conduct of business between solicitor and solicitor as to whether things are acceptable or not.

Mr Swinney: I am trying to help the definitional process and I want to understand exactly what you believe the profession must remain in a position to determine. Can you explain what those things are?

Alistair Cockburn: Professional misconduct is self-defining. It is to do with the conduct of the individual solicitor in his day-to-day life, dealing with clients, with other members of the profession and with people outside the profession. You cannot define it any more than that, and that is the problem with trying to include a wordy definition that could be applied by the commission. Misconduct is a living thing. What was not misconduct yesterday could become misconduct today because the profession views it as such. Or something that was misconduct yesterday may no longer be considered misconduct today simply because that is the way the profession has been forced to change. If you try to establish a wordy definition of misconduct, I am afraid that you will fail.

Mr Swinney: You are misinterpreting what I am trying to do. I do not want to make a wordy definition. I simply want to understand what parts of the profession you believe it must retain control of for its independence to be assured.

Alistair Cockburn: I cannot say any more than that it is to do with the regulation of a solicitor's day-to-day working life and his relationships with those outside his firm, whether they be clients, solicitors or otherwise.

Mark Irvine: I will have a go at answering that. I do not think that it is so much about defining and detailing what misconduct is, as about the conduct of the profession. It is the other way round. Until last year, I sat on the General Teaching Council for Scotland. The council has a disciplinary and regulatory function, but it would also from time to time set out the rules of conduct that were expected of teachers. It is not for the tribunal to define those issues; that is done by the wider profession. The definitions do not come about through the tribunal, but the profession itself sets the rules of conduct, which are influenced, to some extent, by changing times. What was practised 20 years ago might not be practised now, but there are things that always run through the conduct expected of professionals. For example, dishonesty is always dishonesty—it was 20 years ago and it would be now—but there are issues to do with how we deal with cases that change over time, because of technology and for many other reasons.

Mr Swinney: If it is the tribunal that is determining, against certain tests, whether a solicitor is prosecuted, surely the tribunal must understand what constitutes professional misconduct in a definitive fashion. I am trying to understand how the tribunal can form judgments if it does not have a prescriptive judgment or set of criteria for what constitutes professional misconduct.

Alistair Cockburn: It is an amorphous thing. If you try to catch hold of what misconduct is, I am afraid that you will fail. It is just the impression of the profession in relation to any individual conduct or relationship with some other external person. That is all that it is.

Mr Swinney: Are there black-and-white cases that can be categorised either as professional misconduct or as inadequate professional service, or are there grey areas that involve both categories?

Alistair Cockburn: There can certainly be inadequate professional service that comes nowhere near being professional misconduct.

Mr Swinney: Are there hybrid cases, too?

Alistair Cockburn: Yes. There are cases of misconduct in which there has automatically been inadequate professional service.

Mr Swinney: The former Scottish legal services ombudsman said in her submission to the committee that the bill would be strengthened if a conduct complaint were defined as

"anything that is not related to professional services provided by a practitioner".

Is that a helpful distinction?

Alistair Cockburn: As I said, if we try to define misconduct we will fail. The current test for misconduct is that there must be serious and reprehensible conduct that would not be the action of a competent and reputable solicitor. The Sharp approach is the closest we come to having a test.

Mr Swinney: If it is impossible to define professional misconduct, how on earth can the bill make a distinction between misconduct and inadequate professional service and provide that one category of complaint should be dealt with by the profession?

Alistair Cockburn: As I said, there is inadequate professional service if a solicitor has failed in some way to achieve a standard in an individual case. The solicitor's conduct might not be an issue at all.

The Convener: No member of the committee is a lawyer so, for the sake of clarity, and to follow up Mr Swinney's questions, will you tell us whether you rely heavily on previous cases and decisions or whether the professional and lay members of the tribunal can be flexible in taking a view on the ethics of cases?

Alistair Cockburn: No tribunal is bound by a decision of an earlier tribunal, because there is no

tiered appellate system. Decisions are circulated, so members are aware of decisions that are promulgated during their period of service. However, we do not discuss precedent on an individual basis; each individually constituted tribunal simply considers the evidence and takes a view.

Repeated instances of particular conduct, such as failure to respond to correspondence from the professional body, almost inevitably lead to a finding of misconduct. There might be instances in which we are not satisfied that a notice was served or we are not satisfied that there was sufficient communication between the Law Society and the solicitor, but we do not get bogged down in dealing with precedent.

The Convener: That is helpful and clear.

Bill Butler: The situation is not very clear to me.

Mr Cockburn, you said that professional misconduct is an amorphous concept that is difficult to get hold of. I think that you said that the tribunal forms an impression of what has happened. There is an impressionistic element to any professional judgment—teachers make judgments not just on the basis of criteria but by forming an impression. Perhaps you can help me out. You said that the tribunal is not bound by precedent, but that repeated instances can help it to come to a conclusion. Am I nearing the mark if I say that the tribunal takes an impressionistic approach and considers repeated instances but is not bound by set criteria?

Alistair Cockburn: The tribunal is not bound by set criteria. However, if a tribunal said that there had been no misconduct in a case in which a solicitor had failed to provide a file or an explanation that the Law Society had properly demanded, the society would almost automatically appeal against that decision. The tribunal is aware—

Bill Butler: So criteria on which you reflect or repeated instances from the past allow you almost automatically to say, "Yes, that is misconduct."

15:45

Alistair Cockburn: I have given an example.

Bill Butler: Would you say that it is misconduct?

Alistair Cockburn: In that example it would be easy to determine whether professional misconduct took place, but many other cases are not easy to decide.

Bill Butler: Have a go. You have given me an easy example that the committee can digest. Will you give us other instances to digest?

Alistair Cockburn: If an incorrect planning certificate was issued in relation to a conveyancing transaction, whether the solicitor knew that it was the wrong certificate would have to be determined. If it was issued accidentally, the question would be whether the solicitor had an overall duty not to fail and to apply the correct certificate to the case.

Bill Butler: In that instance, you would decide whether the behaviour was professional misconduct on the basis of the circumstances.

Alistair Cockburn: That is correct.

Mr Swinney: That sounded like an example of inadequate professional service—it is similar to providing the wrong file. Professional misconduct strikes me as lying to a client, for example.

Alistair Cockburn: What if it were determined that the solicitor knew that it was the wrong certificate?

Mr Swinney: If a solicitor deliberately picked out the wrong form and misled a client into signing it, that would be dishonesty rather than an administrative error. However, a solicitor might genuinely take out the wrong file and give a client form B1 instead of B2. They might realise that after the event and think, "Oh my goodness, what am I going to do?" and they could phone the client to sort that out. That might end up as inadequate professional service. We are trying to get a feel for what falls into which camp.

Judith Lea (Scottish Solicitors Discipline Tribunal): The tribunal has a useful searchable website that contains all its decisions. Tribunal members use it quite a lot, as does the Law Society in deciding when to prosecute cases. That information has come online in the past few years—all tribunal decisions since 1995 are on the website.

The Convener: I am inclined to move on, because I feel that the subject will arise again in other members' questions.

Jeremy Purvis: Why would you like section 16 to be amended so that the commission has the power to take a complaint to the tribunal or to recommend that the Law Society should do so? Your submission says that a gap will exist, but in what circumstances will it exist?

Alistair Cockburn: Concerns might arise if a matter were referred to the society but the society said that it was not in favour of prosecution. For openness and accountability, it would be proper for that to go back to the commission, which ought to consider whether it wanted to take a case before the tribunal.

Jeremy Purvis: You think that the commission should have the power to take a case before the tribunal only if it believes that a complaint has not been investigated properly.

Alistair Cockburn: The alternative is to cut the Law Society out of the process altogether and to make the commission the investigating authority that takes its own decision. If we want the society to be connected with the prosecution process, as a first step we need to refer cases to it for decisions. If its decision is negative, the case can go back to the commission, which can review the society's reasoning and decide whether to prosecute.

Jeremy Purvis: You might be able to help me out with a section of the bill. Section 16(2)(d) says that the commission can make a report that recommends

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

Could the commission say in its report that the Law Society should refer a case to the tribunal?

Alistair Cockburn: I am not sure that that would be interpreted as a requirement on the body to reconsider its decision. I understand that section to refer to the power under which the commission refers a case to the society in the first instance and says, "We think there's something here. Will you take a view on it?"

Jeremy Purvis: Okay. Let us move on to section 36. In your written submission, you state:

"There are concerns with regard to unsatisfactory professional conduct being committed by a firm."

You are talking about occasions on which a complaint has been upheld or a direction has been given, and you state specifically that the 21-day time period could be extended. In what circumstances would that be appropriate?

Alistair Cockburn: Experience dictates that there are occasions on which one would welcome a power to extend the time limit. An injustice can be occasioned on an individual basis if that power does not exist. When the power might be exercised would be a matter of discretion.

Jeremy Purvis: Under the bill, you will acquire a new power to hear appeals relating to unsatisfactory professional conduct. Are you satisfied with the definition of that new concept?

Alistair Cockburn: I do not think that I properly understand what it means. It seems to me that inadequate professional service equates to unsatisfactory professional conduct.

Jeremy Purvis: So it comes back to what you said in response to Mr Swinney's questions: you do not see a distinction between the two. Is that correct?

Alistair Cockburn: If an individual solicitor is guilty of inadequate professional service, that means that he has not met the professional standard in an individual case, which therefore is unsatisfactory.

Jeremy Purvis: So, with regard to that element, should you have the power to consider all complaints?

Alistair Cockburn: You will appreciate the fact that I am here on behalf of the tribunal.

Jeremy Purvis: Absolutely.

Alistair Cockburn: The tribunal does not have full committee meetings on a monthly basis; we meet once a year as a group. It is therefore difficult for me to advance a tribunal view rather than my own view of the matter. My personal view is that the tribunal would be happy merely to keep conduct matters. Appeals on IPS are quite a burden to the tribunal and they have occasioned a vast increase in its work. The tribunal would be happy for the commission to keep such cases and, if there were appeals, to take them right to court. I do not know whether the courts would want that to happen, however, as there might be quite a volume of appeals.

Jeremy Purvis: Forgive me for being slightly confused, but in previous answers the point was made that in many cases it is nigh on impossible to distinguish between inadequate professional service and misconduct. You have just said that, if a complaint were made about inadequate professional service—which, as defined in the bill, would include a degree of negligence—you would be happy for it to go to the commission and that, if there were an appeal, it should go to the courts rather than, as in the bill, to the commission's own complaints committee. However, if the complaint were about conduct, you would be the appropriate mechanism for an appeal.

Alistair Cockburn: We are not so much a mechanism for appeal; we sit as a court of first instance, with the right of appeal on misconduct matters being to the courts.

Mark Irvine: The vast majority of cases that come before the tribunal are conduct cases, and the tribunal does not sit beyond the meetings that it has to consider one or more cases. It does not consider wider policy matters or how the tribunal operates, other than at its annual meetings. The vast bulk of the work of the tribunal is done through one, two or maybe three cases coming before it on a particular day, and in my experience—tribunal members do not sit at all the hearings—99 per cent of those cases are conduct matters. IPS rarely comes before the tribunal.

Judith Lea: What generally happens in IPS appeals is that, when a solicitor who has lodged an appeal realises the cost implications and the publicity that will ensue if the tribunal makes a determination, the solicitor thinks again and

withdraws the appeal. Therefore, the tribunal does not deal with many appeals, even though it receives quite a lot of them.

Jeremy Purvis: Under the new mechanism whereby the commission will deal with IPS cases and will have its own appeal mechanism for them, should we anticipate a reduction in the tribunal's workload? Although Alistair Cockburn has just acknowledged that the majority of the tribunal's cases relate to conduct, will the remaining cases go down a different route?

Alistair Cockburn: I cannot prognosticate what is likely to happen with the number of misconduct cases. I think that there is now some stability in the number of prosecutions that come before the tribunal. Over the past three years the number has certainly increased, but I think that it has now levelled off.

Jeremy Purvis: I want to move on to consider compensation under section 8. This question is easy for me to ask, because it is posed in the tribunal's written submission, which states:

"How is the Commission to know if the Tribunal has made an award of compensation in respect of professional misconduct in connection with a matter they are now dealing with as IPS?"

What practical difficulties do you foresee regarding the ability of the commission to take into account compensation that has been awarded by the tribunal? Are the difficulties with the bill that have been outlined insurmountable?

Alistair Cockburn: No. The issue is simply a matter of communication.

Jeremy Purvis: What would be the appropriate communication mechanism for the relationship between the commission and the tribunal?

Alistair Cockburn: Presumably, the staff of the commission would communicate with the clerk of the tribunal to inquire whether a prosecution had taken place in respect of complaint X and, if so, whether a determination had been made that involved compensation.

Jeremy Purvis: In our consideration of a different bill, the committee considered the relationship between the proposed police complaints commissioner and the Scottish public services ombudsman. In our discussions on that issue, some witnesses recommended that there should be a more formal mechanism or protocol. Would some such mechanism to clarify the roles of the commission and tribunal be practical? Perhaps Mr Irvine has a view on that.

Mark Irvine: I have no particular view as a lay member. The matter is probably for the staff of the tribunal, such as Judith Lea, who is the clerk. It would seem sensible to have a protocol, service level agreement or understanding as to how such communication should take place, but writing that down would not need the Treaty of Versailles. Something sensible, short and to the point would be preferable.

Judith Lea: In most cases, the determination of inadequate professional service would be made first. That is certainly what seems to happen at the moment. In connection with professional misconduct cases, the Law Society will often advise the tribunal whether an IPS determination has already been made and whether the compensation has been paid. Whether the Law Society should advise us or whether there should be written communication between me and the commission is an issue that I am sure can be overcome, but we thought that we should highlight the matter to the committee.

Jeremy Purvis: That is useful.

The Convener: For the committee's information, how many cases each year is the tribunal presented with?

Judith Lea: Since I have been with the tribunal—I am not sure why, but I do not think that it is anything to do with me—the number of cases has risen each year. Our annual report shows that the number of cases that we dealt with last year had increased quite a bit on the year before. Last year, we met 32 times—compared with 22 times the previous year—and we issued 48 decisions, of which 27 were findings of professional misconduct. In some cases, the tribunal found no professional misconduct.

The Convener: So in its 32 sessions the tribunal considered 48 cases.

Judith Lea: We considered 48 cases for which we issued a decision.

The Convener: How many findings of professional misconduct did the tribunal issue?

Judith Lea: We issued 27 findings of professional misconduct.

The Convener: Were those of a general nature or did they deal with specific conduct? Did any of them relate to IPS?

Judith Lea: We have separate figures for IPS appeals. We did not deal with any IPS cases as a matter of first instance. We dealt with IPS cases only in connection with appeals.

16:00

The Convener: That is helpful.

Jackie Baillie: Your written evidence expresses concern about the tribunal's new power under section 38 to award compensation. Will you place your concerns on record?

Alistair Cockburn: We are concerned whether we have the skills to assess proper levels of compensation. Do we apply a court standard? What kind of proof of loss will we ask for? Who will be responsible for adducing that proof? Several clients might be involved in a case of misconduct. Do we give the individual client the right to produce evidence? If the Law Society fiscal—if that is who will prosecute the case—does not adduce the evidence, what will happen? As we might simply give a complainer whose case is before the tribunal another reason to be dissatisfied, we need to set out who is responsible and what tests will be applied.

Jackie Baillie: Would not your lay members bring the relevant experience to the table?

Alistair Cockburn: With respect, our lay members are probably in less of a position to make such evaluations. Given that the powers are quite substantial, I imagine that the commission will be concerned with awarding compensation for that which is properly attributable as a loss. Otherwise, the temptation will be to concentrate on imposing fines instead of on awarding compensation.

Jackie Baillie: But, despite your concerns about a series of practical issues, you accept the general principle.

Alistair Cockburn: That the commission should have the power to award some form of compensation?

Jackie Baillie: No. I am talking about the new power that will be available to the tribunal.

Alistair Cockburn: We will be able to accept the principle, provided that we receive satisfactory guidance on the circumstances in which the power is to be applied and on the legal proof that will be required. However, such a move will certainly extend the tribunal's sittings. After all, if we had to discuss whether to impose a £20,000 fine on a solicitor, we would probably sit for a lot longer than we would if we were simply determining whether he was guilty of misconduct.

Jackie Baillie: Sure, but I believe that the maximum fine that you can impose is £5,000, so you need not have that worry.

Mark Irvine: I do not think that there is a problem in principle with giving this power to the tribunal to which, as you might expect, lay members bring all kinds of skills. However, committee members might benefit from knowing how the tribunal works. It is a small body that deals with perhaps three cases during a day's sitting. It does not operate in an executive way with committees and subcommittees and it does not have debates or discussions outside its annual meeting. It would be by no means impossible to give the tribunal other duties and powers. However, at the moment, people simply turn up of a morning to hear evidence presented for the three listed cases. Having to carry out those other duties properly would change the tribunal's functions and method of operation. Of course, that might not be a bad thing.

Judith Lea: Such a move would also give rise to practical difficulties. There are cases in which, for example, a delay in recording deeds might affect 30 or 40 clients. Because such cases also involve a breach of accounts rules, the clients might not even know that the complaint has gone before the tribunal. The question is whether the fiscal would be obliged to find out whether each of those clients had suffered any loss. That might not be the case, but the tribunal is concerned about how far such duties or powers might go.

Alistair Cockburn: One must ask whether it is necessary for the tribunal to have such powers if the proposed commission is to investigate IPS matters. I acknowledge that the tribunal might need them if such matters are to be sent either to the commission or to the tribunal. However, if that is the case, why do we not have equality?

Jackie Baillie: The issue is that IPS cases are about service and the tribunal deals with misconduct and loss as a result of that. I am clear that the commission will not have the power to deal with such cases, but we have heard your explanation and we will reflect on it.

Mr Swinney: I want to follow up an answer that Mr Irvine gave, which left me a little concerned. The committee has heard a lot about the expertise that is required to make judgments about these issues. If I understood Mr Irvine correctly, he said that tribunal members turn up on a Monday morning and might have three cases to consider. They just pitch up, look at the stuff and go away again. However, Mr Irvine said that introducing any other considerations would overburden the tribunal. If that is a fair reflection of how the tribunal goes about its business, I am left concerned about how the tribunal applies a standard of professional misconduct. When a solicitor comes before the tribunal, how do the tribunal members make a judgment that satisfies the public that a set of tests has been applied? How do the members find out about those tests and how are they trained? Are they trained? Are they briefed?

Mark Irvine: The members are trained. We have an annual training day in which all the members take part and they can all influence the agenda. Whether that is sufficient—particularly if the role of the tribunal is extended—is for the tribunal and others to consider. I am not complaining; I am simply saying that putting

additional duties on the tribunal will change how it operates.

A clear test is applied—it is called the Sharp test, which, as Alistair Cockburn described, relates to serious and reprehensible conduct. The tribunal members bring their experience to bear in judging individual cases, using the evidence that is presented to them. Precedent can be referred to, if need be. Some of the cases need only common sense, but others are more difficult. There is always lots of paperwork, such as witness statements, and witnesses do turn up. We do not just pitch up on a Monday morning and hear the cases; a lot of background work and reading is required. On the day, we hear and test the evidence of individuals who come to put their case before the tribunal.

Mr Swinney: So members of the tribunal become accustomed to or familiar with expected standards of professional conduct through discussing and agreeing them at an annual training day.

Mark Irvine: They are discussed in a structured way through the annual training event and they are discussed during meetings of the tribunal as the members deliberate and test individual cases against the Sharp test or the normal expectation. The duties that are placed on solicitors are many and varied. For example, one duty is to be honest. If, after testing the evidence, an allegation that a solicitor has been dishonest is proved to be true, they are clearly guilty of professional misconduct or misconduct, call it what you will.

Mr Swinney: When the Sharp test is passed, does the tribunal always find the solicitor guilty?

Alistair Cockburn: All I can say is that it is difficult to believe that the tribunal would find a solicitor guilty of reprehensible conduct, as described in the Sharp case, but not convict him of misconduct.

Mr Swinney: I am asking whether it is a fact that that never happens. The answer is either yes or no.

Mark Irvine: Yes.

Mr Swinney: So if a solicitor's conduct is judged to pass the Sharp test, they are found guilty.

Alistair Cockburn: They ought to be, but the problem is that neither Mark Irvine nor I, nor even Judith Lea, sits on the tribunal for every single case. We get reports of cases, but—

Mr Swinney: I respectfully ask that that information be supplied to the committee. I appreciate that it may not be possible to answer the question today.

The Convener: To expand, we are complete outsiders to the process and we are trying to get as much information as we can. If the witnesses feel after the meeting that they can offer some short, sharp information to clarify points that have been raised—possibly more than once—it would be extremely helpful if they would write to the clerks.

Alistair Cockburn: We will consider that.

Judith Lea: I sit on the tribunal for the majority of cases and I have never known a case in which the Sharp test was passed and the solicitor was not found guilty.

Mr Swinney: I am just interested in clarification on that.

Judith Lea: There is induction training for new tribunal members when they first start, and they also have to observe tribunal hearings. They are not just thrown in there. They get the papers a week before each tribunal hearing so they have to do a lot of reading beforehand.

The Convener: The induction training is given when they are first appointed.

Judith Lea: Yes. They have to have an induction training session before they can sit on the tribunal.

The Convener: It might be helpful to have a note on the induction training. Mr Butler wants to talk about the constitution of the tribunal.

Bill Butler: Yes, but before we go there, how long does the induction process take?

Judith Lea: New members have to observe two meetings of the tribunal and also attend an induction training day.

Bill Butler: It takes three days.

Judith Lea: Yes.

Bill Butler: Okay; I am grateful for that.

You accept that the tribunal should be made up of equal proportions of lawyers and lay members, but you have also stated that you have concerns about the casting vote of the chairperson and the implications of that. What are your concerns and have you any suggestions about how they can be overcome?

Alistair Cockburn: There would be difficulty in a split vote. We have previously had disagreements in the tribunal—some have only been a three to two verdict. There is a possibility of getting a two-two split. In that circumstance, practice would dictate that the chairman would not move to convict even if in the first instance his vote would have been for a guilty verdict. If the tribunal's vote was split, the chairman would not simply repeat the earlier finding but would need to vote for the status quo, which would mean a verdict of not guilty of professional misconduct.

That is the danger, and the only way to avoid it is to have an uneven number of tribunal members.

Bill Butler: I take it that the chairperson of the tribunal would not wish to use a casting vote because tribunal members view themselves as being equals.

Alistair Cockburn: Yes.

Bill Butler: Okay—that is very clear, and the way to get around the problem is very clear. Thank you for that.

You will have heard today, and it has been suggested to the committee at other times, that the new commission will not be sufficiently independent of the Government, which would be to the detriment of the independence of the legal profession. Aspects of the proposals that have given particular cause for concern include Scottish ministers' powers to appoint, to decide the term of appointment and the power of direction. Do you have any views on the appointments process that is proposed for commission members?

Alistair Cockburn: The tribunal has no view on that matter—it has not been discussed.

Bill Butler: All right. Perhaps you could give me your individual view—Mr Irving and Ms Lea could follow.

Alistair Cockburn: On the face of it, if the Executive has the power to give directions at all, that would seem to be anathema to the independence of the legal profession.

Mark Irvine: I do not have an opinion.

Bill Butler: You remain silent.

Mark Irvine: It is not really a matter for the tribunal as such, and it is not useful to offer an individual view. I do not have anything to add to what Alistair Cockburn has said.

Judith Lea: I have nothing to add.

Bill Butler: Thank you for that; it was certainly succinct.

Jeremy Purvis: You might feel that I am asking for your personal opinions again. Notwithstanding your concerns about the non-lawyer members of the tribunal, I understand that all members will be appointed by the Lord President. The non-lawyers will be appointed after consultation of the Scottish ministers. Is that a possible mechanism for appointment of the commissioners? If it is, what value will there be in going down that route?

Alistair Cockburn: Do you mean the solicitor members of the commission?

Jeremy Purvis: As far as I understand it, all members of the tribunal are appointed by the Lord President and the non-lawyer members will still be appointed by the Lord President after consultation of the Scottish ministers. The commissioners will be appointed by Scottish ministers. Do you think that the constitution that is proposed for the tribunal will be preferable for the commission? If you do, can you say why?

Alistair Cockburn: As long as the process is open and there is proven accountability, I do not think that anyone could have a problem with how appointments are made. The issue is all to do with the public's perceiving the body as independent. I do not have a problem with the process that is used for the discipline tribunal.

16:15

Mark Irvine: I can speak only about lay-member appointments. Lay members are appointed through the same process that is used for other public appointments, which is governed by the Office of the Commissioner for Public Appointments guidelines. Although the Lord President appoints the lay members, it is done on the recommendation of ministers via the civil service in the usual way. I am not aware of whether the Lord President has rejected any recommendations—I do not think so. In effect, the minister makes the appointment and it is rubber-stamped by the Lord President.

Alistair Cockburn: We make the point in our submission that if the solicitor members' names are not run past the Law Society of Scotland, there may—although on the face of it a solicitor merits appointment—be an undercurrent of which the Law Society is aware, but of which the commission or the Scottish Executive might be unaware. It might be necessary to run names past the Law Society.

Jeremy Purvis: You are not offering the view that that would be the preferable way to appoint members of the commission.

Alistair Cockburn: No.

Jeremy Purvis: I have one more question. If a complaint about conduct is made and it goes to the tribunal under the proposals in the bill, either on appeal or for a determination, the tribunal might find that there was no misconduct but there was inadequate professional service. Would it be beneficial to have a mechanism whereby, even though the complaint was defined at the start of the process as being a conduct complaint, it could go back to the commission? There could be an additional power for the tribunal to refer a complaint back to the commission, in addition to the commission referring a complaint to the tribunal.

Alistair Cockburn: Would you expect the tribunal to find that there had been inadequate

professional service, or merely to refer the matter to the commission to consider whether there had been IPS?

Jeremy Purvis: Under the mechanism as it stands, the tribunal would not be able to issue a finding because it would not have investigated whether there had been inadequate professional service.

Alistair Cockburn: A huge cost would be involved if the solicitor could be prosecuted before the tribunal and acquitted on the matter, but then had to go before the commission. That would almost, but not quite, be double jeopardy, because there are two distinct tests; quite a burden would be placed on an individual solicitor if he was prosecuted twice for the same matter.

Jeremy Purvis: I am interested that you want the commission to be able to refer matters to the tribunal, but do not want the tribunal to refer matters to the commission in cases of IPS.

Mark Irvine: That is because it is necessary to test the evidence. On what basis would the tribunal refer the matter on if it had not heard the evidence? If it had heard the evidence, that would defeat the point of referring the matter on because it would have heard and tested everything. It would not just be a matter of quickly scanning the papers and referring the matter back to the commission. If a determination is made, the evidence must have been tested.

Jeremy Purvis: Ms Lea said that in a case of alleged misconduct the tribunal might, while it is investigating the misconduct complaint, come across underlying issues that, although there is no misconduct, it would like the commission to consider as an inadequate professional service issue. I am not stipulating whether it would be a finding or a recommendation; I am asking whether there should be a mechanism for the matter to go back to the commission.

Alistair Cockburn: If the tribunal has the power to make a recommendation, should not it also have the power to make a determination? Would not that be sensible? If we have heard the evidence and take the view that it is worthy of determination by the commission as an IPS matter, should not we have the capability to do that ourselves?

Jeremy Purvis: That may be the case, but when it comes to determinations and findings, the powers that are open to you are, as you say in your written evidence, less than those of the commission. Therefore, it may be beneficial for the commission to deal with IPS.

Alistair Cockburn: As I said, the tribunal could be given those powers.

Mr Swinney: My question follows from Jeremy Purvis's questions. You suggested that it might be too much of a "burden"—I think that you used that word—for the tribunal to refer back to the commission a complaint from a conduct perspective that ends up being about inadequate professional services. If it would be too much of a burden, does not that make the case for there being no distinction made between conduct and service complaints, and for the commission to deal with the whole lot?

Alistair Cockburn: It would be a burden on the individual solicitor who was being prosecuted, not on the body that is responsible for considering the complaint. There is a question about whether to remove the label "professional misconduct" and to use a different term. Unless a body of the profession makes the determination or sets the standard, I do not see how that label can be maintained.

Mr Maxwell: I want to follow up a question that the convener asked about the number of cases. You said that there were 32 sittings, 48 cases and 27 findings of professional misconduct. We have heard the concern expressed that certain types of work will no longer be attractive, such as work in rural practices or certain areas of law, and that firms will go out of business or withdraw from those areas of practice. Do you have a breakdown of statistics that show us the areas in which most complaints arise, so that we can determine whether there is any substance to such comments?

Alistair Cockburn: We have some figures, but they are not broken down by class of action, such as matrimonial, commercial, or criminal law or conveyancing. We have details of the grounds on which misconduct is established, which include

"Failure to reply to Law Society and/or clients … Conflict of Interests … Failure to deal with Trust/Executry"

and

"Failure to deal with Court Proceedings".

Mr Maxwell: Could you write to us with that information?

Alistair Cockburn: It is in our annual report.

Judith Lea: The report is on our website.

Mr Maxwell: Is only the current annual report on the website?

Judith Lea: All the past years' reports are on it.

Alistair Cockburn: You are right that there is great fear among the profession that if we identify that the majority of the complaints come from a certain area of work, that area of work will be abandoned—particularly if the solicitor is being remunerated merely through the legal-aid scheme—and that we will create a desert in that field of law.

Mr Maxwell: That is the concern that has been expressed, but it is only hearsay. We are looking for factual evidence to support it.

Alistair Cockburn: I am not sure that you will be able to determine that the majority of complaints are in one area of law, but if a firm identifies that it can anticipate complaints in a particular area, it might feel that it requires to withdraw from it in order to avoid all the individual levy charges on complaints that it thinks might be incurred.

Mr Maxwell: I understand that logic. Any evidence that you can give us would be helpful. I do not think that that view on its own is enough, but if we get evidence from various sources, we might be able to build up a better picture of what might happen.

Jeremy Purvis: Why do you think the former Scottish legal services ombudsman thought that view was rubbish?

Alistair Cockburn: She is entitled to her view. As a member of the profession, I am entitled to mine. I talk to my brethren, who have expressed their views, which is why I am advising you of their perception of what might happen.

The Convener: I bring this evidence session to a close. I thank our witnesses. We look forward to receiving the communications that we requested. As I said, if on reviewing the *Official Report* of the meeting you wish to clarify something in a pointed and brief manner, we will accept that gratefully.

Jackie Baillie: I am sure that, in addition to brethren, Alistair Cockburn has a growing number of sisters, too.

Alistair Cockburn: We must devise a collective name for them.

The Convener: I welcome Professor Alice Brown, the Scottish public services ombudsman. I thank the professor for coming along this afternoon. You are aware of the bill and the issues that face the committee. The proposed new commission will be a non-departmental public body, but its funding will come from the legal profession. Evidence that we received from the British and Irish Ombudsman Association indicated its preference for an ombudsman for the function that is envisaged; it claimed that

"a plethora of other titles can cause confusion."

Do you have a view on whether an ombudsman or a commission model is more appropriate in this context?

Professor Alice Brown (Scottish Public Services Ombudsman): I am not as familiar with the detailed arguments as are some of today's previous witnesses because I have not been asked by the Executive to comment on any of the proposals so far. This area is quite a new venture for me.

The Convener: You are here because the committee felt that you had something to offer from your current role.

Professor Brown: Indeed—thank you. I am aware of the submission from the British and Irish Ombudsman Association and I am aware of some of the discussions that have gone on there. The BIOA is concerned that the use of many different titles to mean the same thing is confusing for the public. It wants greater clarity in roles and functions and it wants appropriate titles to go with those roles and functions. It argues that what is proposed is essentially a complaint-handling organisation. The best and clearest title for someone who judges evidence that comes before them—in this case, in terms of civil justice, and in my case administrative justice—is "ombudsman". "Commissioner" and "commission" are used in lots of different ways that involve lots of different roles. The point that the BIOA is trying to get across is that there should be greater clarity about the distinctive roles that are necessary in the arms of governance. The next question would be about what is the appropriate relationship between them.

The Convener: That is helpful—thank you.

Bill Butler: As an NDPB, the commission might fall within your oversight, although that is not expressly provided for in the bill. Would you prefer that it was?

Professor Brown: My reading of the Scottish Public Services Ombudsman Act 2002 is that the proposed commission is likely to fall under the jurisdiction of the SPSO to the extent that we will provide further consideration of the way in which the commission has arrived at its decisions, rather than a form of appeal against the commission's decisions. We will ask whether the commission arrived at a decision following the proper procedures and policies. In other words, we will ask whether a decision was properly made or made without maladministration. Although the bill is silent on the issue, my reading of it is that the commission is likely to come under my jurisdiction, although it would be clearer if that were specified in the bill so that there is no ambiguity.

Bill Butler: I understand that. Would you prefer that?

Professor Brown: It is not a matter of my preference; it is for Parliament to decide, but—

Bill Butler: Would such provision be more appropriate?

Professor Brown: Such provision might address concerns about there not being further consideration of whether there had been due and fair process. Whether it would meet the points that

have been raised about human rights legislation is another matter. The distinction between the public and private sectors raises particular issues although, as we are all aware, there is increasing blurring between the two.

There is also an issue about whether, once a decision is made, it can be challenged. I do not have enforcement powers; it is my understanding that the ombudsman in our decisions would not contravene article 6 of the European convention on human rights, but the position that it cannot be challenged is the one that is up for question at the moment. If the commission were to come under our jurisdiction, that might help to address some concerns, but the other issue is to do with enforcement of decisions.

16:30

Bill Butler: How do you deal with complaints against any similar type of body at the moment?

Professor Brown: The health service provides a useful parallel in terms of complaints that might be received.

We tend to see the situation as being to do with a member of the public having a problem. Quite often, the member of the public perceives that problem in a particular way, which is that something has gone wrong. They might think that that was the fault of a particular doctor, nurse or whoever. They then bring a complaint about Doctor X in such and such a hospital to my office and ask me to investigate it. As you know, the journey of a patient through the health service can start at their general practitioner, continue through various hospitals and might even end up outside Scotland. Part of our job in investigating complaints is to trace that journey and try to find out what went wrong at various points and who might be responsible for what went wrong. Often, because the investigation gives us an opportunity to get a complete picture, we find that although the complaint concerned only one nurse or doctor, the fault lies with more than one person or organisation.

In the health service, we often find that an individual practitioner might not have done anything clinically wrong but that the service failed the patient in one way or another. Quite often, that has happened because of poor communication between practitioners. Sometimes, a practitioner can treat a person wrongly because the patient's records have not been kept up to date by another practitioner. The situation can be complex.

Bill Butler: There can be a sin of omission rather than of commission.

Professor Brown: Yes.

Once we have considered such a complaint, we might be critical of a number of individuals—medical practitioners or administrative staff—but because of confidentiality rules, we tend not to name the complainant or the members of staff in our reports. The hospital or the practice is named and the person who is involved is made known to the organisation. In some circumstances, the hospital might take further action against the employees who are involved. Alternatively, if we came across a serious situation that posed a risk to patients, we would report that.

There are different degrees to which mistakes are made and different issues are involved in each circumstance. We must consider not only an individual's fitness to practise or their medical competence but the extent to which the service as a whole has failed an individual.

Mr Swinney: Do any provisions in the bill duplicate functions that you have?

Professor Brown: The legal profession covers various people. Not all people who are solicitors or are legally trained work in private firms. Therefore, we cover complaints that might include people who are legally qualified but who work in the health service, the Scottish Executive and local government. In my office this morning, liaison officers and monitoring officers in local government met us to discuss lessons that could be learned from complaints. We fed back to them information about some of the things that happen and where improvements might be made, and they made points about our processes and pointed out where we might make improvements. The jurisdiction of the Scottish public services ombudsman covers complaints that include lawyers.

Mr Swinney: Is there a need to narrow the scope of the bill to exclude such people or should, for the sake of completeness, the legislation that established your office be amended to make it clear that there is no opportunity to consider issues in two different spheres and that there cannot be duplication of destinations for an individual's complaint against a solicitor?

Professor Brown: There might be room to consider that aspect, in order to avoid situations in which issues could be raised again and again, through different avenues, which would be neither good use of public money nor fair on the person about whom the complaint was made. It should be clear that there can be complementarity but not overlap.

In response to a report from my office about a health service complaint, the health service might decide to take a conduct issue to the General Medical Council or a person might decide to go to court—it would be difficult to exclude such elements. However, much depends on the credibility and professionalism of the first

investigation of a complaint. Most reasonable people do not want to raise a complaint again and again; they want an end to the problem.

We should stress that an ombudsman should be the last resort in two senses. The parties to a disagreement, dispute or misunderstanding should try to sort out the problem themselves in the first instance. Therefore much pressure should be brought to bear on improving complaint handling at the source of the complaint, because many problems should not escalate. However, when problems escalate, an advantage of having an ombudsman service is that there can be a judgment of last resort—with the exception of judicial review—that allows both parties to move on from whatever went wrong. It is helpful to consider the ombudsman's role in that way.

Mr Swinney: I very much agree with your second point. Would it therefore be beneficial to make it absolutely clear that any complaint about a solicitor must be dealt with by the new commission and not by the Scottish public services ombudsman?

Professor Brown: The only difficulty with such an approach would be that if a solicitor worked with other colleagues to provide a public service it might be difficult to separate out the particular from the general aspects of their role in a matter that gave rise to a complaint.

A complaint might not necessarily be about an individual solicitor; it might be about an organisation, such as a local authority or a firm of solicitors. We have to be a wee bit careful about that. However, Mr Swinney's point is well made—bills such as the one that we are considering should complement related legislation. We want to do everything we can do to avoid duplication; we will have more discussions about that if it is helpful.

Mr Maxwell: The committee has heard different views—they range from one end of the scale to the other—about the make-up of the commission and the level of legal representation that it should have. What safeguards need to be put in place to ensure that the commission is seen as being independent from the legal profession and the Government?

Professor Brown: That question is a difficult one because it relates to people's perceptions. There is a need to secure not only public confidence that the approach is open, fair, independent and impartial, but also to secure the confidence of the profession that the body that is set up knows what it is doing, employs good investigators and follows good processes and procedures in reaching decisions. Different professions have tussled with the issue because it is a difficult call to make.

One way to proceed is to think about other accountability mechanisms for bodies. In going down the road of having a commission or an ombudsman, one model to consider is the Financial Ombudsman Service, which consists of an ombudsman and a board that comprises lay people and people from the financial industries that are involved. The board members have an opportunity to comment on processes and procedures and to say whether they are fair. The aim is to build up a relationship that is not only open and transparent, but which is also a relationship of understanding, respect and credibility for what is done and how it is done. Different points of view are taken on the balance of composition.

You asked about ensuring independence through the appointments process. Appointments will be subject to regulation by the commissioner for public appointments in Scotland, so that will provide some safeguard of independence from the Government. The accountability mechanisms of whatever body or post is created must be considered.

Mr Maxwell: Does the bill provide enough safeguards in the process?

Professor Brown: It could be improved.

Mr Maxwell: In what way?

Professor Brown: As I said, if Parliament went for a single gateway of an ombudsman, a board with some members from the profession and some laypeople could be created, too.

Mr Maxwell: How would that differ from the proposed commission, which is to have a balance of lay and legal members?

Professor Brown: You might feel that that proposal is sufficient. If we add the fact that the commission will fall within my office's jurisdiction, that will be another check on whether procedures and processes have been followed appropriately.

The Convener: Maureen Macmillan wants to expand on safeguards and the regulatory role.

Maureen Macmillan: I am interested in what Professor Brown said to Stewart Maxwell. What safeguards do we need to prevent conflict between the two interests—possibly opposing—of complaints handling and the Law Society's regulatory role?

Professor Brown: I would like to give that more thought; I might send the committee some suggestions. Being clear about what different bodies do is a problem. Regulators or inspectors are not necessarily the best at complaint handling and care is needed in adding that function to the regulation function. However, it might be most appropriate for a professional body such as the

GMC or the Law Society to have a role in relation to conduct—that goes back to the point about what the profession as a whole considers to be misconduct, unfitness to practise or whatever description we want to use. The relationship between complaints handling and regulation can become complex.

As I said, a positive example is that the medical arrangement seems to work well and causes us no major problems. An additional point is that the health service has NHS Quality Improvement Scotland, which has a different role from ours. It is concerned with how we relate to each other and what protocols—we have entered into a protocol with it—allow us to share information from complaints. The information that is shared is not individuals' personal details, but the lessons that can be learned, so that when that body goes out to fulfil its function, it has intelligence and data to hand.

More generally in Scotland, we should say that although we have specific roles that might be distinct and create potential conflicts of interest, we can overcome some of that. The real trick is not to have us all going along parallel lines. My office becomes involved in an issue from the bottom up—from a complainant coming to us and our investigating. Other bodies work from the top down and have a regulation or inspection function. If we miss each other in the middle, we miss a trick. We must be able to share information. If the Auditor General does a best-value inspection, he should have at his disposal some of the information from my office. Similarly, although we do not want to prejudge a complaint, it is useful to have the context for considering a complaint.

We need to get better at joining up that intelligence. To go back to John Swinney's point, the legislation sometimes prohibits that, and not necessarily for good reason. Some things are inherited rather than thought out. If we cannot join things up through legislation, there are ways of doing so through appropriate protocols, and we have a number of those in our office

16:45

Maureen Macmillan: That is very interesting. If you have any further thoughts, I am sure that the committee would be pleased to hear them.

Professor Brown: Certainly. I have one more example. On complaints about local government, we have a separate standards commission and the code of conduct for councillors. We have another protocol with that office because a complaint might involve the actions of the council, individuals in the council or even the councillors. It does not make a lot of sense to members of the public that our office should deal with one bit and someone else should deal with another. It makes a lot more sense if we can work together on such complaints.

If legislation does not allow it, we have to look for other ways in which such joint working is possible, with the agreement of the complainant of course.

Maureen Macmillan: Yes, indeed, I can see the importance of that approach and I can think of other examples of where it would be useful.

We are thinking about the types of powers that a body such as the commission would need to fulfil its functions. Do you have any thoughts about the types of powers that the commission should have?

We spoke about appeals, and you said that appeals about the process could come to you. Have you any thoughts on whether there should be some sort of mechanism for appeals about the substance of a decision rather than appeals that are just about the process?

Professor Brown: Again, a lot of that might be determined by human rights legislation, and I am not an expert in that so I cannot comment directly. We have to think about proportionality—how many times one has to revisit an issue—and about fairness to both sides.

One of the unfortunate things about complaints is that people immediately take a confrontational or adversarial position. Such situations can be helped if people take a more constructive and positive approach to a complaint. The profession should want to know if things go wrong, if it happens regularly and what it can do to improve either the training or the education of lawyers who are on the way through the process.

There is a collective responsibility and, if we can, we should move to a more positive agenda, if you like. People should alert firms to their problems, and a good firm should want to address those problems. I know that that is difficult because none of us likes to be complained about—we immediately start to feel defensive. However, a lot of the work that my office does is about changing the culture around complaints so that people are not immediately defensive or unwilling to give an answer but try to understand whether something has gone wrong and, if so, why. Was it just a genuine mistake, or did something more serious happen that requires to be addressed?

A starting point in this debate is the fact that people take completely opposite positions. One of the key lessons is that handling complaints well can lead to satisfied complainants. If complaints are not handled well, that leads to dissatisfied people who tell between 25 and 100 people about their dissatisfaction. Handling complaints well can

also lead to better morale for staff and for lawyers. No one wants to be in a protracted dispute with a client—or anyone else. I know that such disputes happen in the real world, but a lot of things could help to change the culture of and approach to handling complaints.

To help to free up some of the process and change the culture, our office has proposed that the Scottish Parliament should consider implementing a piece of legislation that would allow people in the public services to apologise without that being an admission of liability or negligence. That is particularly important if we are dealing with complaints about lawyers, who are likely to see things from a legal perspective. I understand and very much empathise with that, but most laypeople do not see things from a legal perspective. They ask whether something is fair or whether something has gone wrong, and if something has gone wrong, they ask what can be done to ensure that another client who comes through the door the next day does not have the same problem.

Maureen Macmillan: Your last point is extremely important. In local government, I experienced situations in which a department was keen to apologise but the legal department would not allow it to do so.

Professor Brown: Quite. We have had some interesting discussions about that recently. I have just finished visiting all 32 local authorities with Lewis Shand Smith, one of my deputies. We have met chief executives and council leaders, and we have given presentations to councils to get some of these issues across. Councils can show that they are customer focused by being up-front and demonstrating what they have done about the complaints that they have received—especially the ones that have not come to the ombudsman—and where they have improved their policies and practices as a result. I would support the creation of that culture within the professions as well.

Jeremy Purvis: I want to ask about the distinction between service and conduct. Do you think that it would be beneficial for the commission to have the power to offer to enter into mediation when a complaint has been referred to it? The explanatory notes to the bill state that the commission may do so

"by notice in writing to both the complainer and the practitioner, but may mediate only if both the complainer and the practitioner accept that offer."

That aspect of one of the roles of the commission is laid out more clearly in the bill than elsewhere at present.

Professor Brown: It is. When I took up this job, I was surprised when other ombudsmen said that they did not undertake mediation. They made a clear distinction between mediation and what an ombudsman does. My PhD thesis was on the Advisory, Conciliation and Arbitration Service, so I am well rehearsed in the distinctions between conciliation, mediation and arbitration. I recognise that part of the argument is about who does what. However, there are lots of opportunities to think about mediated settlements, and I have been watching with interest some of the encouraging work that the Executive has been doing on that in health and civil justice.

We should see civil justice and administrative justice as a continuum in which people have different options and should not need to use the courts. They might approach their MSP or local councillor, or they might use mediation, a tribunal, an ombudsman and, finally, a court. It is about proportionality, flexibility and what is appropriate in certain circumstances for certain people. Some people whom I meet are way beyond the mediation stage because the relationship has broken down; however, in lots of other cases, I would like to get the two parties in the room to talk about the issues.

Jeremy Purvis: There will be cases in which there is considerable fault. Do you believe that it is the role of an ombudsman to investigate and determine negligence cases? Should they then have powers to order compensation?

Professor Brown: The language in my neck of the woods is rather different. We are quasi-judicial in that we weigh up the evidence and try to look at it impartially. We are independent—neither on one side nor the other—and we interrogate the evidence that people bring to us. When one of my investigators receives a complaint, they must clarify at that stage what they think it is about, with the complainant and the body that is being complained about. They then have to draw up an investigation plan, detailing the types of things that they will look at. The key questions that I ask are about what should have and what did happen in the circumstances; whether there are different versions of what happened; and what can be done about it. It is the question of what can be done about it that ends up in redress.

We tend not to use the word "compensation" because that immediately makes people think about money. One of the tests for an ombudsman is to try to put someone into the position that they would have been in had the problem not arisen in the first place. That cannot happen in health cases or in serious cases of negligence or misconduct, which might lead to claims for compensation.

I will give an example of a service complaint, which might not necessarily be about an individual. A council official gives someone the wrong information: they tell a person that no planning permission is needed for an extension.

The person goes ahead and builds the extension, which they are subsequently required to pull down. A genuine mistake has been made, but the council pays the cost of pulling down the extension and the legal expenses. Such situations are relatively straightforward, because councils have the funds to be able to pay those costs. However, a problem would arise if a complaint was made to a one or two-person legal firm.

I have difficulty with the bill in that regard and I am struggling to understand the compensation element as the result of a service complaint that the commission would consider and what is covered by the master policy in relation to negligence. When someone makes a genuine mistake it is not always appropriate to blame them and describe their behaviour as misconduct, because we all have bad days and make mistakes, but it is different if the person makes mistakes every week. How would an individual be compensated for loss that they had suffered as a result of a mistake? Would the mistake be regarded as negligence, which would be dealt with under the master policy? The bill is ambiguous and it is not clear to me what would happen.

Jeremy Purvis: We are talking about a situation in which a person might go to court, which would have considerable cost implications and cause considerable anxiety.

Professor Brown: Yes, indeed.

Jeremy Purvis: I am deeply uneasy about that part of the proposed commission's statutory role, for a number of reasons.

Members have asked all witnesses about the distinction between service complaints and conduct complaints. How much does it matter whether a complainant knows into what category their complaint falls and how it will be handled, as long as they have faith that core elements of how the complaint is investigated and resolved will be impartial, independent, verifiable and auditable? Does a complainant need to know that they are using a gateway mechanism? Should the nature of the mechanism be transparent and publicised, so that people understand their rights?

Professor Brown: There should be transparency and publicity about people's rights and the processes for both types of complaint.

It is often difficult to know whether a service complaint will lead to a much more serious issue of misconduct as more information about the case is uncovered, so I appreciate the difficulty of distinguishing between the two types of complaint. There remains ambiguity about how cases that involve both elements would be dealt with—who does what and when?—which will not be easy to resolve. Perhaps the complainant should have a degree of choice. As I said, a person's bringing a complaint about the health service to the ombudsman does not preclude the possibility of a complaint being made to the GMC further down the line if there has been serious misconduct, notwithstanding the point that I made about the desirability of not rehearsing the same arguments again and again.

Sometimes the different elements of the complaint cannot be identified until a bit of digging and investigating has been done. I did not hear Linda Costelloe Baker give evidence but I read her submission, in which she made points about the number of cases that she has dealt with that involved elements of both misconduct and inadequate professional service—she is obviously more familiar than I am with the type of legal complaints that are made.

Jeremy Purvis: Members of the Scottish Parliament are gatekeepers for complaints—I am often frustrated when we are regarded as the objects of complaints rather than gateways for resolving complaints. Constituents who bring complaints to me do not know where I will make representations; they just want the problem to be resolved. Does it matter if the public do not know the route that will be taken, as long as they are confident that the complaint will be handled appropriately?

17:00

Professor Brown: I take your point, which relates to the answer that I gave at the beginning. If people have a problem, they want their complaint handled well. They might be less concerned about exactly who does it, but they will want to be assured of certain things. Usually, they want a level of independence, impartiality, proportionality, accessibility and transparency—all the things that add up to a good complaint-handling system.

The Convener: The last question is on non-lawyers.

Jackie Baillie: I have an interest in legal advice provided by non-lawyers, which is provided for in the bill through access to legal aid. If my understanding is correct, you cover the Scottish Legal Aid Board in its entirety. Is that right?

Professor Brown: Yes.

Jackie Baillie: Equally, you would cover non-lawyers who are active in the public sector.

Professor Brown: That is right.

Jackie Baillie: Do you therefore think that there is a need for a body that deals with all those who give legal advice, irrespective of whether they are public, private or—and I am throwing this in but it is not meant to be a wobbly one—voluntary sector

bodies? I am conscious of the fact that a number of the providers of those types of services will be in the voluntary sector.

Professor Brown: Again, they would be covered by my office to some extent, because there is a wonderful section in the Scottish Public Services Ombudsman Act 2002 that refers to services provided by the body or by another organisation acting on its behalf. In my submission, I pointed out that the blurring of the public, private and voluntary sectors increasingly makes that area quite complex. We will quite often get complaints about voluntary organisations or private firms, and we have to look at each complaint to see whether the service was being provided on behalf of a body that is under our jurisdiction. If it was, the complaint comes under our jurisdiction, but that takes us into a governance and accountability issue between the body that is under our jurisdiction and the organisation it has employed to do certain things.

We have to examine every case, because sometimes it will have to do with the constitution of the organisation as well, but the Scottish Public Services Ombudsman Act 2002 does catch such cases. When I go out to give presentations, I tell people about the organisations and key areas that are listed in that legislation, but I always add an "and …" because of the section that refers to acting on behalf of such organisations, which encapsulates a lot of other things. There is probably less public awareness about that, and it is important to get some of that understanding and information out to people. When discussing the matters that we are debating today, it is helpful to have a clear mapping of the bodies that are already there and of what their respective roles are, and the next big test question is about how they complement one another to ensure that the whole thing adds up to a coherent system.

There are ways of doing that across Scotland, but there is also a need to do it not just sectorally but in relation to specific groups. If one is thinking about care for the elderly or care for young children, for example, one has to think about it from a thematic or constituency point of view—I do not mean constituency in the parliamentary sense—rather than sectorally, because increasingly we have joint delivery of services, which complicates the matter. That relates to the question about making things clear and simple to understand, which is key. It should not be for members of the public to have to understand all that complexity; they should be able to enter relatively easily into the process. The organisations behind the scenes should help to make the connections and deliver collectively the appropriate services at the appropriate time.

Jackie Baillie: I am highly persuaded of that argument, but that is for another place and another time.

If lawyers are slightly nervous that the non-lawyers might go completely unnoticed, can you confirm that what you are saying is that they are covered already, by and large?

Professor Brown: To some extent, yes.

Jackie Baillie: The lawyers also raised with us the issue of quality assurance mechanisms for the non-lawyers. Have you come across that anywhere? Is it a feature of your work? Can you offer any advice on the kind of mechanisms that would be appropriate?

Professor Brown: Are you talking about quality assurance for the role of people being employed in that capacity within any other organisations?

Jackie Baillie: It would be the quality assurance of their role as non-lawyers providing advice and having access to legal aid funds.

Professor Brown: I would like to give that a bit more thought and see whether I have any specific points to make when I get back to you.

Jackie Baillie: Thank you very much.

The Convener: Thank you, Professor Brown. We would be grateful for clarification—briefly, as the clerks have lots to cover—of anything that you think would be helpful to the committee. I am sorry that the meeting has run later than anticipated.

Professor Brown: That is fine. Similarly, if other points arise, I would be happy to take any inquiries to the office. I also make a plea that, whatever body or organisation is established, thought should be given from the outset, rather than after the event, to sharing services and location.

The Convener: I am sure that the Scottish ministers will read every word in the *Official Report*.

17:05

Meeting continued in private until 17:14.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Monday 29 May 2006

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron