JUSTICE 2 COMMITTEE

Tuesday 23 May 2006

Session 2

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JUSTICE 2 COMMITTEE
15th Meeting 2006, Session 2

CONVENER

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

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

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

COMMITTEE SUBSTITUTES

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

*attended

THE FOLLOWING ALSO ATTENDED:

Mr John Swinney (North Tayside) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Bill Alexander
James Clark
Martyn Evans (Scottish Consumer Council)
Trevor Goddard (Royal & Sun Alliance Insurance plc)
Mike Lloyd
Stewart Mackenzie
Neil McKechnie
Lindsay Montgomery (Scottish Legal Aid Board)
Joan Pentland-Clark
Duncan Shields
Alistair Sim (Marsh Ltd)
Peter Turrell (Royal & Sun Alliance Insurance plc)

CLERKS TO THE COMMITTEE

Tracey Hawe
Alison Walker

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION
Committee Room 1

Scottish Parliament

Justice 2 Committee

Tuesday 23 May 2006

[THE CONVENER *opened the meeting at 14:08*]

Item in Private

The Convener (Mr David Davidson): Good afternoon. This is the 15th meeting of the Justice 2 Committee in 2006. I ask people to have all telephones and pagers—that includes BlackBerrys—switched off.

We have received apologies from Jackie Baillie. I welcome John Swinney, who is using his right to attend a parliamentary committee in public session.

Item 1 is to ask the committee whether it agrees to take item 3, on the work programme, in private.

Members *indicated agreement*.

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

14:09

The Convener: Item 2 is the continuation of evidence taking on the Legal Profession and Legal Aid (Scotland) Bill. I welcome Margaret Ross, who is the committee's adviser on the bill, and Sarah Harvie-Clark, who is from the Scottish Parliament information centre.

For the avoidance of doubt, I do not—as I have said regularly—have any declarations to make. One or two people seem to think that because my son was an advocate in the West Indies he is an advocate in Scotland. He is not registered to practise law in Scotland as an advocate or as a solicitor. He is, in fact, a member of the English bar.

Maureen Macmillan (Highlands and Islands) (Lab): I refer people to the declaration that I made when we began scrutiny of the bill.

The Convener: I welcome the first panel of witnesses. The panel members are Lindsay Montgomery, who is chief executive of the Scottish Legal Aid Board; Tom Murray, who is director of legal services and applications at SLAB; Colin Lancaster, who is head of policy at SLAB; and Martyn Evans, who is from the Scottish Consumer Council.

I will ask the first question, which is for the Scottish Consumer Council. We have heard from other witnesses that it is often difficult to be clear about the conduct versus service classification and about hybrid complaints. For the record, can you explain to us why your organisation has changed its view and now considers that conduct complaints should fall within the remit of the proposed Scottish legal complaints commission? How do you envisage conduct complaints being handled? If the profession is to continue handling conduct complaints, what power should the commission have to review the substance as well as the handling of the complaint? I will repeat the questions if you require me to do so, but they go as a group.

Martyn Evans (Scottish Consumer Council): Clearly, you have evidence before you on conduct and service. We have been considering the matter since 1999, when we first conducted our research into complaints against solicitors. It is difficult for a consumer body such as ours and for complainants to make the distinction between conduct and service. You heard in the evidence of the vice-dean of the Faculty of Advocates that she, too, finds it difficult to make that distinction.

When we commented on the issue previously, we had not seen the weight of evidence in the responses to the consultation. The responses indicated that people were not convinced that separating the two matters and leaving conduct to the Law Society of Scotland and service to the Scottish legal complaints commission would achieve the public interest purpose of the bill, which is to put consumers at the heart of the matter.

There is merit in allowing any profession to discipline its members, set the conduct standards and examine members' standards of conduct. We reviewed the matter prior to giving evidence to the committee and decided that our view was that an independent group consisting of peers from the profession and public interest members could decide those matters competently against the standards that the profession sets. That explains why we changed our mind.

There is merit in any professional body examining whether its members have conducted themselves according to the rules, but the problem is that there is a clear lack of confidence in the profession doing that. Given the weight of evidence from the consultation process, if the bill does not address that lack of confidence, a problem will continue to exist and it will have to be addressed in the future. We would like the bill to try to settle the matter. The reputation of the legal profession would be maintained and enhanced by having an independent commission that investigates both service and conduct complaints made against members.

The Convener: I finished off by asking whether, if the profession continues to handle conduct complaints—that still might be the approach that the Executive wants to take; we must remember that it is an Executive bill—the commission should have the power to review the substance as well as the handling of the complaint. Should the profession still have the right to investigate the conduct of its members?

Martyn Evans: If you gave the commission that power, you would be allowing it to review conduct complaints, which would achieve the same objective that I am trying to achieve. If the commission were allowed to consider the substance of a complaint and essentially act as an appeal body after the Law Society has considered it, that would achieve the same objective that I am trying to achieve, but it would do so by putting in an additional stage that would elongate the complaints procedure. We cannot see the purpose of that. It is difficult to understand why the commission would be given such a power if the principle that lies behind our view is not accepted. The bill allows the commission an overview of the process by which the Law Society reviews conduct complaints, but the commission cannot investigate the substance of complaints. If you accept the Executive's current position, the bill makes sense because the commission reviews the process but not the substance of the complaint. If consideration of the substance of the complaint were to be added to the role of the commission, the commission would act as an appeal body and that would elongate the complaints process. Why would you want to do that?

14:15

The Convener: Thank you for being clear about the reasons for the change. We have received a large volume of evidence in the past few weeks.

Colin Fox (Lothians) (SSP): The Scottish Consumer Council's submission refers to research that it carried out in 1999 to examine the experience of complainers. Some 50 per cent of respondents felt that their complaint had not been handled fairly and that the Law Society had not been impartial but had appeared to take the side of the solicitor. Will the bill allay those respondents' fears or do you think, as you seem to suggest in your submission, that it has been an exercise in milking the cow and then kicking over the bucket in that it will not provide the outcome that you would like?

Martyn Evans: I tried to explain that in the submission. The policy memorandum says that the purpose of the bill is to put consumers at the heart of regulation. It half does that by giving the commission the power to deal with service complaints, but does not take the extra step of giving it the power to deal with conduct complaints. The Law Society says that there is a perception that the complaint-handling system is unfair; we say that there is more than a perception. There will continue to be a discussion about that. In our 1999 research, when we assessed dissatisfaction we also considered the outcome of the case in question. Proportionately, the people for whom the outcome was in their favour were as dissatisfied as those for whom the outcome was not in their favour. That was more evidence that the process was at fault.

Bill Butler (Glasgow Anniesland) (Lab): Good afternoon, gentlemen. The Scottish Consumer Council favours the commission's proposed power to monitor the effectiveness of the guarantee fund and the master policy. We have received many submissions from lawyers that suggest that the role of the master policy is much misunderstood and does not require additional oversight. Why is the Scottish Consumer Council in favour of the monitoring and what form do you expect it to take?

Martyn Evans: We have anecdotal evidence from people who have said that they do not think

that the process has been followed in a reasonable manner. We approached the Law Society to see whether we could carry out joint research with it into the consumer experience of the master policy, but it said that it had other commitments and did not have time to help us with that. We have no clear evidence about how the master policy process is going. However, people who are dissatisfied with it have contacted us. It is appropriate that an independent body made up of members of the legal profession and public interest members has oversight of an important consumer protection measure. The process of oversight that is set out in the bill is right and appropriate.

Maureen Macmillan: Do you know how other professions are insured? Have you had similar complaints about architects or accountants? There must be parallels.

Martyn Evans: I have only anecdotal evidence of that. The complaints that have come across my desk and the telephone calls that we have received over the years have been about the master policy; I cannot recall receiving one about the insurance that is held by other professions, although that is not to say that there have not been any such calls. The issue of the master policy comes before our council consistently. As with all such matters, we try to find an evidence base from which to proceed. In this case, we can do that only with the co-operation of the Law Society, which, unfortunately, said that it did not have the time to help us.

Mr Stewart Maxwell (West of Scotland) (SNP): We have received written and oral evidence that the inclusion of negligence in the definition of "inadequate professional services" might cause confusion about what the various elements of compensation are for and that insurance cover might not meet the higher compensation levels. What is your view of that evidence?

Martyn Evans: We welcome the inclusion of negligence as a heading under which a complaint can be made and compensation can be awarded. At the moment, there is a high risk involved in going to court to try to seek compensation for losses. What the insurance will cover is a matter for the legal profession's insurers. If they feel that there would be a large number of claims for which they cannot get a reasonable premium, presumably they will not insure. What we hope is that there will be a low number of negligence claims, and that therefore the master policy will cover them.

Mr Maxwell: Would you reject the idea that there is a need to give negligence a separate heading?

Martyn Evans: We like the fact that the bill makes it clear that negligence is included under IPS. It should be explicitly stated that negligence can be compensated for.

Mr Maxwell: Some people have said that when it comes to negligence, it is difficult to get a lawyer to sue another lawyer. Would it make it easier if negligence were included under IPS?

Martyn Evans: We have had trouble finding evidence of that but it is a strong feeling among a large number of people, who find it difficult to find a competent lawyer to take action. The purpose of the complaints process in the bill is to have an informal, non-court-based mechanism for resolving those matters. A competent and reputable profession should not fear anything about having an independent organisation looking at complaint handling and indeed any aspect of negligence that might arise.

Mr Maxwell: Does the Scottish Legal Aid Board favour the inclusion of negligence claims within the remit of the commission?

Lindsay Montgomery (Scottish Legal Aid Board): We have always supported the idea that negligence should be covered by that area. The previous idea that people had to go to court put quite large barriers in front of them, so we thought that the provisions in the bill were an improvement.

Mr Maxwell: As we understand it, part of the intention of that is to keep negligence claims out of the courts and away from the legal aid fund. Could that be part of the reason for doing that? Do you anticipate any difficulties with that?

Lindsay Montgomery: I am not sure that the intention was explicitly to keep such claims away from the legal aid fund. We have funded cases against solicitors that have been taken by other solicitors. If the legally assisted person is successful in suing their solicitor or any other professional, the legal aid costs will normally come out of the winnings from the case. There are therefore no costs to us, so that was not really part of the thinking behind that.

Mr Maxwell: So the Scottish Legal Aid Board would fund such claims, irrespective of whether they were in court—

Lindsay Montgomery: No. If the case was going to court, someone could apply for legal aid. If they get legal aid and they win, the cost to the legal aid fund would be recovered from the case, through reparation.

Mr Maxwell: Exactly, but more cases may be kept out of court because of the increased maximum level of compensation from £5,000 to £20,000. People cannot get legal aid for pursuing cases that are not within the sphere of the courts.

Lindsay Montgomery: Much larger claims might be outside the boundaries of the bill, but the bill recognises that such cases may still go to court, in which case I do not see why someone would be excluded, provided they have gone through the process first—

Mr Maxwell: Perhaps I am not explaining myself properly. I accept that such cases have to go to court—there is no difference there—but the change from £5,000 to £20,000 will surely take more cases away from the court and bring them within the remit of the commission.

Lindsay Montgomery: Yes.

Mr Maxwell: There will not be legal aid funding for people who are represented through that—

Lindsay Montgomery: If someone has an alternative means of recovery, we will not normally fund them. However, if someone is suing for a substantial amount, they could still apply for legal aid and take a case to court. The bill makes provision for that. It is expected that the compensation would be taken into account. There is no real saving from our point of view from cases that would otherwise have gone to court, because we would normally recover the cost anyway.

Mr Maxwell: You would recover it if—

Lindsay Montgomery: If they went to court and won.

Mr Maxwell: But if they did not win?

Lindsay Montgomery: The cases that we tend to fund have a high probability of being won, mainly because part of the test is the probability of success. Often we will get the solicitor to seek counsel's opinion on the probability of success.

Mr Maxwell: So you see no difficulties arising as a result of the change.

Lindsay Montgomery: Not particularly, no.

Maureen Macmillan: Can we just confirm the fact that there is a means test before someone can get legal aid, no matter what level of claim they want to pursue in court?

Lindsay Montgomery: Yes.

Maureen Macmillan: Do you agree that that means that if the claim goes to court, people could still be excluded?

Lindsay Montgomery: If they do not qualify for legal aid, yes.

Maureen Macmillan: Further, can you confirm that what is happening in the bill will mean that more people are included?

Lindsay Montgomery: Yes.

Colin Fox: On the funding of the legal complaints commission, the Scottish Consumer Council's written submission says that you favour the polluter-pays principle. However, we have heard two views in that regard. Some people say that it is unfair to ask everyone to pay, regardless of the outcome of the complaint, while the former Scottish legal services ombudsman and others have said that the provision in the bill is designed to ensure that there is no suspicion that the commission has something to gain from upholding complaints. Could you elaborate on your understanding of both sides of the issue and explain why you come down on the side of the polluter-pays principle?

Martyn Evans: We think that any profession should bear the cost of a complaints system against it because it is in the interests of every member of that profession that the reputation of the profession is maintained. That is why we support the bill's proposal that there be an annual general levy, which will share the cost. We also believe that people who have poor business practice should bear the cost of continuing to have that poor business practice if complaints carry on against them, and that the entire profession should have an interest in a practice raising its game.

We are in favour of a complaints levy, but the question is whether it would be levied against a firm if the complaint did not succeed. Our reading of the bill is that, under section 20(3), the commission can determine different amounts for the complaints levy in different circumstances. If that is not the clear intention, we would like that to be clarified. In relation to the Financial Services Ombudsman, there is a general levy and a complaints levy. We think that the same thing should apply in this instance, but we also think that, up to a certain amount of complaints, the costs should be covered by the annual levy and that, after a certain amount, the firm should start paying because it is making a disproportionate call on the funds that are raised through the annual levy.

We want to balance the arguments that have been put. There is a driver relating to shared responsibility for the reputation of the profession and a driver relating to the individual firm's responsibility for service standards. One driver would be reflected in the annual levy and the other would be reflected in the complaints levy.

Colin Fox: You have said that you are attracted to the idea of the profession as a whole paying for the complaints system. That would mean that lawyers and solicitors who are the subject of a complaint would be asked to pay twice, as they would pay the general levy and the complaints levy. You must understand that their contention is that it would not only be the polluters who would

pay because even people who are found not to be polluters would be asked to pay the complaints levy.

Martyn Evans: I understand the argument, but I do not understand the complaint about the proposal's fairness. If the cost were not apportioned in the way that is suggested, the risk to an individual firm that had to bear the cost of a complaint would be quite enormous.

People who work in a profession share an interest in the reputation of that profession. They have an interest in having a complaints system that picks out firms that are performing poorly and conducting themselves badly. That is why we suggest that there should be an annual general levy. However, we also believe that there should be a complaints levy.

I understand what you say; I am just saying that a clear consumer protection issue is involved, as is the aim of improving business behaviour, which is reflected in the cost that must be borne. That is why, on our reading of the bill, we are broadly in favour of the two levies to pay for the commission. We seek clarification of whether the commission could set the complaints levy to zero for an unfounded complaint.

14:30

Colin Fox: I understand. When we discussed the matter before, it was suggested that the complainer might pay a levy for complaining, which would reduce the likelihood of vexatious complaints. I take it that the Scottish Consumer Council is not attracted to that option for funding the commission.

Martyn Evans: Organisations that feel under threat from complaints make that suggestion quite often, which is entirely inappropriate. Professional and other organisations are allowed to have a range of privileges because that is in the public interest. One consequence of having privileges is that organisations must maintain their reputation by mechanisms such as the proposed complaints system, to show the competence of the profession through independent review.

Mr John Swinney (North Tayside) (SNP): I will ask about the financial parameters of the Scottish legal complaints commission. If we operate on the basis that solicitors pay a general levy and the commission begins to develop a bureaucracy, before we know it that could be a financial burden that none of us was keen to establish. Would any consumer issues arise from placing a financial parameter on the commission so that it does not grow arms and legs and does not become an inordinate financial burden? Does such a parameter offend against the protection of the consumer interest?

Martyn Evans: Not at all. All regulation has a cost, which is normally passed on to the consumer. All regulation also reduces choices. The proposed regulatory mechanism will add a cost to consumers' legal bills, as does the current system. There is a clear consumer interest in having proportionate and appropriate costs.

The committee has talked to previous witnesses about trying to marry the independence of the commission with accountability for how the commission conducts its business. Getting that right will be important for the consumer interest. We do not say that unfettered discretion to charge what the commission likes would have no consequence; it would have serious consequences for consumers, as it would increase their legal bills.

Maureen Macmillan: I return to the balance between a general levy and a complaints levy. I think that you mentioned the possibility of making some complaints against a solicitor for free—for example, the general levy could cover two free complaints a year.

Martyn Evans: I did say that; that is a reflection of how I understand—

Maureen Macmillan: You did not actually make that suggestion; that is what I extrapolated from what you hinted at. Would such an arrangement strike a good balance?

Martyn Evans: At the moment, I think that it would strike a good balance and I would like the power to be made explicit in the bill if it is unclear. The bill makes it clear that the commission must consult a range of interests, including consumer organisations, about how it sets its levy. When consulted, we would put that suggestion to the commission and say that the evidence is that two free goes provide a reasonable way to balance the complex interests.

Colin Fox: One criticism of the bill in your submission is that little provision is made for people to complain about fees, which are a big concern. Are you anxious about whether the general levy and the complaints levy will percolate to the consumer, who will have to pick up the bill for them?

Martyn Evans: Consumers are already bound to pick up payment for the current system for reviewing complaints. We want to balance the confidence that consumers have in a complaints system with the cost of that complaints system. I see no other outcome than that the cost of the independent complaints system will eventually percolate to consumers—not just individuals, but businesses.

I was trying to answer the question that I thought Mr Swinney was asking, which was, if that

situation spiralled out of control, would it be of no interest to consumer organisations? It would be of considerable interest to consumer organisations because regulation costs consumers and reduces their choice. Whatever regulation is imposed must be balanced against the benefit that it tries to deliver. Discussion about cost and benefit is straightforward.

Colin Fox: I am grateful to you for working out Mr Swinney's question.

Mr Swinney: It was very clear to begin with.

Colin Fox: I will put the same basic question, but from a slightly different angle, to the Scottish Legal Aid Board. You wrote in your submission of your anxiety that the levy would be unfair to in-house lawyers who work for SLAB. Will you explain?

Lindsay Montgomery: We note that although most of the solicitors who work for my sort of organisation and others do not deal directly with clients, they would still have to pay the levy.

Colin Fox: Is that fair? Should the bill allow them to opt out?

Lindsay Montgomery: If the Executive gives me a grant and solicitors who work for my organisation have to pay the levy, it has no direct effect on us because it could be argued that the Government is just subsidising legal aid work. It is for ministers to decide how they want to organise the funding and it is of no great moment to us.

Colin Fox: Okay, so you are prepared to accept the levy as just another part of your burden. What about the Scottish law centre lawyers who contacted us and said that although they have to contribute to the levies, there is no slack in their funding provision to allow them to pay? Do they have a case?

Lindsay Montgomery: I understand their concern because they will look to their funders to provide more money to pay for the levy.

I return to your more general question. We support the polluter-pays principle, but our primary concern about the bill is that the innocent will pay. Given that most solicitors do not regard legal aid work as being as profitable as private work—they would probably put an exclamation mark at the end of that statement—we are concerned that people will select away from legal aid work if they feel that they will have to pay in cases where they did nothing wrong. That could change the balance of risk in their business and we are worried that that could reduce access to justice.

Colin Fox: Should there be an exemption for your SLAB lawyers who are not likely to be subject to complaints or are you prepared to let the matter go?

Lindsay Montgomery: Sorry, I meant that the private solicitors for whom we pay will have to pay the levy. All that we are saying is that solicitors should not have to pay the levy when they are not guilty of the offences of which they were accused. That introduces unfairness and concern to their business. If they regard legal aid work as not being particularly profitable, they might move away from it, which concerns us from an access to justice point of view.

Maureen Macmillan: Do the lawyers who work for you pay the Law Society levy?

Lindsay Montgomery: Yes.

Maureen Macmillan: That levy covers the Law Society complaints procedure. What is the difference then?

Lindsay Montgomery: Amounts come into it. Many solicitors have asked the Law Society whether there will be a reduction in their practising certificate costs given that some costs are moving elsewhere. I am not sure what the answer is yet.

Maureen Macmillan: It will be interesting to find out the Law Society's answer.

Mr Maxwell: Surely the levy would be a useful incentive to reduce or eliminate complaints against a solicitor. Only by driving down the number of complaints will they drive down their costs because there will be fewer complaints to pay for.

Lindsay Montgomery: We support the idea of a polluter-pays levy. It should have the effect of improving standards and encouraging solicitors to minimise the potential for valid complaints made against them. There is no difference in principle; our problem is purely with the cases where solicitors are found not guilty but still have to pay.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): The financial memorandum suggests that the annual levy will be about £100 and that the complaints levy will be about £300. If the commission were to increase the annual levy by £50, would that have any effect on a solicitor's decision to give up civil legal aid work?

Lindsay Montgomery: The issue is not so much the annual levy as the complaints levy. If the complaints levy is £300 or more, solicitors might well have to think more carefully about taking on such work, because they will not make an awful lot from it.

Jeremy Purvis: Would you prefer a flat-rate levy for everything?

Lindsay Montgomery: No. I believe that most solicitors accept that they should pay up if they are found guilty of getting something wrong. I do not think that there is a right answer to this problem—it will be up to the proposed commission to find the best balance.

I know that I keep coming back to this point, but a big problem for the solicitors to whom I have spoken is that they will, if they are to be charged large amounts of money when they have not done anything wrong, have less control over their business costs, which will obviously affect business decisions. No one can know the number of solicitors who will be significantly affected, but I know that some firms have considered the matter and have decided that, because their civil legal aid work is already at the margins, they will not do it any more.

Jeremy Purvis: Is that because, for example, last year there were five complaints that would, under the new provisions, each have cost £1,500 even if they had all been thrown out or if the solicitors involved had been found not guilty?

Lindsay Montgomery: The concern is that some people might see an opportunity in the provisions. Of course, that is a judgment call that solicitors will have to make.

Jeremy Purvis: The committee has heard that disincentives for solicitors could include the £20,000 maximum compensation level, the potential increase in the excess that is paid and the increase in the complaints levy. We need to find out whether those factors will lead to more solicitors deciding not to accept legal aid work. What is the current trend? How many solicitors in Scotland give up civil legal aid work each year, and what are their reasons for doing so?

Lindsay Montgomery: We know, because we monitor the numbers, that there has over the past three years been a reduction in the number of solicitors who carry out civil legal aid work. There has also been a slight reduction in the number who are involved in criminal legal aid work, but we are less concerned about supply in that area.

Solicitors give up the work for a range of reasons and many already take very few such cases. Indeed, just less than half the solicitors who do civil legal aid work take on fewer than 10 cases a year; some decide not to continue simply because they do not think that it is worth their while and others feel that the fees are not high enough. However, ministers have already in principle agreed amendments that we have proposed to improve civil legal aid fees, which might allow some solicitors to keep up their civil legal aid work. Ministers are also considering our proposal that the board directly employ civil solicitors in areas where there are not enough to provide a service.

That said, although the number of solicitors who take on civil legal aid work has reduced, some firms are actually doing more business, although they tend to be in the cities where there are higher volumes of such work.

Jeremy Purvis: I have heard that solicitors who take on small amounts of civil legal aid work have to bear a disproportionate bureaucratic burden. The fact that their income from their civil legal aid work is far outweighed by the costs of processing that work in line with your requirements has a big impact on, for example, small rural practices.

14:45

Lindsay Montgomery: Even if they take a small number of cases, solicitors will be subject to the Law Society's peer review quality standard, which we work with it to apply. If a solicitor deals with a case every month or so, they will have in place the basic administration, which applies whether they deal with two or 50 or more cases. It would therefore be administratively more expensive to take only a few cases. We are trying to find ways of making the system more efficient. One of the big investments that we have made is in providing online services, which we think will mean that those who deal with a small number of cases will find the administration much easier to operate, which is proving to be the case in areas where such services have been provided.

Jeremy Purvis: Does Mr Evans wish to comment?

Martyn Evans: There is a supply issue as well as a demand issue. The number of applications for civil legal aid has decreased, which has to be put into the equation. One has to understand the reasons for that, which might relate to the eligibility levels. It is not just a question of the supply of legal aid lawyers. Social welfare law is not well served generally for a variety of reasons, which our civil justice review, "Complaints About Solicitors: A Study of Consumers' Experiences of the Law Society of Scotland's Complaints Procedure" considered. I would be wary of making too much of a decline in the number of providers without considering the decline in the number of people who apply for civil legal aid, which is what drives the provision of legal aid. That decline might have occurred because legal aid eligibility levels have not reflected a range of changes in society.

I was puzzled by some of the arguments against having the compensation level set at £20,000. Some people seemed to suggest that the legal profession would withdraw from providing certain services if that level was introduced. It is difficult to know whether that is the case. The bill neither changes the likelihood of poor practice by a member of the legal profession nor changes the levels of compensation that could be awarded against a solicitor firm or advocate. The courts can award compensation for serious matters. It appears to us that the bill will increase the probability that someone will get caught. We worry about the arguments against the £20,000, which

suggest in essence that because the system of complaint handling will be effective, firms might withdraw from certain areas of business.

Jeremy Purvis: Are you saying that because the emphasis will be on a non-court process for negligence claims, there is an increased chance that people will not be put off making such claims? Complaints will go to the commission, which will see them through. Are you therefore saying that more solicitors could be found to be negligent, that the current system, in which people have to go to court, is putting them off and that the clear-up rate will be consequently higher?

Martyn Evans: That is our contention. However, we will be equally delighted if there is a low number of compensation claims. The view that is coming back to us is that the risk of going to court and the uncertainties that are involved in that are too high for people to bear. The more informal mechanism of peer review with independent public-interest involvement will bring out genuine cases in which losses occur that should be compensated for. I have tried to emphasise that it is in the profession's interest as well as the consumers' interest for that to happen. The vast majority of members of the legal profession are extremely competent and the evidence that we get from our surveys shows that they are highly thought of by their users.

Jeremy Purvis: I have a brief final question. Is there a difference in the proportion of complaints against legal aid cases as opposed to non-legal aid cases that currently go to the Law Society?

Martyn Evans: I do not know. The Law Society would have that information. I could refer back to our 1999 research.

Jeremy Purvis: Does the Scottish Legal Aid Board know how many legal aid cases result in complaints to the Law Society?

Lindsay Montgomery: No—we are not always told by the Law Society that a complaint involving a legal aid case has been made. We know about some, but not all, of them.

Jeremy Purvis: That is a bit odd, given that public money is being used.

Lindsay Montgomery: I have suggested to the Law Society that it should let us have more information about complaints.

Jeremy Purvis: What was its response?

Lindsay Montgomery: It is still considering the suggestion.

Jeremy Purvis: How long has it been considering the suggestion?

Lindsay Montgomery: It has been doing so for a wee while. It is something that we will discuss further.

Jeremy Purvis: How many months is "a wee while"?

Lindsay Montgomery: I cannot remember—I will have to check.

Jeremy Purvis: Is it more than a year?

The Convener: Perhaps you might drop us a note when you have gone back to the office and checked that.

Mr Swinney: With the addition of the word "shortly", convener.

The Convener: We do not provide dictionary definitions.

I have a question before we leave the point that is under discussion. Mr Montgomery said that the Executive is considering employment of in-house lawyers to take on legal aid work where there is a shortage. Was that consideration initiated by the Scottish Legal Aid Board or by the Executive?

Lindsay Montgomery: We have been considering that issue for a while. It was considered in the strategic review of legal aid in order to ensure that there are no gaps in provision. We have worked out more detailed proposals, which ministers are considering. The issue was mentioned as part of the advice for consultation.

The Convener: Having raised the matter here, I wonder whether you can send us a short note on the background so that we have a better understanding of your concerns. Obviously, it is a public interest issue.

Lindsay Montgomery: Sure.

Maureen Macmillan: I want to talk about non-lawyers and the provision in the bill for legal advice and assistance cover to be provided by registered advisers who are not necessarily lawyers. We have received evidence from advisers whose unanimous view is that they do not want to be involved on a case-by-case basis, which would require a means-tested scheme. Obviously, that would also exclude people who are already excluded by the legal aid rules; for example, voluntary organisations and small businesses. The advisers want a grant-funded scheme and the bill team has suggested that it might be open to that suggestion for stage 2 of the bill. For the record, can SLAB and the SCC say whether they would prefer a grant-funded scheme?

Martyn Evans: We would definitely prefer a grant-funded scheme to be put into the bill, in addition to the existing provision of allowing legal aid to be extended. We think that that provision is good and positive, but we suggest that it will impact on only a small area of legal advice and provision. Grant funding could make a substantive step change in the availability of legal advice on

aspects that we discussed previously, such as in social welfare law, and in rural areas and parts of our cities. If grant funding could be put in the bill, it would be a welcome step.

Lindsay Montgomery: We feel strongly that case-by-case funding would be only at the margins of interest for the non-lawyer sector: I think that the sector has made that clear. However, the more fundamental issue is that most of the proposals in the consultation document "Advice for All: Publicly Funded Legal Assistance in Scotland—The Way Forward" were about bringing more flexibility into the operation of legal aid so that we can try to match supply with demand. Currently, it is a wholly demand-led system and we do not have the ability to ensure that the right people get advice in the right places.

Grant funding would allow that to be changed. We envisage grant funding running alongside the ability to have contracting on the solicitors' side, so that if we had gaps in, for example, a particular island or in a subject area, we could make provision available. We think that both those proposals need to be developed for stage 2. We welcome the Executive's indication that it is seriously considering that.

Maureen Macmillan: Do you agree with the bill's extension of legal advice and assistance provision to non-lawyers? Will the bill provide an appropriate extension of such services? The SLAB submission suggests that the bill is limited in that "only very initial advice" would be funded. Can you elaborate on where you would like the bill to go in that respect?

Lindsay Montgomery: In general terms, if we move to grant funding and contracts, that will be the fundamental change. On the advice and assistance element, we are sure that there is an error in the bill because it does not cover all aspects of advice and assistance. That will need to be corrected so that the registered advisers sector can provide the whole service.

Maureen Macmillan: Do you think that that is an inadvertent omission?

Lindsay Montgomery: Yes. That is our understanding, anyway.

Maureen Macmillan: Does the Consumer Council have anything to add?

Martyn Evans: We have a problem with section 45, which says that people who have acquired rights of audience under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 will be excluded from the provisions of legal aid advice and assistance. It is difficult to understand that exclusion. From the consumer perspective, if those people have rights of audience and legal aid advice and assistance is to be extended to a variety of professions, we see no reason why those people should be excluded.

Maureen Macmillan: How robust are the proposed quality assurance mechanisms?

Lindsay Montgomery: The bill has no proposals on that. Do you mean the code of practice?

Maureen Macmillan: How robust should such mechanisms be?

Lindsay Montgomery: Our view is that quality assurance must apply to all publicly funded advice and legal services. It is essential that people have confidence in the services that they receive. We have done work with the Executive to start to consider all the quality assurance arrangements that are in place in the various sectors, with a view to helping to develop better guidance and requirements for them all. That will relate to what we have put in place for solicitors who work on civil matters, to what we are working on with the Law Society and the Faculty of Advocates in relation to criminal matters and to what happens in the advice sector.

The code that the bill envisages will provide an opportunity to enshrine quality standards. We want to rest on much of what exists, rather than reinvent the wheel, which would be a shocking waste of time and effort.

Maureen Macmillan: We have heard from organisations such as Citizens Advice Scotland that they have quality controls in place. Would you just check that those controls were of a high enough quality?

Lindsay Montgomery: Yes.

Maureen Macmillan: What is the Consumer Council's view?

Martyn Evans: Of course it is important that all consumers of the newly funded services have confidence in the quality of the providers of those services. Like the Scottish Legal Aid Board, we ask for a proportionate quality assurance system. That might be a passport system for some groups, such as Citizens Advice Scotland, which deals with a long list of issues.

We criticise the register as a quality assurance mechanism. When applied to volunteers in the voluntary sector, it will have a disproportionate cost and will not, because of volunteer turnover, be very effective. When I worked with citizens advice bureaux, volunteer turnover as a whole was about 100 per cent every three years, so the register would have to be renewed regularly. It is difficult to see what assurance that would give consumers. A register would be appropriate for some of the groups that will emerge from the new funding, but it will be a disproportionate measure

for other groups. We want to work with the holders of the register to find a more proportionate form of quality assurance, which we mention in our submission.

Maureen Macmillan: In Inverness, joint working between SLAB and Citizens Advice Scotland enables an in-house lawyer to advise advisers. How would that fit in with regulation?

Lindsay Montgomery: The bill envisages that advisers will be registered. I agree with Martyn Evans: as we said in our evidence, we are worried about having to register individuals because the cost to us and to other organisations will be substantial. I expect Citizens Advice Scotland, for example, to certify the training, quality and management of its volunteers, which will make volunteers part of the register. We expect arrangements under part V of the Legal Aid (Scotland) Act 1986 to be part of, and to fit comfortably with, the code.

Bill Butler: My question is for both organisations and is about another aspect of the non-lawyers issue that Maureen Macmillan has explored. We have heard evidence to suggest that non-lawyers and people who come under the extended rights of audience should fall within the remit of the proposed commission, but we have also heard from the Scottish public services ombudsman that many non-lawyer advisers who work for, or are contracted to, public sector organisations fall within her remit. What is your view on including non-lawyers in the commission's remit?

15:00

Martyn Evans: A range of non-lawyers should be and are included in the remit of the commission, such as people who work in conveyancing. Perhaps the new ones who will have rights of audience should also be included. I would have to check the bill to see whether they are.

Bill Butler: Has any been omitted?

Martyn Evans: None has been omitted that I am aware of. I will check the bill and write to you if it turns out that any has, although when we examined the bill, we thought that the range was correct.

It would be disproportionate to have people who work in publicly funded voluntary sector advice services regulated in terms of complaints. That would not be in keeping with the intention of the commission. However, as we said in our written submission, they must be subject to a rigorous and independent complaints system. I was the chief executive of the CAB service for five years, so I know that there is an independent complaints review system for CABx.

Bill Butler: Is that system still the correct one to use with regard to the particular advice that we are talking about?

Martyn Evans: The principles in the bill that relate to the legal profession are that there should be local resolution, if possible, and that there should be an independent review of a consumer's complaint if the consumer is still unsatisfied. As far as I am aware, that is what happens with regard to the CABx. That is also what should apply to a range of independent advice centres. That system will assure consumer organisations and clients that their complaint will be dealt with locally if possible and that there will be an independent review of the complaint if necessary. That is an appropriate consumer protection.

Lindsay Montgomery: I find it difficult to disagree with any of that. We would find it odd if the advice sector were included for a commission that is supposed to regulate solicitors. On the code of practice, if we are funding people—through grants or whatever—a robust complaints procedure will be an essential part of that. However, we are talking about people who work for organisations that are publicly funded and who do not tend to charge for their services. They are in quite a different position from the legal profession.

The Convener: I thank both organisations for attending and for agreeing to send us brief notes on the various points on which you said you would get back to us.

We will suspend for a couple of minutes to allow our witnesses to change over.

15:02

Meeting suspended.

15:04

On resuming—

The Convener: I welcome Trevor Goddard and Peter Turrell, of Royal & Sun Alliance Insurance plc, and Alistair Sim, of Marsh Ltd.

The bill proposes that the commission should monitor the operation of the master policy and the guarantee fund. Do you have any dealings with the guarantee fund, even indirectly?

Peter Turrell (Royal & Sun Alliance Insurance plc): I am the underwriting director with Royal & Sun Alliance. The insurance company has no dealings with the guarantee fund. We do not see that as an issue. We provide insurance for the master policy as lead insurer of a programme of

five insurers. From that point of view, we are not involved. We have not commented on the guarantee fund in our evidence, as that is a matter for the Law Society.

Alistair Sim (Marsh Ltd): We have restricted our submission to commenting on the implications for professional indemnity insurance only. However, we should explain that Marsh is the broker to the Law Society of Scotland in relation to a stop-loss arrangement, which protects the guarantee fund. However, in relation to claims and complaints, we are involved in master policy claims only.

Peter Turrell: I should add one point, in the interests of correctness. We are involved in a follow line in the stop-loss insurance of the guarantee fund. We are not the lead insurer for that; we are a follow-line insurer. I want to make that clear. We have an involvement on an excess-layer, stop-loss basis.

The Convener: Who takes the first line?

Alistair Sim: I am personally not involved in the arrangement. I could drop you a line with a note of the insurers of the stop-loss arrangement if that would be helpful.

The Convener: I would appreciate that.

How does the guarantee fund complement the master policy or, even, divert claims from it?

Peter Turrell: There are two issues. The guarantee fund provides protection for the public in the event of fraudulent activity on the part of a fraudulent solicitor. However, our insurance on the master policy is provided against the legal liability of solicitors for negligence—the wording is slightly wider on that. Under the policy, we provide an element of fraud cover for innocent partners. For example, if one partner in a three-partner firm is found to be fraudulent but the other partners are totally innocent of the fraudulent behaviour, there is cover under the policy to indemnify the innocent partners. We do not indemnify the fraudulent partner. If the firm has only one practitioner and they are found to be fraudulent, that would fall under the auspices of the guarantee fund, as there would be no indemnity under the insurance that we lead, which is the master policy.

Alistair Sim: That covers the position pretty well. The guarantee fund is a compensation scheme of last resort. The guarantee fund kicks in to protect a client who has suffered pecuniary loss as a result of a solicitor's dishonesty in the event either that professional indemnity insurance does not apply, for the reasons that Mr Turrell has outlined, or that that professional indemnity insurance is exhausted, the firm's assets are exhausted and the principal's assets are exhausted and the only compensation that would be available to the disadvantaged client would be under the compensation scheme arrangement. The contrast with the master policy is that it is an indemnity insurance policy, whereas the guarantee fund is a compensation scheme arrangement.

Bill Butler: Good afternoon, gentlemen. You probably heard the Scottish Consumer Council tell us that there is a perception among consumers that the master policy system lacks transparency and that there is anecdotal evidence of delays in settling the claims of clients who seek compensation from a lawyer. The committee has also heard from individuals who think that there is difficulty in getting a lawyer to help them with a claim for compensation against another lawyer, because it is in the interests of all lawyers to keep down the number of claims on the master policy. What are your comments on those interesting views?

Peter Turrell: Perhaps we could start with the suggestion that there is anecdotal evidence of delays. My colleague, Trevor Goddard, heads up our claims team in Glasgow, which deals with all the claims under our master policy. It is probably appropriate for him to reply to that question.

All that I will say is that we do not accept that there are delays in handling claims under the master policy, if by delay we mean inactivity or the deliberate slowing down of the process. It is in the business interests of us, as the lead insurer, and all the insurers involved to handle the claims as quickly as possible, but within the terms of our legal contract, which is the insurance policy with our policy holders, the solicitors. Trevor Goddard can give a more detailed response, which I hope will be helpful to the committee.

Trevor Goddard (Royal & Sun Alliance Insurance plc): I am happy to do so. As has been said, such evidence as there is seems to be largely anecdotal. We have not seen evidence in any other form that indicates that such so-called delays exist. I feel quite strongly about the matter, as the manager of the team that handles the vast majority of claims under the master policy against solicitor practices. Before I came to the meeting, I read the SPICe report, which reinforces the point about such evidence as there is being anecdotal, because it states that the Scottish Executive does not have data on settlement times for claims.

Bill Butler: Do you have evidence that refutes the anecdotal assertion?

Trevor Goddard: Our submission to the consultation exercise in July 2005 mentioned the fact that, for the master policy period 2003-04, 93 per cent of the claims that we were settling and which were worth up to and including £5,000 were settled within 12 months of the date of claim. The

file is usually closed sometime after the settlement cheque has been issued. For today's meeting, I have taken the opportunity to update the figures. The figure for the master policy period 2004-05 is almost identical, at 92 per cent. In fact, 80 per cent of those claims were settled within six months of the date of claim. That provides some fairly powerful evidence to disabuse people of the notion that there is unreasonable or undue delay.

As Peter Turrell said, the fact is that claims-handling delay is not in our or our co-insurers' interests as insurance companies. In general, claims tend to become more expensive the longer that they stay open. That is because interest on damages can accrue and costs will increase—both defence costs and costs incurred by the claimant's representative; uncertainty also increases the longer that a claim goes on.

Bill Butler: So it is in your interest to get the claim done and dusted as quickly as possible.

Trevor Goddard: Absolutely. It is in our interest to establish first that a claim that is made against a policy holder is valid. It is important to make the point that not all insurance claims and not all professional indemnity claims are valid. Provided that we are satisfied that they are valid, it is in our interests to settle them as quickly as we can.

Bill Butler: What about the 8 per cent of claims that are not, according to your figures for 2004-05, settled within 12 months? What is the range of the period of settlement for those?

Trevor Goddard: I mentioned the range of nought to £5,000. Typically, claims at that level—[*Interruption.*]

The Convener: I ask you to hold on for a second. Something within the window machinery is operating and it is noisy—I presume that it is an automatic window. I am sorry about that.

15:15

Trevor Goddard: No problem. The issue is slightly complicated by the fact that those settlements will not include the self-insured amount of the insured practice. I am talking about amounts that we as insurers have paid out under the master policy. The remaining 8 per cent of claims at that level will typically be resolved within a maximum of two to three years. There will always be a small percentage of claims that take longer to settle. I would be happy to give you the reasons why some claims take longer to settle.

Bill Butler: Perhaps that could be given to the committee as written evidence. Mr Sim, would you like to say something about the question that Mr Turrell and Mr Goddard were discussing?

Alistair Sim: On anecdotal evidence of delays?

Bill Butler: Yes.

Alistair Sim: I first wish to make a point. Quite a few references in the evidence slightly bother me. I wonder whether we could nail the point about what the master policy does and what the master policy insurers do. The master policy is not a compensation scheme but a policy of professional indemnity insurance. Certain references to claims being processed through the master policy or amounts being awarded by the master policy make me think that there might be a perception in certain quarters that it is something that it is not. It is a two-sided process.

Bill Butler: So there is a distinction between compensation and indemnification. It is the master policy that is the indemnification.

Alistair Sim: Yes. I say unashamedly that the claimant has to prove his or her claim. It is therefore a two-sided process. As master policy brokers, we expect to see exactly what these gentlemen are describing, which is that there are no undue delays.

Bill Butler: Delay is not in your interests.

Alistair Sim: Well, we are not the insurers—

Bill Butler: It is in no one's interests.

Alistair Sim: It is of no direct interest to us, but it is of interest to us in our capacity as brokers in two respects. First, we are aware of the fact that the cost of a claim tends to increase as time goes by, if only because of the costs associated with a long-running claim. With the increasing cost of claims goes increasing future premiums. It is not in the interests of the profession for delay that could be avoided to creep in. Such delay escalates the ultimate cost of claims, which ultimately escalates the cost of future premiums.

Secondly, it is a condition of the master policy arrangement that insurers sign up to the claims-handling philosophy. That is not a guarantee of response times or a service charter but it is a philosophy, and we expect to see evidence that the insurers have complied with it. Royal & Sun Alliance is the lead insurer; other insurers will get involved in handling some claims if RSA has a conflict.

Bill Butler: I invite RSA or Marsh to comment on the second issue, which is that some individuals think that it is difficult to get a lawyer to help them with a claim for compensation against another lawyer because it is in the interests of all lawyers to keep down the number of claims on the master policy.

Alistair Sim: I can only say what we see. All claims require to be intimated to us as brokers before they go on to the insurers. Every day, when claims come in, all we see is that the claimant is

represented by solicitors, whether they are from the north, the south, the east or the west, whether they are a small firm or a large firm, and whether they are advising the claimant on a small, medium or large claim. All those claims will have an impact on the ultimate cost of insurance.

Bill Butler: So you would say that there is really no substance to that perception.

Alistair Sim: Versus anecdotal evidence—

Bill Butler: In terms of everyday, factual experience. Does one of the RSA representatives wish to comment?

Trevor Goddard: Absolutely. I would back up precisely what Alistair Sim said. Every day, my department sees solicitors' letters that intimate claims on behalf of their clients against other solicitors. One very good aspect of our approach is that the two specialist claims investigators on my team visit solicitors and negotiate settlements directly with them.

Bill Butler: So there is no factual basis for these assertions, even at the margins.

Peter Turrell: We can comment only on what we have seen. Issues of representation are matters for the Law Society of Scotland as the professional body.

Mr Swinney: Mr Sim, I wonder whether you can expand on your earlier comment that the claimant's absolute duty is to prove the claim. Will you say a little more about what you mean by that? To whom should the claimant provide such proof? How do you or RSA scrutinise the claim?

Alistair Sim: We do not scrutinise anything, because we do not handle or pay out on claims. We are not insurers; we are brokers to the master policy. As a result, we make no judgment of the claim as presented. It is submitted to us as required under the terms of the master policy by the insured practice, not by the claimant or the claimant's agent; after all, the claimant has no direct claim on the master policy in the way that they might have with a compensation arrangement. Because the solicitor's policy is affected, the practice invokes the protection of its insurance cover. The insured solicitor intimates the claim to us as the broker, and we pass it on to the insurers for handling.

Mr Swinney: How do you resolve debates about a claim's validity? I imagine that that is a question for RSA.

Trevor Goddard: When Alistair Sim's team notifies us of a claim, we make an initial assessment of the evidence that has been presented. In the majority of cases, we will have to investigate the claim and get to the bottom of the dispute by contacting not only the insured practice to get its file on the matter and seek its views on the allegations but the claimant—or, very often, the claimant's representative. Only then can we really assess the claim. Of course, because it is a civil liability policy, we make an assessment of legal liability on behalf of the insured practice. For example, in a case of negligence, we have to assess and apprise ourselves of the common law of negligence as it stands. After all, it is a moving picture; new legislation is passed or existing legislation is amended. Our judgment is based on those assessments.

If we judge that the insured practice has definitely breached a duty and that loss has resulted, we will seek to settle the claim. However, if we do not think that the claim passes that test, we will, on behalf of the insured practice, repudiate it or say, "We cannot see that the claim has been proved. Is there anything else that we should know about?"

Mr Swinney: So you are the final arbiters on the validity of a claim.

Trevor Goddard: No, the court is the final arbiter. We assess claims. Unlike the proposed commission, which will make determinations, we do not decide whether an award should be made. If we think that there is legal liability, we will seek to negotiate a settlement. However, if the claimant, through their representative, does not like what we have said, either because we have repudiated the claim or because we feel that the claim is not as valid as they have made out—perhaps in relation to quantum—he or she has to decide whether to take the matter to court.

There is perhaps a misconception about the number of claims that go to court. Earlier, someone said that it seems to be the only available option. However, less than 1 per cent of the master policy claims that we deal with go to proof. The great majority are either settled, because we accept that there is legal liability—or a substantial risk that it will be found—or repudiated, in which case the claimant has the option to go to litigation. Litigation accounts for only a small percentage of the claims that we look at—something less than 10 per cent.

Mr Swinney: In several of your answers, you spoke about the position of the claimant as the insured party. Where are the clients in all this?

Trevor Goddard: Our client is the insured practice.

Mr Swinney: Where does the client of the potentially offending solicitor come into your considerations?

Trevor Goddard: That person is the claimant; they have a claim against the insured practice. They have asked their solicitor to do something

that has not been done, and they are dissatisfied with the outcome. Hence, they are the third party whom we deal with in relation to the policy of indemnity.

Mr Swinney: So you have potentially competing and conflicting claims between an individual, who is the client of a firm of solicitors, and the firm of solicitors, which is insured by you.

Trevor Goddard: I do not see that as a conflict.

Mr Swinney: The point that I am making is that you administer an insurance policy on behalf of a firm of solicitors, which is your insured party, against which a third party, who is a member of the public, seeks to make a claim. You said before that it is in the interests of the insurers to settle cases quickly because that keeps premiums down for firms of solicitors. Meanwhile, members of the public are involved in those claims. I suggest that there might be a couple of conflicts of interest in such situations.

Alistair Sim: I think there has been a fundamental misunderstanding of what the master policy does—it does not affect anyone's rights or any remedies. A claimant's claim is against the firm of solicitors; it is not against the master policy directly.

Mr Swinney: The point I am driving at is that RSA is the lead insurer for a policy that protects a wide range of solicitors' firms throughout the country; Marsh is the broker for that policy. From the answers that you have given so far, I have taken it that you aim to protect the interests of those whom you insure. I used to work for an insurance company so I know that that is a natural thing to do.

Alistair Sim: That is what the master policy does.

Mr Swinney: It is a legitimate thing for an insurance company to do. Meanwhile, members of the public are involved in the claims. I suggest that you might have a conflict of interest between resolving the concerns and issues that affect members of the public who are involved in the claims and trying to protect those who pay you premiums.

Peter Turrell: I do not believe that that is a conflict of interest. When we agree that a valid claim has been made and liability is established, we seek to settle that claim as quickly and fairly as possible.

Mr Swinney: The key point is that you must agree whether a claim is valid. That is where I think you might have a conflict of interest.

Peter Turrell: I do not believe that we have.

Maureen Macmillan: My question goes back to what you said about there not being any undue delay in administering the policy following a claim. We heard from the Scottish Consumer Council that there were far more complaints about the way in which insurance claims were dealt with in legal cases than in any other professional indemnity cases involving architects, accountants or whatever. Do you know of any such claims against other professions? Is that a valid point from the SCC?

Peter Turrell: In addition to solicitors, we insure other professions in the professional indemnity market. Perhaps Trevor Goddard will comment on those claims. I understand that claims against those other professions are treated in exactly the same way as claims against solicitors.

Trevor Goddard: I see no evidence of a disproportionate number of complaints that arise in relation to insurance for solicitors as opposed to insurance for any other professionals.

Maureen Macmillan: What about complaints in connection with how swiftly such claims are dealt with?

Trevor Goddard: The same would apply.

Colin Fox: The bill gives the proposed commission the right to monitor the master policy and the guarantee fund. What monitoring functions will the bill pass to the commission? Who monitors the governance, regulation and effectiveness of the policy and the fund at the moment? Does Marsh do that?

15:30

Alistair Sim: The answer depends on what you mean by monitoring. One aspect of the bill that we do not quite understand is the definition of effectiveness. The master policy is a commercial insurance policy whose ultimate aim is to cover valid insured claims against solicitors. When judging by that measure, I cannot think of a valid claim in all the time that the master policy has run to which the master policy has not responded in the way that I described and met the claim.

I am a bit confused about what monitoring effectiveness is intended to mean in the bill. If monitoring effectiveness is meant to ensure that the master policy does what it says on the tin, that is ultimately a matter for the Law Society, through us as its professional adviser. The society decides what the master policy requires to do and it is for us as broker to ensure that we secure cover from insurers in the market that achieves that end.

Colin Fox: You are saying that the Law Society ensures that the master policy does what it says on the tin, to coin a phrase. The Law Society monitors the master policy's functions and the guarantee fund to ensure that they do what they are expected to do—that funds are available to

provide sufficient coverage and that claims will be upheld, should that be necessary.

Alistair Sim: The scope and adequacy of cover are considerations for the society, which instructs us.

Colin Fox: Is that the case for not only the master policy but the guarantee fund?

Alistair Sim: I am not commenting particularly on the guarantee fund, but that is the case for the master policy.

Colin Fox: I will turn around a comment that you made. I take your point that the bill is unclear to you, but what functions would you like, or expect, the bill to give the commission in monitoring the policy? What relationship would Marsh and the lead insurer have with the commission in that context?

Alistair Sim: I think that I am right in saying that monitoring turnaround times has been mentioned. That idea is a bit confusing, for the reasons that you have heard from all three of us. I see how it applies to an ombudsman arrangement with target response times and how it might apply to the court system, but I do not really see how it applies to a commercial insurance arrangement that indemnifies solicitors and deals with negotiation over a claim, which is a two-sided process. I am not sure how monitoring would work in that situation.

Colin Fox: You are looking for clarification of what the monitoring functions in the bill will entail, so that you have an idea of your role further down the line.

Alistair Sim: Yes.

Peter Turrell: We have sought to make all our comments from the insurance angle, for the obvious reason that our company is an insurer. The two points on which we would like further clarification are the proposed oversight role and the interpretation of negligence, to which we may return, which goes to the core of the insurance policy. The Scottish Executive has given evidence on how negligence might be interpreted and it is important to us to have clarity about that.

We are not aware of oversight of other individual policies or commercial and legal contracts between commercial insurers and businesses or private partnerships, which law firms are. We do not understand what oversight involves and we do not see the reason for it, hence the need for clarity.

We and our co-insurers are regulated by the Financial Services Authority at a corporate level. Given that there is so much uncertainty about the measure and that it does not fit with any of the other insurance contracts that we have, we are not in favour of it. It might mean that we have to disclose confidential or commercially sensitive information. We just do not know. I do not see the reason for the oversight, which, as far as we are aware, is not applicable to any other kind of insurance policy.

The Convener: It is quite possible that we will raise that issue with the minister.

Colin Fox: Notwithstanding what you have said, Mr Turrell, you have no objections in principle to the commission overseeing the policy, as long as clarity is provided on the role that it would play. Your position is not that you would rather that it kept its distance altogether.

Peter Turrell: We are not in favour of the measure, for the reasons that I have set out. We are an insurer; we do not set, and do not intend to advise you on, the legal or regulatory framework. The setting of the regulatory framework is up to the Parliament. As a commercial insurer, we will have to make decisions when we know what the framework is. We will have to consider whether it makes commercial sense for us to underwrite the master policy.

The Convener: In other words, you will respond to market forces when it comes to interpreting the challenges that you will face. You will consider the framework that is in place.

Peter Turrell: Yes. We do not pretend that we can set the framework. We lack information on what will be involved. There is no precedent for the measure, and I am not in favour of it.

Jeremy Purvis: Before I turn to the remit of the commission, I will ask a quick question on the premiums that are currently paid. There has been a big growth in the number of complaints to the Law Society, which has been put down to the misselling of endowments. Were you involved in processing those claims? Has there been a knock-on impact on the premiums that all solicitors pay?

Peter Turrell: I will explain the underwriting process and how we set premiums and assess risk. As an insurer, our two main functions—and areas of expertise—are, first, assessing risk and setting price and, secondly, handling claims. The main way in which we assess future risk is to consider the average number and size of past claims by all solicitors. On the basis of that, we predict the terms that we will be able to set.

Jeremy Purvis: Do you consider the experience throughout the profession, or on a firm-by-firm basis?

Peter Turrell: At the stage to which I am referring, we consider the experience throughout the profession. I can explain how we then set the premium for individual solicitor practices.

One of our concerns is the interpretation of negligence, and it would assist us if the committee could obtain clarity from the Executive on that. In assessing risk, we use our experience in the past 10 years or so, in which there has been a reasonably stable legal environment, although there has been some change. We use the common-law test of negligence, which is decided ultimately by the courts and which has been established for many years, but it is not clear whether the bill will change that interpretation. In that context, the Executive has used the phrase "fair and reasonable". If the common-law position on negligence were changed, it would become much more difficult to use past experience to assess future risk, and past experience might be no guide at all to the claims that we will get in the future. That is why we are asking for more clarity.

It is difficult for us to say what the impact on premiums will be or what the self-insured amount will be in future when we do not have clarity about what the bill proposes on the interpretation of negligence and how the commission will establish the value of claims. Will a test of "fair and reasonable" establish a different legal environment from the one that we work in, which is set by common law and the courts?

Jeremy Purvis: So there is the issue of the definition of negligence, but there is also the prospect of a non-court route. I was interested in your statement—if I heard you right—that 1 per cent of current negligence claims go through the court route. You probably heard from the previous panel and others that the complaints commission process could, in effect, widen the route for negligence claims. The commission will be a non-court route and it might be easier for individuals to see the process through to the end. You would regard that as creating greater risk because there could be more claims on the insurance policy. The complaints commission will provide a much wider and more open system for the consumer.

Peter Turrell: Our concern is about how the commission will interpret negligence. Will it be the same as our current interpretation of it, which is ultimately set by common law? We do not feel that the bill or the evidence that has been given so far makes it clear whether the interpretation will be different. If it is, the claims pattern will change. There could be fewer claims, but I accept that it is more likely that there will be more claims. If that were the case, it would make it difficult for us to assess future risk. Our starting position would be to continue, if possible, our involvement in the master policy.

Jeremy Purvis: I presume that you would prefer the risk of claims on professional indemnity insurance to be reduced. If the commission had a role in improving standards across the profession, that would be good because it would mean that there would be fewer complaints. However, that would have to be balanced against the potential for there to be more calls on the insurance because the system would be more open. Which of those possibilities would be a better business opportunity? Which would be more profitable?

Peter Turrell: That is an impossible question to answer.

Jeremy Purvis: Would you prefer a system in which there were lower premiums and fewer complaints, or one in which the chances are that there would be more complaints and more calls on insurance, which would mean that you would be able to have higher premiums? You must know what would provide a better margin for your business.

Peter Turrell: All of that applies not only to the master policy but to all insurance. Our concern is to get as much clarity as we can so that we can get the price and the terms right and make the right decisions for our business.

Mr Maxwell: On the same line of questioning, you said that you base your pricing policy on your experience and the current understanding of negligence in the profession. I understand that it will be difficult to predict risk if things change, but could you use your experience of other jurisdictions or professions? In your earlier answers to Maureen Macmillan's questions, you said that you insured other professions, not just lawyers and solicitors. Is there evidence from a system akin to the one proposed in the bill that is used by other professions, such as accountants or architects, which I think is the example that you gave, that the number of claims went up, so the premium had to go up?

Peter Turrell: The risks are so different between professions that it would be exceedingly difficult to provide information based on that.

The Financial Ombudsman Service has been mentioned. That is the system on which I believe the Scottish Executive might have based the proposals to some extent. Royal & Sun Alliance is a very small player. We do not generally insure financial advisers or independent financial advisers, so we have had little exposure in that area. We are not a big professional indemnity underwriter of financial advisers, so it is difficult for us to draw any evidence from the system that has operated in that sector.

Mr Maxwell: Are you aware from other insurers that are big players in the IFA world of what happened when the system was established?

15:45

Peter Turrell: We do not talk to other insurers about such competitive matters, because of

competition law. That would not be good practice. Perhaps the representative from Marsh could comment on the matter, as it is a broker. The general feel from the market is that about four or five years ago it became difficult for some financial advisers to get insurance cover, mainly because of some of the claims experiences. Certainly, my understanding from market comment was that the number of insurance players in the sector reduced. Therefore, one would assume that premiums went up.

Alistair Sim: We are conscious that, on several occasions, the Scottish Executive officials who gave evidence to the committee talked about how they had modelled the scheme on the Financial Ombudsman Service, which they found to be an attractive model. However, we wonder how good a fit it is for negligence claims against solicitors.

There are distinctions between the types of dispute that go to the Financial Ombudsman Service, which affect how it is able to deal with claims, and the types of claims that are made against solicitors. I am thinking about the diversity of claims and the range of allegations that are made against solicitors. Often, there is no dispute about the facts in a claim against a financial adviser or a financial institution.

I am not sure whether that is why we have so many questions—I will not say concerns—about the bill. There are so many uncertainties. Such a system perhaps makes sense in the context of claims against financial advisers and financial institutions about the misselling of financial products in that very regulated sector, but it perhaps does not fit so well with the diversity of allegations that might give rise to claims against solicitors. That will cause a concern for insurers in general.

The Convener: I wonder whether we can come back to the remit of the commission, which is the matter on which Mr Purvis started his questions. Does Mr Purvis have another question?

Jeremy Purvis: No.

The Convener: You are quite happy to leave it at that. I am sorry, but there are some time constraints this afternoon.

Stewart Maxwell will ask about compensation awards.

Mr Maxwell: You will be aware that the bill proposes a change to compensation, from £5,000 up to £20,000. The definition of inadequate professional service includes negligence. The bill team told us that that reflected a policy decision to offer an alternative to the courts for people who want to secure compensation for small negligence claims. Do you become involved in instructing representation and settling claims within that limit through the courts?

Peter Turrell: I am sorry; I did not understand your question.

Mr Maxwell: Do you instruct representation for settling compensation claims within that limit? Are you involved in that at all?

Trevor Goddard: There will be a small number of cases. The economics of defending a claim of that order mean that we would have to be absolutely certain of our ground to allow the claim to go to the doors of the court. Earlier, I mentioned that around 1 per cent of master policy claims end up going to proof. If I were to hazard a guess, I would say that only a small percentage are within the range that you are referring to.

Most of the cases that go to court are complex commercial claims and are outwith the expected remit of the commission. A commercial organisation might bring a claim worth many hundreds of thousands of pounds against a large firm of solicitors, for example.

Mr Maxwell: You say that the amount would be small. Do the claims that go to court tend to be those involving complaints by third parties rather than those in which a client has a complaint against their lawyer?

Trevor Goddard: Almost invariably, we will be looking at claims that have been brought by the erstwhile client of the solicitor.

Mr Maxwell: So you have no experience of third parties making claims against solicitors.

Peter Turrell: There will be very few such cases. I cannot think of an example in which a solicitor-client relationship has not been the basis for the claim.

Mr Maxwell: Will the increase in compensation levels make it more likely that you will instruct representation through the courts? At the moment, the level is £5,000, so I can understand why someone might not go to the bother of getting representation. However, that might change if the level rises to £20,000.

Peter Turrell: I do not necessarily think so. Our concerns are more to do with the practical side. What will happen in cases in which the alleged financial loss is £30,000? Will the commission handle the case until the sum involved rises above £20,000, after which the case will go to court? Alternatively, will the commission not handle the case at all, because the claim might be £30,000? That brings us to some of the questions that we have asked for the sake of clarity about issues such as how the courts will interact with the commission on the commission's decisions, particularly if the interpretation of negligence or the way of valuing claims changes—as we have explained, that is uncertain. In dealing with a £30,000 claim, how would the court relate to the

commission's decision, if that was made on a different basis? Those are the sorts of practical issue that we wanted to raise in the interests of clarity.

Mr Maxwell: At the moment, you do not know what that relationship would be.

Peter Turrell: That is right. Because of the uncertainty about the interpretation of negligence, we do not know what that relationship will be.

Alistair Sim: If the FOS scheme is the model, it seems likely that it is intended that a different test will be applied to a claim. Although the matter is referred to as negligence, and negligence has a meaning in the law of Scotland as we know it, it seems that not only a new redress process but a new remedy is being created. There is a bit of uncertainty about what "fair and reasonable" will mean. The question of the circumstances and the extent to which the commission will find in favour of a claimant is uncertain at the moment, particularly if the scheme is to be based on the FOS model.

Mr Maxwell: You seem unsure about the basis of the whole bill. If the scheme should not be based on the FOS scheme, what should it be based on?

Alistair Sim: From an insurer's point of view, I am conscious of the evidence that Professor Paterson gave the other day about how much the process gets changed until we end up back with a court applying a negligence test, as we know it; causation, arguments and considerations, as we know them; and a quantification view, as we know it, as opposed to this unknown that may or may not be similar to the Financial Ombudsman Service scheme. That is causing concerns. You have heard from insurers, but they are but one current insurer of the master policy.

Mr Maxwell: Is your concern the lack of clarity—the fact that you just do not know—or a deeper concern about a change that is going on that may lead to a greater number of claims against insurance companies?

Alistair Sim: There definitely seems to be the potential for a triple whammy. There may be more claims because there is no cost downside to a claimant, as the Executive acknowledged when it spoke about providing greater access to justice. More claims—meritorious or otherwise—are expected. There is also the potential for a lower test or hurdle to be applied under the FOS model, and a different approach might be taken to causation and quantification, for instance. All of that could be adverse to the profession and, therefore, to insurers relative to the status quo.

Peter Turrell: I agree with that. Our concern is primarily about the clarity of how negligence is to be interpreted and whether the claims will be valued in the same way when their values are set. That leads on to more practical questions about how there will be consistency in the commission's decisions and what will happen in a multiparty dispute, action or claim in which the solicitor might be alleged to be negligent alongside an architect and an engineer. How will that work if the commission's ambit does not reach to the engineer and the architect? What would happen with a £30,000 claim? What will be the interaction with the courts? Will representation be allowed? What about the external appeal? Those are the questions that we are trying to set out for clarity.

Will the awards be separated into different categories of inconvenience, distress and negligence? That would be exceedingly helpful to insurers. There is also the practical side of how we, as lead insurers of the master policy, will interact with the commission. Everybody agrees that it is best to resolve disputes as quickly as possible and to settle claims without referral to the commission. Therefore, the issue is how we interact before a claim goes to the commission and then, subsequently, if a claim under negligence goes to the commission.

That is our list of concerns, and it would be helpful if we could get greater clarity on those issues from the committee asking the Executive about them at the next stage of the bill.

Jeremy Purvis: I would like to clarify one point. Will it still be possible to go to court to test proof, regardless of the standard of negligence that the commission sets? I would be grateful if you could confirm that the ability to go to court will not be removed.

I am also interested in the table in Mr Sim's written evidence on self-insurance and where the master policy comes in. How many current claims would come under self-insurance and how many would come under the master policy? In a six-partner practice, the typical excess is currently £18,000. I would be interested to hear a breakdown of the proportion of claims that are covered by self-insurance and the proportion that are covered by the master policy.

Alistair Sim: I am afraid that we do not know.

The Convener: Can you drop us a note on that?

Alistair Sim: I can tell the committee right now that we do not know. If the insurance is not engaged, we are simply unaware of such cases.

16:00

Jeremy Purvis: Who would know?

Alistair Sim: Each individual practice. If the level of excess were lower and they had engaged

the master policy, we would know. However, if the claim was below the excess, the practice may or may not have intimated the claim to the master policy through ourselves.

Jeremy Purvis: I presume that the Law Society would know.

Alistair Sim: No. It would certainly not be aware of that.

Jeremy Purvis: So, where—

The Convener: Mr Purvis, their reply is that they do not know. It is up to the committee to ask around to find out whether we can get the information that you seek.

Jeremy Purvis: I was attempting to ask why, convener, but I accept—

The Convener: Thank you. I call Maureen Macmillan.

Maureen Macmillan: There has already been a lot of discussion about the £20,000 compensation. One of the problems is that people read section 8 in different ways. Some solicitors think that it means that there is no-fault compensation up to £20,000; others think that there is only compensation for proven loss up to £20,000; others still—including the witnesses—think that it means that there is a limit of £20,000 for negligence only. Why do you read section 8 in that way?

Peter Turrell: That is an area in which we seek clarity—we do not know. We are not lawyers or the drafters of the bill; we can only react to what we see. I agree that it seems unclear. If possible, we would like clarity, to enable us to decide how to consider terms under the master policy.

Maureen Macmillan: You have flagged up your concerns about the commission deciding negligence claims, whether in establishing negligence or in establishing quantum. If a solicitor who knew that there was going to be a claim of negligence got to you first and had the case sorted out—say, by your paying the client £10,000—I presume that the client would still be able to complain to the commission, which might come to a different conclusion and decide that £15,000 should be paid. In those circumstances, who would pay the difference? I presume that you would think that you had covered the solicitor insurance-wise and that the extra demand from the commission would have to be borne by the solicitor himself.

Trevor Goddard: That is an area in which clarity would be appreciated. At the moment, when we settle claims, we seek to agree a full and final settlement with the claimant to prevent the chance of a claim resurfacing in some other way. However, we cannot say how the new mechanism might work, as we simply do not understand how it will work in practice.

Maureen Macmillan: Apart from the Financial Ombudsman Service, are you aware of any tribunals or commissions that deal with negligence by a professional body? We usually think of that being dealt with by the courts.

Peter Turrell: Regarding solicitors in England and Wales, there have been various discussions following the Clementi review and the publication of the white paper. It seems to us that England and Wales are slightly behind Scotland in progressing changes in the area of complaints. We insure some solicitors in England and Wales—we have a small element of the market—but we do not know what is going to happen there. At the moment, there is a complaints set-up that we know will change, but it seems to be a bit behind Scotland and we do not know where we are with that yet.

Maureen Macmillan: So, it is only in legal services that these proposals are being made, either in Scotland or in England. You cannot think of any other professional body that would deal with the matter.

Alistair Sim: An ombudsman arrangement for members of the Royal Institution of Chartered Surveyors may be at an embryonic stage. That appears to have jurisdiction over negligence up to £25,000.

Maureen Macmillan: So movements in that direction are being made in sectors other than legal services.

Alistair Sim *indicated agreement*.

Peter Turrell: If we insure in those sectors, the issues are still having clarity about the interpretation of negligence and so on. We come back to the same point.

Maureen Macmillan: I will move slightly sideways. The former Scottish legal services ombudsman proposed that compensation for distress from IPS and for negligence should be separated. She suggested a limit of about £1,000 for IPS, which would make a clear distinction between negligence and IPS. Do you agree with that?

Alistair Sim: That is a good idea.

Peter Turrell: We have said that we want clarification on the breakdown of each award—what elements are for negligence and for distress from IPS. That information would be exceedingly helpful and more useful than simply a total award of £20,000.

Trevor Goddard: I can give a practical example. If the commission determined that £20,000 should be awarded, the claim might be

well in excess of that amount and might end up having to be determined in the courts. If no clarity were given about the breakdown of the award, it would be difficult for us as an insurer and ultimately for the court to say to what degree we should offset, if at all, what has been awarded through the commission. That is another practical reason why we would like to see the breakdown.

Mr Swinney: Paragraph 5.5.2 of Mr Sim's submission says that one of Marsh's primary roles is to

"Monitor the performance of insurers."

What performance measures or indicators do you use for that?

Alistair Sim: Complaints are one measure. We expect to investigate complaints and follow them through with insurers, panel solicitors and co-insurers. We conduct a satisfaction survey of insured practices and—unusually—of claimants' agents. The aim of that is to find out whether the claims-handling philosophy—the statement of fair dealing to which the master policy insurers must sign up—is being complied with. We conduct what is in effect an audit of compliance by looking at files randomly at the insurers' premises, to ensure compliance with the claims-handling philosophy. We check matters such as the service and the level of reporting to the insured solicitor. We check the setting of reserves on outstanding claims, which is key to the master policy's commercial aspects, to ensure that reserves are not overstated, which would inflate future premiums. We also ensure that other auditing takes place—that co-insurers audit the lead insurer's claims handling.

Mr Swinney: Do you ever dispense with an insurance company's services?

Alistair Sim: We would.

Mr Swinney: Have you ever done so?

Alistair Sim: Not for a reason that relates to the measures that I described.

Mr Swinney: My next question is for all three witnesses. What obligation do you consider you have to protect the interests of the consumers of legal services?

Alistair Sim: The master policy has a public protection aspect. First and foremost, the master policy indemnifies solicitors, but it has all sorts of special features—I would go so far as to say that they are unique—that are there for the sole reason of protecting the public.

Mr Swinney: What are they?

Alistair Sim: One feature is the guarantee of run-off cover, which is cover that continues beyond the cessation of a practice, whether it just closed down or whether a practitioner died or became insolvent. Unusually, the master policy guarantees continuing master policy cover for claims that arise after a practice has ceased to operate and to be able to pay premiums.

Trevor Goddard: My answer from a claims-handling perspective is encapsulated in the claims-handling philosophy, of which the committee has a copy. We seek to treat the rights of those who are insured and of claimants fairly and reasonably.

The Convener: Thank you for your attendance and for being so open with us. I ask you to send us what you have said you will send as quickly as possible.

16:10

Meeting suspended.

16:16

On resuming—

The Convener: I welcome our next panel of witnesses, who are William Alexander, Stewart Mackenzie and Neil McKechnie. I must stress at the outset that the committee is not a review body for individual cases; its role is to consider evidence only in relation to the Scottish Executive's Legal Profession and Legal Aid (Scotland) Bill. As a result, our questions for this panel and the next will focus on that matter, and I ask the witnesses to be as concise as possible.

I thank the panel for its forbearance. As you will appreciate, the committee was very interested in the areas that the previous witnesses covered. However, we look forward to hearing your evidence.

The bill proposes that the new commission will deal with service complaints, while the professional bodies will retain responsibility for dealing with conduct complaints. Will the consumer understand the distinction between the two types of complaint?

Bill Alexander: Probably not. To be honest, I am interested mainly in sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, and in more access to justice and in bodies competing with solicitors. I have not looked in any great detail at the part of the bill to which you refer, but I will try briefly to answer your question.

Most people do not understand the difference between service complaints and conduct complaints. They confuse issues of negligence with issues of service and vice versa. Stringent measures will need to be taken to highlight the difference and, perhaps, to provide guidance that

will allow consumers to understand what they are complaining about.

The Convener: Is there a responsibility on the Executive to mount a proper public education campaign that clarifies the subject and deals with it in everyday language?

Bill Alexander: Yes. I mentioned negligence earlier. In Scots law, the test for negligence was established many years ago in the case of Hunter v Hanley. However, I am concerned that the Executive is attempting to introduce a new standard of negligence. That would be foolish and would simply leave the Executive open to challenge in the courts. Instead, we should try to make the legal system and complaints procedure in Scotland as clear and concise as possible for the people who are using them.

The Convener: Do the other witnesses think that consumers will understand the distinction between service complaints and conduct complaints?

Stewart Mackenzie: Yes. There should be no problem with that. The distinction does not require a lot of explanation; it is quite simple.

Neil McKechnie: It depends on the circumstances of the case. Many cases that start off as service complaints can migrate into more serious matters. A complaint might be considered to be a service complaint by one pursuer, but not by another.

The Convener: You have expressed a range of opinions, which is perfectly fair, because you are here as three individuals. Mr Mackenzie, do you agree with Mr Alexander that there should be a good definition of conduct and service complaints, so that the public, who are perhaps not skilled in such matters, have a clear understanding of the distinction?

Stewart Mackenzie: Yes, but I do not think that the Executive would require to provide a terribly complicated explanation, because the distinction is simple to explain.

Bill Butler: Good afternoon, gentlemen. The legal professional bodies say that they need to retain control of conduct complaints to know what is going on in the profession and to enforce professional standards among their members. Are you happy with the professional bodies continuing to have responsibility for conduct complaints?

Bill Alexander: I have not given that much thought. I understood that I would be giving evidence based on my submission, which did not cover those aspects of the bill. I can try to answer if you like.

Bill Butler: Yes. Your view would be helpful.

Bill Alexander: It is important for any professional organisation to be involved with what its members are doing. All professional organisations, such as those for surveyors, architects and medical practitioners, have that role. The problem with the legal profession is that it has had so much control for so long over what has happened that the public feel alienated by the process. That is why there is so much concern from people—albeit a small group—who are upset at what they perceive to be the abuse of a process. Does that help?

Bill Butler: Yes. That was a clear statement of your general view on the matter, for which I am grateful.

Stewart Mackenzie: I am totally opposed to the Law Society retaining control over conduct complaints. There is a basic, inherent conflict of interest in the society handling complaints of any description. It would be impossible for the society to be independent, which it requires to be when dealing with complaints. The chairman of the Scottish Solicitors Discipline Tribunal said it all last week when he used the phrase, “my brethren”.

Bill Butler: That phrase can mean many things to many people, but I take your point.

Neil McKechnie: I agree with Mr Mackenzie on the question of the Law Society’s independence in misconduct complaints. In my experience—most people would accept this—the society is wholly incompetent to carry out that role, which it has shown in its actions with respect to me.

Bill Butler: Those answers were clear. Mr Mackenzie and Mr McKechnie are coming at the issue from one angle and Mr Alexander is coming at it from a slightly different angle. I am grateful for your answers.

Colin Fox: Good afternoon, gentlemen. You will have heard today and previously that we are concerned to ensure that the Scottish legal complaints commission enjoys the confidence of the public and is seen to be independent and transparent. The proposal in the bill is for a nine-member commission with a majority of non-lawyers—five—and four lawyers. The chair would always be a non-lawyer. Are you satisfied that that composition would guarantee the commission’s impartiality? Is the ratio appropriate? Does it strike the right balance or would you prefer an alternative?

Neil McKechnie: On the face of it, as long as there is a lay majority that is acceptable to me. The only proviso that I would add—in case the issue has been overlooked—is that the lay members should not have been solicitors in the past.

Stewart Mackenzie: The proposed composition of the commission does not give me great concern, although I would prefer to see a higher

number of laypeople. If the proposals in the bill represent the eventual composition of the commission, I would be satisfied enough with that.

Bill Alexander: The composition of the commission is okay. My only concern relates to the situation that would arise when the commission was assessing, for example, a negligence complaint. We have heard that such cases are complicated. How would the matter be determined if the four members of the legal profession said, "Ah, but such and such a case means X, Y and Z"? It would be difficult for a layperson, without a legal background, to say that they were wrong. I am curious about how a reasonably balanced discussion could take place on the merits of a particular complaint. Other than that, I think that the composition of the commission is okay.

Colin Fox: It has been suggested that there must be sufficient lawyers on the commission to give legal advice and opinion and to steer members through the complaint. By and large, you are quite happy with the proposal.

Bill Alexander: Yes.

The Convener: I think that you are suggesting that although you do not want the laypeople to have been involved in practising law, you feel that, if there is a point of discussion within the commission, they may need some independent expertise from a lawyer who is not on the commission. Have I taken that as a stronger comment than you intended to make?

Bill Alexander: No. That would be my view. If the commission is considering a negligence complaint, it is important that someone explains to the laypeople what the standards of negligence are and what negligence means in law. It always comes back to a legal process. That is my only concern.

The Convener: Does anyone have anything to add?

Neil McKechnie: I would have thought that the people who are chosen to be on the commission should be competent and trustworthy enough to be able to give their opinion honestly without having to take outside advice.

The Convener: Would you perhaps be thinking of people who have had experience on a commission or tribunal?

Neil McKechnie: Yes, ideally as a layperson. That would be of benefit to the commission.

The Convener: Thank you for providing us with clarity.

Mr Maxwell: Some members of the legal profession have expressed the view that the bill's proposed maximum level of compensation—of £20,000 for service complaints—is too high and will threaten the financial viability of some types of work or work in some areas. A number of people have mentioned rural areas, for example. Do you have any comment to make on that from the point of view of the consumer? Is £20,000 too high, too low or about right? Do you have any views on the compensation level in general and the impact that it may have on the kind of work that lawyers might be willing to undertake?

Neil McKechnie: I am not certain that there would be a particularly bad impact on rural solicitors. I suggested in my submission that the level should be set at about £30,000.

Mr Maxwell: Why did you suggest that figure?

Neil McKechnie: The negotiated settlement between two parties in employment tribunal cases can be up to £30,000. That is why I suggested that figure to represent the complaint being supported.

Mr Maxwell: You have no fear that lawyers who work in certain areas, or who do certain types of work for which the level of return is marginal, would withdraw from that work if they feared the effect of complaints.

Neil McKechnie: I am not convinced by the argument that it would be detrimental to them.

16:30

Stewart Mackenzie: I would be quite happy with the fine being set at £20,000. I would have liked the level to be set a bit higher—perhaps at £50,000—as I think that one of the greatest deterrents to poor service would be the threat of a substantial fine. I see no reason why the profession should not be insured against that risk, because that would mean that the firm would not be at risk of going out of business.

However, setting the fine at £20,000 will sort out a lot of problems and encourage the profession to get its act together to the extent that the commission might find, four or five years from now, that it does not have a lot of work to do.

Mr Maxwell: You think that it will be a positive incentive that will drive down the number of complaints.

Stewart Mackenzie: Yes. The new commission will result in there being a lot fewer complaints than there are at the moment, simply because of the threat of that substantial fine. However, on the issue of firms being driven out of business, I see no reason why each solicitor could not insure themselves against such a risk.

Mr Maxwell: The insurance companies and the solicitors have said that the problem is that the excess level will rise. If there is a higher level of compensation, premiums will rise, as will the

amount that the firm has to pay itself before the insurance kicks in.

Stewart Mackenzie: However, that would be the case only if the cover was kept on the master policy. Why cannot a separate policy be set up to cover each solicitor for the risk of a fine of up to £20,000? It need not be connected to the self-insured amount, which is connected to the master policy.

Bill Alexander: I think that a fine of £20,000 is fine. My only concern is that solicitors will simply put up their prices to cover any cost.

Mr Maxwell: They may well do that.

Colin Fox: We are gathering evidence on the issue of how the commission should be paid for. The bill proposes that all lawyers should pay a fee of around £150 a year and that, on top of that, a lawyer who had a complaint levelled against them would have to pay a complaints levy of perhaps £300, which would have to be paid regardless of whether the complaint was upheld. Some people have suggested that that is unfair. What is your view of that? If someone had it in for a lawyer, they could make a series of complaints, for which the lawyer would have to pay—if 10 complaints were made, the lawyer would have to pay £3,000. Do you think that the proposal is a fair and reasonable way of funding the commission?

Bill Alexander: In principle, the proposal in the bill is okay. However, there would have to be a safeguard to protect lawyers against people who make vexatious complaints. The scenario that you outlined could be dealt with using a degree of common sense. The role of the independent commission would be to consider complaints and, in such a situation, to say that the complaints were not justified and find a way of ensuring that the complainer was prevented from making unwarranted accusations. However, I think that a solicitor could simply take out an interim interdict and go through the court process to stop such behaviour.

Stewart Mackenzie: On the basis that the commission would filter out frivolous complaints, a complaint that the commission dealt with would have substance, regardless of whether it was upheld. Therefore, the solicitor would have to end up paying for the complaint.

Neil McKechnie: I agree with Mr Mackenzie. The fact that the complaint had started the process would show that it must have had merit. However, the control mechanisms at the beginning of the process must be able to knock out all vexatious complaints and anyone who attempts to make such a complaint should have to pay.

Colin Fox: As long as there is an early hurdle that knocks out clearly malevolent and badly motivated complaints, you would be quite happy with the proposal regarding the complaints levy.

Stewart Mackenzie: Yes.

Bill Alexander: Yes.

Neil McKechnie: Yes.

Colin Fox: Have you given thought to the suggestion that, instead of everybody paying £150 and certain people paying an additional £300, it might be better to have everyone paying £250?

Bill Alexander: That would take away the incentive for the solicitor who is being complained about to get their act together.

Neil McKechnie: The levies will be paid by an organisation that has had the opportunity for a long time to raise the standards of solicitors but has failed to do that. I do not see how that can be militated against.

Mr Maxwell: Might there be an incentive for the commission to lower the hurdle for the acceptance of complaints because that is, in effect, where its funding will come from? The more complaints it knocks out, the less money it will receive, which means that it could face a funding shortfall. The commission will receive money from the general levy, but it will also receive money based on the number of complaints that it handles.

Bill Alexander: There could be such an incentive. Whether it would be acted on is a question that relates to the professionalism and integrity of the people who are on the commission.

Neil McKechnie: If the commission behaved in such a way, it would soon lose the confidence of the public.

Stewart Mackenzie: I agree.

Maureen Macmillan: Do the master policy and the solicitors guarantee fund provide effective protection for clients at the moment?

Stewart Mackenzie: The committee appears to be confusing the matter of the guarantee fund and the matter of the master policy. The committee put questions to the representatives of Marsh and Royal & Sun Alliance about the guarantee fund. However, only one person operates the guarantee fund, and that is the chief accountant of the Law Society.

What was your question about the master policy?

Maureen Macmillan: Do you think that it provides effective protection for clients from the negligence of solicitors?

Stewart Mackenzie: The former ombudsman has stated that there is an undoubted problem with people's ability to get solicitors to sue other

solicitors. A year ago, she asked the Executive to carry out research in that regard but nothing has been done.

If you think that adequate consumer protection is provided by the ability to make master policy claims that last nine years or 11 years, I would not agree with you. If the committee requires information on the number of years that such a claim takes, I could provide it.

Maureen Macmillan: That would be helpful. Would it help if the commission were to be given a power of oversight in relation to the problems that exist?

Stewart Mackenzie: Absolutely. There is no question about that. That was first identified by the ombudsman just over a year ago. She was of the view that an oversight role on the master policy is crucial. Much about the master policy has been hidden. For example, it has become known only recently that less than 1 per cent of claims actually get to court and that the policy paid out £10 million last year. That is what the Law Society has told the committee. It is my view that the policy has wrecked clients' lives over the past 15 to 20 years.

Maureen Macmillan: Is that because of the delays?

Stewart Mackenzie: No. A Scottish solicitor wrote in *The Herald* in 1997 that the Law Society had set up a policy that protected solicitors at the expense of their clients. He then wrote in a subsequent article that he had been threatened with disciplinary action for speaking out and saying that. The policy protects the profession—it is abysmal consumer protection. Oversight would change a lot of that.

Maureen Macmillan: Thank you. That is helpful. Mr McKechnie, do you have a view on that?

Neil McKechnie: I echo what Mr Mackenzie has said. Because of the way in which the master policy was set up, I do not believe that it was intended to protect the client in any way. I am slightly worried about some of the wording in the bill regarding the commission's role and its association with the Law Society. To my mind, it looks as though the Law Society is being placated too much, and there is doubt about how much of an overseeing position the commission will maintain.

Maureen Macmillan: Can you point us to where that is in the bill?

Neil McKechnie: I do not have the bill in front of me, but the point is mentioned in my written submission.

Maureen Macmillan: That is fine. We can check that over again.

Stewart Mackenzie: What should have been set up to protect the consumers of legal services is a client's insurance policy for the specific piece of legal work that the solicitor was doing. In that way, the client, not the solicitor, would be insured. If the client's piece of business went wrong, the client's insurer would fight the case on the client's behalf.

Maureen Macmillan: Okay. Thank you.

Neil McKechnie: I did not comment on the guarantee fund. Many people would be surprised to learn that the compensation side of the guarantee fund is done on a wing and a prayer. Basically, the Law Society decides whether someone is entitled to compensation.

Mr Swinney: You were in the public gallery when we heard evidence from Marsh and Royal & Sun Alliance. At the end of that evidence, I was left with the impression that there is absolutely no difficulty in members of the public obtaining legal services to pursue actions against solicitors against whom they have a complaint or about whom they are concerned. I was also led to believe that the process by which claims are handled by insurers is swift, evidence-based and sympathetic. Are those impressions borne out by your experience?

Neil McKechnie: That does not ring true with my understanding. It is difficult to know what to say, except that I find it difficult to accept that position.

16:45

Bill Alexander: I have not been involved with complaints against other solicitors other than in a pro bono capacity. Research is needed into the matter, and I was disappointed to learn this morning that the Executive has no intention of carrying out that research. I spoke to Andrew Dickson, the head of the access to justice division, this morning to see what the Executive's view is. The Executive has decided that it could not competently carry out the research because it would be too difficult to get anything other than anecdotal evidence. All that I would say is that anecdotal evidence is usually based on someone's problems, and if they give their opinion honestly it should be worthy of consideration.

Mr Swinney: That is an issue that the former Scottish legal services ombudsman has raised as a point of concern. We are not talking just about anecdotal evidence from individuals; it is an issue on which the ombudsman saw fit to comment.

Bill Alexander: Absolutely. I raised that with Mr Dickson. He said that he had spoken to Debbie Headrick of the legal studies research team and that their concern was that they were not able to get—I had better watch what I say, in case I quote him wrongly—a robust, independent evidence base for the research. To me, it seems a fairly

simple matter of asking people whether they have had problems and, if they have, of asking for the details. I do not understand why the Executive has problems with that. Perhaps the matter can be taken up with the Justice Department.

Stewart Mackenzie: The ombudsman said that it is undoubtedly a problem. Many people up and down the country have tried to get solicitors to sue other solicitors, and many theories have been put forward as to why that does not happen. Most relate to the fact that a solicitor's premium would go up in the following year if he succeeded in pursuing a claim on the master policy for a client. However, I am inclined to think that not wanting to establish case law has a lot to do with the problem of people not succeeding in getting solicitors into court. The figures that are now being put about show that less than 1 per cent of claims get to a proof hearing. I am pretty sure that, if the committee did the research, you would have considerable difficulty in finding cases that have gone to Scottish courts and you would find, therefore, an acute absence of case law. If that were established, it would answer a lot of questions. That is my theory.

The Convener: That is an interesting comment, Mr Mackenzie. Mr Alexander says that he has spoken to officials in the Justice Department. I cannot put words into a conversation to which I was not privy, but I presume that it would be a case not just of looking for individuals who had been unsuccessful in finding a lawyer, but of speaking to lawyers to see whether they had turned down such cases, in order to make the evidence base solid. Was that the gist of your conversation, Mr Alexander?

Bill Alexander: No. Basically, Andrew Dickson said that the Executive was not going to do the research. I asked why, and he said that it would be difficult to do. We then had a debate about it over the phone. I was talking about the position of individuals, but those in the legal profession would have to be given the opportunity to explain their reasons for turning down cases if that was what they had been doing. Sometimes, a solicitor will turn down a case against another solicitor simply because they do not believe that there is any merit in it. They have to give the client independent advice and tell them that they do not have a hope in hell of making the case run. Cases may be turned down for that reason.

Maureen Macmillan: Is there any question of claims not being pursued because of the unavailability of legal aid to fight such cases?

Bill Alexander: That is a big issue. My view is that cost is a real problem. If someone who has been involved in an unsuccessful litigation believes that their solicitor has let them down and wants another solicitor to do something about it, the first thing that the other solicitor will normally say is, "Yes, you have a case. Yes, it is complicated. Can I have some funds, please?" That is the problem. If the person has spent all their money on the fees for the first litigation, they do not have the financial wherewithal to fund another action. They would have to pay, on average, £150 an hour for a solicitor, which most people in Scotland cannot afford.

Jeremy Purvis: I move on to the issue of non-lawyers having the right to speak or make representations in court, which is the meat of Mr Alexander's comments and which Mr Mackenzie is right to comment on, although I know it is not part of his written submission. The Executive has stated its intention to extend to non-lawyers the right to speak in court. If you agree with that, Mr Alexander, to whom should the right be extended? You have suggested that it should be extended to someone's attorney.

Bill Alexander: I suggested that idea as a solution to what I envisage will be a problem. In 2002, a few colleagues and I—all with a legal background—made representations as an association to the Justice Department to commence sections 25 to 29 of the 1990 act. We were told at that juncture that the Executive had no plans to commence that legislation and had none for the foreseeable future. In 2003, I lodged a petition to try to get the legislation commenced. Thereafter, as members will see from my petition, it has been a bit of a nightmare. The Executive has made up reasons that have no evidential basis.

My colleagues and I have come to the view that there is no point in continuing with our proposal. We get the strong impression that civil servants do not want the legislation to be commenced. Even if it were commenced and we put in a submission, we would have to deal with the same civil servants who have argued over the years that the legislation should not be commenced. We have no intention of wasting our time and money putting together a submission for rights of audience and rights to conduct litigation only for it to fail.

Jeremy Purvis: If your proposal is accepted or the implementation goes ahead, would those who are non-lawyers be open to the same complaints procedures as those that the bill will establish for lawyers?

Bill Alexander: Are you talking about the proposals under the bill or the separate proposals that I made?

Jeremy Purvis: Both.

Bill Alexander: My understanding is that, under the bill, non-lawyers will be covered by the same procedures as solicitors. My separate proposals are an interim solution, but I see no reason why

non-lawyers could not be covered by the legal complaints commission.

Jeremy Purvis: Do the other witnesses have any views on that?

Stewart Mackenzie: Had sections 25 to 29 been implemented many years ago, we would not have people saying today, "Oh, I can't get a lawyer to sue another lawyer." People who needed a lawyer to sue another lawyer would have been able to go to people who were allowed to practise in courts without being insured under the master policy or without being members of the Law Society.

Neil McKechnie: As long as the individuals are properly qualified, it is a good idea.

Jeremy Purvis: I suppose "properly qualified" implies having not only appropriate qualifications but the ability to demonstrate competence and professional standards, which in turn implies that there would be adequate regulation of the professional body of which the person was a member.

Neil McKechnie: Correct.

Jeremy Purvis: Does Mr Mackenzie agree with that?

Stewart Mackenzie: Yes.

Bill Alexander: Can I just make a point?

Jeremy Purvis: I did not see a reference to that in your paper, Mr Alexander.

Bill Alexander: No, because I am coming from a different premise. Currently, if someone cannot afford a solicitor and they want to go into court themselves as a party litigant, the courts will try to accommodate that. What I am suggesting is that if someone has some form of legal qualification or can demonstrate to the court that they will be of assistance, then that has got to be an improvement on the current situation. It is wrong that someone has to try to act on their own behalf as party litigant when they may be frightened to death and find it difficult to speak, and may have medical problems.

Jeremy Purvis: If I understand you correctly, what you suggest is more akin to the advocacy route in, for example, mental health with the mental health commissioners.

Bill Alexander: One of the things that interested me in a research report was the fact that in Finland, Denmark and Sweden people are allowed to represent someone in court without being a solicitor. Their courts can accommodate that with no problem. I spoke to the Office of Fair Trading a couple of weeks ago and I was told that that system seems to be successful. The European Commission has asked for the legal services markets in the United Kingdom to be opened up to more competition, so something has to be done.

Colin Fox: I am interested in the reference in Mr Alexander's submission to McKenzie friends. I remember being in London at the time of the poll tax, which we all loved to death. I represented a number of people as a McKenzie friend, so I understand what one is, although it perhaps exists only in English law. The role of a McKenzie friend is fairly limited. Do you have an idea for a more profound form of representation?

Bill Alexander: Yes. In England, if someone is trying to act on their own behalf, for whatever reason, they are entitled to be accompanied in court by someone who can help them with points of procedure and perhaps points of law, but that person cannot speak for the person. In Scots law, such help is not allowed. I am suggesting that, until sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 are clarified and we see whether there are any submissions by any of the interested bodies, we should create a Scottish McKenzie friend—someone who knows the background and can give assistance in court. I suggest that such a person should swear an oath, as sheriff officers and solicitors do in court, and that they may be required to have a degree of professional indemnity, if that is possible. Such people should be allowed to go into court and try to help people if they are interested in doing that.

Colin Fox: With the name McKenzie the role should be suited to Scotland. You suggest that McKenzie friends should have more powers, though. It is not just a question of advising the person who is in court about what answer to give; it is about being able to speak on their behalf.

Bill Alexander: In England, the equivalent to sections 25 to 29 was commenced straight away and there are now legal executives, who are beginning to gain recognition. They have been praised publicly by the Lord Chief Justice and the Lord Chancellor as being of service to people at a low cost. Lord Chief Justice Woolf said that, in England, they can do many of the things that a solicitor can do but at a much reduced cost. What has been done in England seems to be working, but we did not commence those sections of the legislation here.

I do not know whether the committee is aware of this, but a date for commencement was set and was agreed by the Secretary of State for Scotland, Michael Forsyth, and Lord President Hope. The date for commencement was 1 July 1996, but civil servants never bothered to put the regulations in place and, as I understand it, they never bothered to tell the secretary of state that the legislation was not going to be commenced.

Colin Fox: That is interesting. Thank you.

The Convener: Your written submission contains a clear definition of what you mean, with three criteria. You mention the person taking an oath in court. The first criterion is:

"The person has to have a legal qualification or experience in court proceedings or at least demonstrate that they will be of assistance to the Court."

How could that definition be firmed up with accreditation, whatever that happens to be?

Bill Alexander: In Scotland, we have paralegals who do courses in court procedure. They are relatively sensibly priced and they do not undertake four or five years of training—it may be only three or four months' training. Someone with a trade union background who had a really good knowledge of employment law might decide that they wanted to help people in employment disputes that fell outwith employment tribunals. If they undertook a course in sheriff court practice and a course in pleadings, which might only take six months or whatever, they could assist a court in making a decision. They would certainly do better than many of the party litigants who are left with no choice but to try to represent themselves.

The Convener: Your third criterion for the person is:

"Professional Indemnity Insurance for at least twice the value of the case that is being heard."

You reckon that we could get advice from the sheriff clerks on that.

Bill Alexander: No. I say that, to ensure that the person who wanted to perform the role had insurance, they would have to give a copy of the insurance certificate to the sheriff clerk.

The Convener: And the sheriff clerk would make a decision.

Bill Alexander: Yes, before the representative came to court. The problem is that people who try to represent someone in court in Scotland never get into the court. The sheriff clerk just says, "No, you're not appearing." They never get in front of the sheriff; the sheriff clerk stops them.

The Convener: Thank you, gentlemen, for your time this afternoon. You have offered to send the committee some short documents to clarify certain points. We would be grateful if you did that as early as you could. Thank you.

I suspend the meeting for a minute while the next witnesses take their places.

17:00

Meeting suspended.

17:01

On resuming—

The Convener: I welcome James Clark, Joan Pentland-Clark, Mike Lloyd and Duncan Shields. I thank you for your written submissions. You will have heard my remarks about the purpose of this meeting. Our questions will follow the same lines as those that we put to previous witnesses.

Under the bill, the proposed new Scottish legal complaints commission will deal with complaints about service, but the professional bodies will retain responsibility for dealing with complaints about conduct. Will consumers understand the distinction between service and conduct complaints?

James Clark: No. The issue has arisen in the past and it certainly came up in the analysis of the responses to the consultation, which indicated that the matter causes great confusion. The fact that people do not understand why their complaints are treated as being in one category and not another might have been behind a number of complaints to the Scottish legal services ombudsman. The approach in the bill will be a source of further confusion.

The Convener: Can you suggest a solution to the problem?

James Clark: All complaints handling should be done by the commission.

Joan Pentland-Clark: I agree with James Clark. All complaints should be dealt with under the same roof, which should be the independent commission. The Law Society of Scotland is never clear when someone makes a complaint; it plays around with the complainer for quite a long time before deciding what type of complaint it is dealing with. Complaints handling should be taken out of the hands of the Law Society.

The Convener: Do you have recommendations about public understanding of the process?

Joan Pentland-Clark: Most people understand the process when they get involved and the arguments are put to them. Most people are not stupid.

Mike Lloyd: The distinction between IPS and professional misconduct is clear, but complaints handling should be taken away from the Law Society and the Faculty of Advocates, which have abused legal consumers for decades to protect solicitors and advocates from the consequences of their misconduct.

Clear statistical evidence from the SLSO shows that the professional bodies should no longer investigate misconduct complaints. Last year, there were 247 complaints about how the Law Society handled a complaint and the ombudsman

found that the Law Society failed properly to investigate complaints in 45 per cent of those cases. It should be of great concern to the committee that top legal brains in Scotland are failing legal consumers. It is strange and disappointing that no member of the committee questioned the Law Society or the former SLSO in detail on the statistics.

The Convener: Thank you for those comments. Mr Shields, will you respond to my original question?

Duncan Shields: I want to widen the debate by making a short statement.

The Convener: It would be helpful if you first answered the question.

Duncan Shields: I am not an expert on public speaking and there are a few well trained people here. I have suffered from cancer and being here is very stressful, so I want to make one or two comments, which are directly to do with complaints handling and the split between conduct and service complaints.

If a lawyer were tried for murder, it would be inconceivable that the jury would consist of five laypeople and four lawyers. Members of the legal profession are not required to sit on the independent tribunal that is the jury in a criminal trial, so why should there be a different approach to service or conduct complaints against lawyers and advocates? The proposed legal complaints commission should have a selection process that mirrors the process for selecting juries and it should not consist of a majority or minority from any profession, especially the legal profession.

The legal profession is arrogant in that it thinks that laypersons cannot make decisions on any aspect of law, especially when it concerns one of its own kind.

The Convener: I appreciate what you are saying, Mr Shields, but you are straying off the question. We will follow the same line of questioning that we used for the previous panel of witnesses and we will ask about the composition of the commission later. We will be happy to hear your comments then.

Duncan Shields: Mr Swinney was allowed to comment. I have been a victim of the system for 12 years and I am in touch with many people in Scotland, which has brought me expertise in the matter. For the record, I want to make a short statement, but you are not allowing me to do so.

The Convener: I am sorry, we cannot accept a statement, but we will question you on the matters that you have just raised.

Duncan Shields: I thought that you would say that, Mr Davidson. However, Douglas Mill was not interrupted when he was swearing on his granny's grave.

Mr Swinney: With respect, you are wasting your opportunity to speak to the committee by challenging the convener—excuse me, convener.

The Convener: Thank you, Mr Swinney.

Mr Shields, there is a reason why we follow a procedure. It is for the committee to take away all the evidence, which is all logged, and consider it carefully after the meeting. It helps our process to follow a pattern of questioning, which we have done this afternoon with some success. My question was simply whether the public would understand the difference between a service and a conduct complaint. We have heard from other witnesses on the matter and we would like to hear your opinion.

Duncan Shields: There are other aspects to that. Douglas Mill suggested that there should be a summary procedure for appeal to the sheriff court, which is what I was trying to talk about. There is no point in having a commission if a case can be taken away from it and brought before the sheriff court. I have been through the stages of the sheriff court process for many years and the situation is despicable, which is why I want to raise wider matters than are being touched on by other witnesses—

The Convener: As I said earlier, the meeting is not a court or a tribunal and its purpose is not to review individual cases. The committee is trying to gather evidence on the bill that the Executive introduced. Obviously, there will be two more stages in the bill process when there will be opportunities for amendment, but at this stage we seek witnesses' views on the bill as introduced and not on the history of particular cases. I would be obliged if you would stick to that.

Duncan Shields: I could have finished my statement in the time that you have taken to block me, but I will leave it at that.

The Convener: Thank you.

Bill Butler: I will play devil's advocate—I think I know how the witnesses will respond. The professional bodies say that they need to retain control of conduct complaints so that they can know what is happening in the profession and enforce professional standards among their members. What do the witnesses make of that argument?

James Clark: The professional bodies would not need to run the complaints process in order to do that. They could supply observers to the complaints handling process and receive feedback from the commission through case reports on complaints, which would briefly set out the issues that each complaint raised. Such an approach

would enable the Law Society to stay abreast of matters and provide the clarity on the commission's approach to decisions that I think the insurers will seek. If the Law Society is to remain the regulatory body in relation to licensing it will have to monitor the situation in any event.

Joan Pentland-Clark: I would say exactly the same thing. There is no problem. We are the ones who have had problems finding out what is happening to us. The Law Society is good at finding out what is going on among its solicitors—it has huge powers in every direction—but the clients hardly ever get a chance to get together. We have had a big fight to find each other. For example, there is no way in which we could have linked up with the 504 people who responded to Cathy Jamieson last year.

Mike Lloyd: Why is the legal profession so obsessed with retaining the right to investigate misconduct complaints? It has been failing in its statutory duty to protect the public for a great number of years. Given that it has got the approach wrong year after year, it should be stripped of the right to self regulate. The concepts behind the issue of professional conduct have been there for years and apply to many other professions.

Duncan Shields: In my submission, I quote the *Galloway Gazette*. In a 2004 edition, it said:

"the Law Society of Scotland ignored complaints about the disgraced former solicitor Kennedy Forster for NINE YEARS and only acted after our exclusive coverage".

I have been in this system for a long time and I am in contact with people across Scotland who face the same utterly appalling situation. That shows that the Law Society is definitely not doing its job in this regard. It is not a matter of its simply answering letters late; there is a multi-million pound land and property fraud going on that has never properly been discussed at this table. That needs to be addressed.

The Convener: It would be helpful to the committee if you could submit a copy of your statement to the clerks on your way out.

Duncan Shields: I would appreciate that. I would have liked to speak, but never mind. I have waited 12 years to make an oral presentation and I expected to come up against a brick wall.

The Convener: Thank you. Colin Fox, could you address the issue of the composition of the commission?

Colin Fox: The committee has heard a lot of evidence about the need for the public to have confidence in the system for handling complaints. I assure you that that is a big part of our deliberations. The bill might well be changed as a result of the evidence that we are gathering.

I want to deal with other issues to which you have given thought. The bill proposes a new Scottish legal complaints commission—out goes the ombudsman and in comes something new. It is suggested there be nine people on the commission, five of whom, including the chairman, would be non-lawyers and four of whom would be lawyers. From your point of view, is that the right balance? Would that satisfy public opinion, or would it be better if the ratio of non-lawyers to lawyers were, for example, 8:1?

James Clark: I do not see the need for the commission to have a set number of lawyers. I follow that in terms of the jury analogy that was drawn. If evidence were presented to intelligent and competent individuals from any walk of life, they should be able to come to the correct conclusion. They could follow the arguments quite easily.

Colin Fox: Do you mean that you would prefer it if there were no lawyers on the commission?

James Clark: There should be, perhaps, a legally qualified clerk or a lawyer available to assist the commission on particular questions of law that might arise. People who sit on juries receive direction with regard to bits of law so that they are able to understand the situation better. That said, I have no objection to there being legal representation on the commission, if the profession insists on it, as long as there is a lay majority. Of course, however, I would insist that the lay members should not have past or present affiliation to the legal profession. I was also concerned by the reference in the bill to the desirability of including legal educators or trainers on the commission. If their sole client base is law firms to which they pitch their services as educators, I am concerned that they would be open to certain kinds of influence.

17:15

Joan Pentland-Clark: I feel the same. One has to be careful about the lay membership. I do not know how lay members are chosen for Law Society committees, but the Law Society seems convinced that those people are doing a wonderful job. There must be careful consideration of who from the public gets onto the commission. Open selection from all walks of life is a good idea. I am not a lawyer, but it is not that hard to get the hang of the law. We know instinctively what is right and wrong as we grow up and most of us understand legal terminology.

Colin Fox: You would like to know how the decision to appoint the five non-lawyer representatives is arrived at and where those people come from.

Joan Pentland-Clark: Yes. I am sure that they would be fairly competent people. I would like there to be more than five lay members, however; what if one of them was ill or whatnot? The balance could be mucked up easily if one person makes the difference in the ratio—I would like there to be six or seven non-lawyers to two lawyers. It is fine to involve lawyers, but I would rather that they were there in an advisory capacity than as members of the commission.

Mike Lloyd: No lawyers should sit on the commission, given the historical and statistical evidence that shows that lawyers have failed year after year to properly investigate misconduct and IPS complaints. I do not see the need for lawyers. After all, a solicitor or advocate has a right of appeal to the Court of Session in front of judges, who are just lawyers by another name.

Colin Fox: Do you not think that some legal input to the process would be beneficial? A practising lawyer could say, "This is why that lawyer did it that way, rather than the other."

Mike Lloyd: My point is that if you examine the statistical evidence and the failure rates of investigation of misconduct and IPS complaints, you will see that lawyers have not done a very good job for many years, so why should lawyers now have the right to sit on the commission?

Colin Fox: Okay, I understand. Mr Shields?

Duncan Shields: As I said before, a jury composed of lawyers is seldom selected in criminal trials. If a lawyer were done for very serious crimes, there would be an outcry from the prosecution if there were a majority, or even a minority, of lawyers on the jury. I do not know why laypeople from all walks of life—the same people who are selected to sit on juries—could not do as good a job on the commission as on a criminal jury.

Colin Fox: Would you rather the ratio of non-lawyers to lawyers was 9:0, with a legal adviser, as Mr Clark suggested?

Duncan Shields: Absolutely. I speak from vast experience of being persecuted through the system. The current problem in Scotland is that too many lawyers become judges and make decisions that they should never make. They do not offer an impartial tribunal; the only impartial tribunal is described in article 6 of the European convention on human rights as a jury of our peers. A judge should be only an arbiter between a jury of our peers and the accused and the link to the conditions of punishment. That should cover lawyers involved in conduct or service complaints.

Jeremy Purvis: The witnesses might have heard that we received evidence that the complaints system is partly about improving the profession and not just about handling complaints; it feeds back to the profession to ensure that it operates better so that there are fewer complaints in the future. One of the reasons for appointing lawyers to the commission is to deal with service complaints, but the Law Society is to continue to deal with conduct complaints. What are your comments on the role of the commission in improving the service provided by the profession?

James Clark: I imagine that the financial threat of a £20,000 award being made will bring improvement, as Mr Mackenzie said. The Law Society is the union of the legal profession—that is, the solicitors—so part of its work will be to disseminate new practice instructions that will be based on the commission's decisions. The effect of that on standards will become much clearer in time. I imagine that the commission's report on a complaint would state the reasons why a service was felt to be below standard, so the commission would start to define standards.

As I understand it, one of the current problems is that there is no clear definition of standards. There are certain codes, and bits and pieces, but they are not exactly tight. There is no great body of comprehensible opinion from the Law Society; there certainly is not an accessible one for the client base that would allow clients to state that a particular practice did not meet the standards. It might be useful for the commission's decisions, particularly significant ones, to be available on the internet or in published form. That would allow clients to use the information to monitor their own solicitor's standards.

Joan Pentland-Clark: I believe that once there is a bit of independent supervision a vast amount of what goes on now will stop immediately—plus there will be the financial incentive and everything. I think that the cover-up will stop once each individual lawyer is responsible for their own actions and that we will get much better behaviour and justice in the legal system.

Mike Lloyd: It is a bit of a nothing question. The commission could report to the Law Society and the Law Society could report to the commission with updates on professional practice and so on. What we should really be talking about is the Law Society internal memo that Mr Swinney discussed with Douglas Mill, the Law Society's chief executive, when the society gave evidence to the Justice 2 Committee recently.

Jeremy Purvis: For the moment, Mr Lloyd, you are answering my question; if it is an odd question, you do not have to answer it.

Mike Lloyd: Well, you are not looking at the bigger picture, which is the human tragedy that has taken place over the years. That will continue if the bill goes through as it stands and that is what

committee members have to get their heads around. The much bigger picture is that the legal profession has ruined lives, and that will continue—no question.

Duncan Shields: In an interview in *The Herald* on 22 May, Linda Costelloe Baker, the former Scottish legal services ombudsman, stated clearly that the bill is a mess. The £20,000 ceiling is meant to give lawyers an incentive to act within the law. If I was trying to get car insurance with a £20,000 limit, I am sure that there would be a hell of a lot of problems. If, through negligence, I hit somebody and broke their leg, they would expect an acceptable amount for that. However, if I broke their neck and they could not walk for the rest of their life, I am sure that a £20,000 limit would not be acceptable.

I know somebody who has lost £20 million through a lawyer's negligence. How £20,000 could be regarded as a threat that would prevent a lawyer from committing fraud is beyond me. I do not know why a limit has been set. A limit should be set only in relation to a particular case. For example, if a client loses £50, the punishment should fit the loss. If a client has lost £20 million, how can £20,000 be acceptable as a threat that would prevent a lawyer from committing fraud? I do not understand why there is such a limit. No other insurance policy on negligence has limits, so I do not understand why there was a limit in the first place. I found out that there was such a limit and that it was only £5,000 when I got involved in the system. However, it is not much of a threat to raise the limit to £20,000. If somebody loses £20 million and the negligent lawyer gets charged £20,000, that bears no resemblance to the monumental amount of the loss—it is just utterly ridiculous.

The Convener: I have a brief supplementary question for Joan Pentland-Clark, who raised the point of the selection process. Under the bill, the Scottish Executive will select the commission's members. Are you content with that? If not, should there be a different kind of selection process?

Joan Pentland-Clark: I am not certain. Does the Scottish Executive refer to the civil service?

The Convener: It is the Government of the day.

Joan Pentland-Clark: It is the Government itself. I do not know who the Minister for Justice will be. If it is the present one, will she select the commission's members?

The Convener: The minister is ultimately accountable to the Parliament.

Joan Pentland-Clark: As long as it is not just lawyers who do the selecting, I do not mind who does it. However, 177 lawyers are employed in the Scottish Executive and it is hard to miss them out.

The Convener: Thank you for that.

Mr Maxwell: I will follow on from the discussion on compensation that we just started to get into. The witnesses will probably be aware that members of the legal profession have expressed the view that the proposed new maximum level of compensation of £20,000 for service complaints is too high and that it will threaten the financial viability of law firms that provide certain types of work, such as work that has a low return or work in poorer and rural areas. Do you think that, from the point of view of the consumer of legal services, the proposed maximum level of compensation is correct? If not, is it too high or too low? Do you have any other views on the proposed maximum level?

James Clark: Reference was made earlier to a figure of £30,000 being used for a tribunal that is comparable to the proposed commission. On the argument that certain types of legal business would be driven out if the maximum level of compensation was £20,000, if the lawyers were doing things right in the first place, they would not have to deal with a £20,000 claim. If they have been doing things wrongly all along, do we really want them to provide the service? It is swings and roundabouts. The other element that seems relevant is fees. If complaints about fees generated a lot of claims in a narrow area of business, the argument about business being driven out might be valid in that case. However, if a complaint was substantiated and someone was awarded £20,000, the lawyer probably would not want to be in that kind of business anyway.

Joan Pentland-Clark: That is more or less what Linda Costelloe Baker said in her interview in *The Herald* yesterday. I do not know whether members read it; it was really competent. Her views are becoming stronger now that she is outwith the system. It is nice to see her coming down so strongly on things. I wrote to her about three years ago saying that it was up to people like her to come out and tell the truth because that was the only way that we could get the system turned round. I am glad that she is coming out with that now.

Mr Maxwell: What is your view of the £20,000 figure?

Joan Pentland-Clark: It is just a figure; it could be £30,000. I think that many people's claims—say from £5,000 to £10,000—will be covered by the £20,000 limit and that will be great. A huge number of others would not even sniff at that amount, although £20,000 is a lot better than £1,000, which is worth less than 10 or perhaps eight hours of a lawyer's time. That is what we were being paid until a year or two ago for years of trauma and disaster.

Mike Lloyd: There should be no limit on financial penalties. Strong penalties would get rid of much of the corruption in the legal profession. The only language they understand is when they start to lose a lot of money. That will remove a lot of the lawlessness that we see.

Mr Maxwell: I am sure that you are aware that any client will still have the right to go to court and sue for £20,000, £100,000 or £20 million. The compensation limit would not prevent anyone from doing that. However, Joan Pentland-Clark made the point that the commission would perhaps deal with many more claims of between, say, £6,000 and £12,000 and that it would be quicker and easier for people to get such compensation through the commission rather than through the court. The commission would be a way of dealing with the smaller claims.

Mike Lloyd: Do you really believe that the commission will give awards of £15,000 plus? I do not think so.

Mr Maxwell: Why do you say that?

Mike Lloyd: Purely because, irrespective of the ceiling that is in place, the average payout is always a fraction of that. Compensation should be limitless.

Duncan Shields: I was listening earlier to the representatives from Marsh and Royal & Sun Alliance bandying figures about. I have also read in the *Official Report* previous evidence about all the money that has been paid out to all these fictitious people. I am well aware of the number of people who have been through the system because I am in contact with them almost daily. I supplied the committee with a copy of the writ that was served by the state of New York against Marsh & McLennan Companies, Inc, which brokers the master policy. The writ states that insurance companies were paying

"Marsh more than a billion dollars in so-called 'contingent commissions' to steer them business and shield them from competition. … Whatever the agreements were named, they created an improper incentive for Marsh",

which has

"corrupted by distorting … the price of insurance … from illegal activities."

The writ goes on to say that the state seeks damages with respect to Marsh's

"fraudulent, anti-competitive and otherwise unlawful conduct".

We are talking about the master policy for the entire legal system—how it can be kept in place is beyond me.

As far as I am concerned, the witness from Marsh told the committee porkies about people getting all sorts of moneys. I know of only one person for whom the master policy has paid out—that person is sitting in this room. We have built up a network of victims, so we should know who has received a payout. I would love Marsh to produce a list of names and figures, because I do not know of anyone who has received a substantial payment from the system. We have to correct that and we need a platform in the courts so that every victim of the system can receive proper compensation.

17:30

Mike Lloyd: I want to make an important point in that context. Mr Goddard, the witness from Royal & Sun Alliance Insurance, said that fewer than 1 per cent of all claims go to proof. However, in evidence to the committee, Douglas Mill, the chief executive of the Law Society of Scotland, said:

"I have figures from Royal & Sun Alliance Insurance, our lead insurer, that show that fewer than 1 per cent of claims against solicitors go to court."—[*Official Report*, *Justice 2 Committee*, 2 May 2006; c 2273.]

There is a big difference between going to proof and going to court, as I am sure the committee appreciates. Someone is not telling the truth, but I do not know whether it is the insurers or the Law Society.

Mr Maxwell: I remember the discussions with both witnesses. We can take the matter up with them.

Mike Lloyd: The committee should ask why Douglas Mill suggested that the 1 per cent figure relates to going to court, when he must know that it relates to going to proof.

Mr Maxwell: I am sure that we can clarify the matter.

The Convener: Mr Lloyd, I assure you that we will thoroughly compare all the evidence that we receive. The committee is obliged to produce a report for the Parliament—it is ultimately for the Parliament, not the committee, to make the decision on the bill.

Mike Lloyd: Absolutely. I want to put the committee on notice in relation to another aspect of evidence—

The Convener: Can we stick to compensation for clients?

Mike Lloyd: The matter is about the internal memo, which relates to payouts. In evidence, Mr Mill told the committee that he suggested a summit meeting with the insurers because that was in the best interests of Mr Mackenzie, but the last sentence of the internal memo clearly gives the real reason. Mr Mill wrote:

"There is no doubt that Mr MacKenzie is intelligent and well organised individual who could, unlike some of the

other thorns in our flesh, come over very well at a JHAC investigation."

The chief executive of the Law Society proposed a summit meeting to pervert the outcome of a parliamentary inquiry—

The Convener: The matter has been before the committee—

Mike Lloyd: Mr Mill said in evidence that he proposed the summit meeting to protect Mr Mackenzie's best interests, which was a lie. The committee should investigate that.

The Convener: The committee will consider all the evidence, I assure you of that.

Duncan Shields: On an unrelated point, David Emslie, who was invited to give evidence to the committee but did not come because of the format, which he has taken to the Standards Committee—

The Convener: That is not the question—

Duncan Shields: He asked the Law Society to produce all the names of people who have received payouts from the master policy. So far the Law Society has generated no figures or names—

The Convener: Thank you for your information. We move on to the complaints levy.

Colin Fox: The witnesses' comments reflect their profound sense of injustice about the current system. Do you think that good lawyers have nothing to fear from the bill? Some lawyers will say, "I've done nothing wrong".

Duncan Shields: Could you give me their names?

Colin Fox: I get to ask the questions. [*Interruption.*] I am asking a serious question. The new legal complaints commission, which I am sure we all want to succeed, would be funded by a general levy payable by all lawyers and a complaints levy of about £300, which would be payable by a lawyer every time a complaint was made against them, irrespective of the outcome of the complaint. I want you to focus on, first, whether that is fair and, second, more generally, how the commission should be funded. Mr Clark can answer first, and we will work our way round to Mr Shields.

James Clark: We are talking about the polluter-pays principle. If a solicitor has a complaint made against them and it turns out that the client just did not like the legal opinion—it was not what they wanted, although it was a properly founded piece of advice—and the chap has been sent away because there is no problem, why should the solicitor pay any more than his general levy? That would be only fair. Equally, if the complaint is more minor, why should there not be a lesser levy or a sliding scale—or some element of a sliding scale? I believe that it was Mr Evans of the Scottish Consumer Council who first came up with that idea, which I quite like.

Colin Fox: So, you think that it is not totally fair that a solicitor might have to pay the levy if they are not found guilty.

James Clark: Yes. That also addresses the point about the commission having to accept complaints in order to generate money to cover its costs. It is not just a hurdle issue; it is a properly based point about whether a complaint is founded.

Colin Fox: Maybe it is the same question, really. What would you think of the commission being funded on the basis of the number of complaints that were allowed to be pursued? There would be an incentive for the commission in that. You could look at that and say that it was pretty corrupt. That would open the commission up to charges that, every time that it allowed a complaint to be taken up, it got money for that. Why would it be in the commission's interests to be—

James Clark: That works both ways. If the commission were snowed under with complaints it might just start to throw them away because it could not handle the work. There is a worry on that side as well.

Colin Fox: I am grateful for that answer. I ask the same question of Joan Pentland-Clark.

Joan Pentland-Clark: I am sorry, but I have forgotten your first question.

Colin Fox: I am asking whether it seems fair for solicitors to be charged for something that—

Joan Pentland-Clark: Oh, the £300?

Colin Fox: Yes.

Joan Pentland-Clark: I should think that not many lawyers would reach a poverty-stricken state through having to pay £300; it is their clients who, by the time that they get to complaining find £300 or even £30 difficult to find—to put a motion in court costs around £27.50. I do not think that there will be many lawyers in that state, unless they are very bad lawyers, in which case they should not be practising.

Colin Fox: A lawyer could be subject to 10 complaints, none of which is upheld, and be fined £3,000.

Joan Pentland-Clark: Most lawyers could find £3,000. They will have got it from the client beforehand, anyhow. I would not worry about the levy of £300 per complaint.

Mike Lloyd: It is clear that honest lawyers should not have to pay anything.

Duncan Shields: Maybe the Executive should take some of the huge amount of money that is spent on legal aid to fund the complaints process. The courts are publicly funded, to some extent. Maybe it should be that when a lawyer is found guilty they have to provide the moneys.

Colin Fox: Do you think that the Scottish legal complaints commission should be publicly funded?

Duncan Shields: How does the Scottish Solicitors Discipline Tribunal system work? It must be funded in some way; there is no reason why the commission could not be similarly funded.

Colin Fox: That is a fair point. We will consider that.

Maureen Macmillan: Earlier, we touched on the master policy and the guarantee fund, but not all the witnesses got a chance to comment on them. Do you think that the master policy and the guarantee fund provide effective protection for clients at the moment? The bill proposes giving the commission oversight of the policy and the fund. What do you think of that?

James Clark: My written submission pretty much focuses on that issue. It is inimical to the proper functioning of the system and access to justice that the regulatory function, the union position and the role as purchaser, or arranger, of the master policy should be concentrated in the hands of one group of people, with the membership at the bottom end of it then expected to be willing to take up work and sue against the policy.

Maureen Macmillan: Is your main problem that other solicitors will not take cases against their fellows?

James Clark: Yes. That issue is dealt with on pages 20 to 21 of the Scottish legal services ombudsman's report for 2004-05, under "Obtaining legal representation". That is the point that was referred to earlier. The former ombudsman recommended then that Scottish ministers look into the matter, but there seems to have been no progress.

Maureen Macmillan: Indeed.

James Clark: The other bit, which I think I included in my written submission, was the letter to Mr Mackenzie from the Office of Fair Trading in which it says specifically that a further potential restriction that has been

"raised repeatedly by users of legal services in Scotland"

is the alleged mutual interest. The letter goes on to call that an access-to-justice issue, not a competition issue. The master policy is a huge problem. I notice also that it is not a requirement under the Solicitors (Scotland) Act 1980; it is just something that the Law Society came up with. It was a requirement of that act that all solicitors should carry a minimum level of insurance for the year, but it was not a requirement that it should all be arranged as one policy.

Maureen Macmillan: Yes, that is right. It used to be that individual solicitors or individual firms found their own insurance. Do you think that the commission's power of oversight will help to resolve those problems? What do you think the power of oversight should consist of?

James Clark: I think that the regulatory function—the licensing function—should be moved over to the commission and separated entirely from the representative, or union, function. I find it hard to agree that the regulator—the licensing body—should have anything to do with providing the insurance. That should be an entirely separate issue. All that the commission should be there to do is check, in the same way as someone's insurance certificate is checked when they go to get their car tax.

I have a bit of an issue with the drafting of section 29(2), which is to do with the power of oversight. It is not clear to me whether the oversight in section 29(2) refers to the guarantee fund, as referred to in section 29(1)(a); to the indemnity arrangements, as referred to in section 29(1)(b) and the self-represented people in terms of section 29(1)(c); or just to section 29(1)(c). The reference is not specific enough.

Maureen Macmillan: That is something that we can have clarified.

Joan Pentland-Clark: I agree completely. We have known for several years—I have known from personal experience—that the root cause of my problems and several others that we have come across since must be the insurance policy: it is the only explanation for what has happened. Also, as James Clark says, the bill gives far too much power into the hands of the Law Society. No lawyer will dare gainsay what the Law Society tells them to do, and that must be taken into consideration. The Law Society has no arm's-length attitude on anything; it has enormous and very dangerous powers, which must be curtailed. The only way of curtailing them is financial, by ensuring that each individual lawyer has to look after his own law firm and himself—not the Law Society. The solicitors might get a row or not be given their licences, but they would no longer be disempowered to do what is demanded by justice or by their own wish to play a decent role in society.

Maureen Macmillan: Our previous panel suggested that each client should be insured separately for each transaction, so that the insurance policy would be for the client rather than for the solicitor.

Joan Pentland-Clark: Do you mean that the solicitor would take out an insurance policy for each client?

Maureen Macmillan: Yes, but the client would be the person who was insured rather than the solicitor.

Joan Pentland-Clark: That might work. I would be in favour of anything that would break up what happens at the moment and take the total power away from the few hands that run the system.

Maureen Macmillan: Mr Lloyd, do you have anything to add to what you said before?

Mike Lloyd: At the moment, the guarantee fund is self-regulating, so it is a law unto itself. I am going to send the committee details of a case in which a solicitor was found guilty at the Scottish Solicitors Discipline Tribunal of dishonestly obtaining £3,000 from his client. Being the victim of a solicitor's dishonesty, the client approached the guarantee fund, but it refused to pay him. There is no statutory obligation on the guarantee fund to pay out as a result of a solicitor's dishonesty, even though people have given you evidence to the contrary. I will send you details of that case.

As regards the master policy, I think that the internal memorandum says it all. In it, the Law Society proposes to discuss claims and complaints aspects with the brokers for the insurers. That alone should strip the Law Society of its right to self-regulate. If it lost that power, there would be no possibility of collusion between the Law Society and the insurers.

17:45

Maureen Macmillan: Do you want the master policy to be disbanded completely, or would you be content for the commission to oversee it?

Mike Lloyd: I am sorry, but I cannot give you an expert view on that.

Duncan Shields: I have already given the committee the writ that was served on Marsh. It says clearly that the contingency payments are wholly illegal, fraudulent and corrupt and that Marsh and Royal & Sun Alliance should be removed immediately as master policy brokers, that there should be an opening of competition and that there should not be only one master policy for the whole legal profession, as that leads to protectionism and means that everyone in the system can work to stop people like ourselves—the victims—from gaining any recompense.

The Convener: Jeremy Purvis will now ask about rights of audience for non-lawyers.

Jeremy Purvis: Do you agree that sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 should be implemented? To whom should the ability to make representations in court be extended? If you agree that that ability should be extended, do you agree that the scope of the complaints commission should be extended to cover them as well?

Duncan Shields: I was one of a few individuals who triggered a complaint of anti-competitiveness against the Law Society of Scotland. On 5 May, *The Scotsman* said that the Office of Fair Trading had

"called on politicians to pass legislation forcing through changes, and warned it may use its own anti-competition powers should they fail to do so."

On this same subject, *The Herald* said:

"People trapped by this loophole can sue their solicitor, of course—in theory. But how easy is it to find a lawyer to sue another lawyer in Scotland? This is a question Costelloe Baker put to ministers 12 months ago and she never got an answer. The Office of Fair Trading has also raised the issue with the Scottish Executive."

There is a complete monopoly of Scottish legal services. The appalling situation, in which people cannot get representation, means that there is massive land and property fraud going on just now. That needs to be exposed.

Mike Lloyd: Break the cartel and you will solve a lot of problems for legal consumers. On the other hand, there should not just be a free-for-all. It should not be possible for any ned to become a lawyer—there should still be statutory regulations in relation to complaints by clients and so on.

Joan Pentland-Clark: I do not know how many people like ourselves have won cases in court, but the fact that that is happening has opened up a chink in the system. Advocates do not know what to do because they are not used to somebody coming into court and speaking the absolute truth about situations. When the absolute truth is backed up by absolute proof, it makes an awful difference. The more that can be done to expand that chink, the better.

James Clark: I go along with what Mike Lloyd said. It should not be just anyone who is able to become a lawyer. I have with me the rulebook of the Court of Session, which is 1,300 finely typed pages. It is not easy to be a party litigant; it is terrifying. The first time that my mother went to court, she was told that motion after motion was incompetent, because of something to do with one of the rules somewhere in this book. Eventually, you work out the rules and start to make progress. In that sense, it is necessary to have someone who has done their three months' training in a sheriff court, if there are ways of opening that up so that people can get their heads round it.

With regard to the McKenzie friends issue, that should be opened up slightly. I know of three or

four party litigants who cannot get a solicitor. They have been through two or three sets, each one dragging out the process longer and costing money. Money is not the issue in two of the instances, however, as they had sufficient funds, but they cannot get a solicitor to act for them. It would be useful to break the monopoly in a situation in which someone is going against the indemnity insurance policy with regard to a big negligence claim. There has to be some equality. It is extremely daunting to be a party litigant with no assistance.

The Convener: I thank our witnesses for giving their personal views on the bill. We look forward to receiving the pieces of short and sharp documentation that you have promised to send to support comments that you have made.

17:51

Meeting continued in private until 18:22.

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