JUSTICE 2 COMMITTEE

Tuesday 30 May 2006

Session 2

£5.00

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

CONTENTS

Tuesday 30 May 2006

JUSTICE 2 COMMITTEE
16th 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:

Paul Martin (Glasgow Springburn) (Lab)
Mr John Swinney (North Tayside) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Hugh Henry (Deputy Minister for Justice)
Louise Miller (Scottish Executive Justice Department)
Mike West (Scottish Executive Justice Department)

CLERKS TO THE COMMITTEE

Tracey Hawe
Alison Walker

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 4

Scottish Parliament

Justice 2 Committee

Tuesday 30 May 2006

[THE CONVENER *opened the meeting at 14:09*]

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

The Convener (Mr David Davidson): Good afternoon and welcome to the 16th meeting in 2006 of the Justice 2 Committee. I ask anybody who has a mobile telephone, pager or BlackBerry with them to ensure that it is switched off before we start. I welcome Margaret Ross, the committee adviser on the Legal Profession and Legal Aid (Scotland) Bill, and Sarah Harvie-Clark, from the Scottish Parliament information centre, who has been supporting us with our research.

For the avoidance of doubt—although this is not required—I declare that my son is a lawyer registered in England. He does not practise in Scotland and has no qualifications to do so, but he is a member of the English bar. There was confusion about the word "advocate"; he was an advocate in the West Indies—that is what they are called out there.

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

The Convener: This is our final evidence session at stage 1 of the bill. The committee has received apologies from Jackie Baillie. I welcome John Swinney, who is exercising his right as a member of the Scottish Parliament to attend public committee meetings. I also welcome Hugh Henry, the Deputy Minister for Justice, and Louise Miller, Mike West and Chris Graham, from the access to justice division of the Scottish Executive.

You will be aware that we have taken a fair bit of evidence to date, and we would like to tease out a number of issues. We have heard contrasting evidence from the former Scottish legal services ombudsman and the current Scottish public services ombudsman. The outgoing Scottish legal services ombudsman suggested that the fundamental weakness in the bill is that, unlike in the proposed model for England and Wales, the Scottish legal complaints commission will be restricted largely to handling complaints rather than addressing the broader functions of regulation, which involves setting standards of professional practice. However, Professor Brown said that complaints handlers are not always the best regulators. What do you think of those different views?

The Deputy Minister for Justice (Hugh Henry): The latter point that complaints handlers are not always the best regulators probably explains why we have a bill before us. Following the work of the previous Justice 1 Committee, we believe that it is probably best that complaints are handled independently of the profession. From what I have heard, there is widespread acceptance of that.

The first point raises a slightly different issue, which relates to conduct. As you know, we have decided to leave the handling of conduct complaints with the profession. We have introduced new powers, so that lower-level conduct issues—to categorise them crudely—are dealt with by the profession, but the more serious conduct complaints are dealt with by the Scottish Solicitors Discipline Tribunal. We think that it is right to differentiate between complaints, because the vast majority of inquiries or complaints—about 80-odd per cent—are service driven rather than conduct driven.

Serious allegations of misconduct have implications for someone's ability to continue in the profession. We would change significantly the role of the independent complaints commission if we were to add consideration of conduct complaints to its remit. We would then have a complaints commission that was no longer just dealing with a complaint, but was making decisions that could impact on someone's ability to practise, which is a different matter. We have ensured that the commission will have a degree of oversight of how conduct complaints are handled. We think that it is right to distinguish between types of complaint and for the commission to do the vast majority of the work relating to complaints.

The Convener: On the structure of the new complaint-handling system, we have received quite a bit of evidence from individuals and from the Scottish Consumer Council that to restore consumer confidence the new commission should handle all complaints. The Scottish Executive did not consult on that. Given the evidence that we have received, will you now consider seriously amending the bill to provide for that later in the process?

Hugh Henry: We are not minded to do that. Our preference is for complaints to be handled at a local level and, wherever possible, to be resolved between the two parties, because that is in the best interests of the client and the lawyer or the legal firm.

We see no reason to burden the commission with all complaints in the first instance, but if a complaint cannot be resolved between the two parties, we want to make it as easy and straightforward as possible for a complaint to be processed then expedited. We think that we have struck the right balance.

14:15

The Convener: We heard evidence from several witnesses, including Professor Paterson, the Scottish Consumer Council, the Scottish Solicitors Discipline Tribunal, the former Scottish legal services ombudsman and the Faculty of Advocates, to the effect that the distinction between service and conduct complaints is difficult to make and that a system based on a distinction between the two might confuse the consumer. Does the minister recognise the seriousness of those comments and the public perception that the commission's remit is confusing? That concern came up a lot during evidence-taking sessions.

Hugh Henry: It is a fair comment, but I hope that people will be able to distinguish between a complaint that is made because someone is not happy with the way in which business has been handled and a complaint about how a solicitor has behaved.

I acknowledge that there might be circumstances in which someone is not sure whether their complaint is about service or conduct. We might need to reflect on whether to allow the commission to handle its part of the business and then refer any conduct element that it identifies to either the Law Society of Scotland or the SSDT. We are aware of that argument and we will consider it.

The Convener: Some of the individuals who gave written and oral evidence said that all complaints are about conduct and professional standards. There seem to be two sides to the continuum and that creates confusion. You said that you are minded to consider the argument, but will you be more explicit?

Hugh Henry: I said that we would think about those comments. We are aware of the argument that it is not always easy for a complainer to distinguish between service and conduct complaints. We do not want to create unnecessary delay and complications; we want a service complaint to be dealt with expeditiously. Once a service complaint is dealt with, it might be that any conduct element could be referred on to a professional body. It would be wrong of me to say that we will make specific amendments later, but it is right for us to reflect on some of the arguments that have been made.

The Convener: Perhaps you will inform the committee through the clerks of any thoughts that you have before we get round to writing our stage 1 report.

Mr John Swinney (North Tayside) (SNP): One of the witnesses from whom we heard last week made what I thought was a compelling point about the fact that most conduct complaints start off as service complaints and then gravitate from service to conduct. Therefore, it is difficult to establish a thick line between service and conduct matters.

The Government proposes that under section 16(2) the Scottish legal complaints commission should have a variety of different powers of intervention in the handling of a conduct complaint if it is dissatisfied with how the professional organisation is processing that complaint.

In the light of that suggestion in the bill, would it not be preferable for the commission to have oversight of both conduct and service, for the sake of completeness, simplicity and ease of access for members of the public? In effect, section 16(2) provides the commission with the power to make some observation on conduct complaints, but not to determine.

Hugh Henry: I am not sure that it is as simple as that. The distinction between service and conduct is not a new one. The Law Society has been dealing with that since 1988. However, I recognise that there can be grey areas. Ultimately, it will be for the commission to decide on the classification of a complaint.

On the latter point, it would be a huge step to say that henceforth all conduct issues should be handled by the commission. Conduct complaints, if they are upheld, can ultimately lead to people being disciplined, whereas the commission's perspective is to provide redress. What John Swinney suggests would fundamentally change the nature of the commission and would take it away from its role of redressing complaints, resolving issues and giving some satisfaction to aggrieved individuals towards being a body with the power to discipline. That would bring in a new set of disciplines—if I can use that word; it is almost a pun—and could introduce new rights of redress for those who are disciplined, as well as new rights of challenge. It would take the commission into completely different territory.

More than 80 per cent of the work is associated with what we might regard as service complaints, so it is right that we take the step now of ensuring that they are dealt with independently and objectively.

Mr Swinney: There is one point that I do not understand. There is a clear logic to what you are saying about the distinction between conduct and service, but I cannot understand why the powers at section 16(2) exist. I am all for those powers being there—in fact, I would like them to go much further—but if I follow the logic of your argument, it is that the commission becoming involved in conduct business would take it into a different sphere. However, given the powers in section 16(2), it is already in that sphere. I encourage you to reflect on whether, for the sake of completeness, there is a way of reinforcing those

powers by allocating the whole of conduct to the commission and putting it in the driving seat in resolving complaints from start to finish, whether they relate to service or conduct matters.

Hugh Henry: I do not think that there is. Section 16(2) does not empower the commission to handle a conduct complaint.

Mr Swinney: I appreciate that, and I did not say that. I was saying that the powers could take the commission into that sphere. The issue needs to be tested.

Hugh Henry: If we do not accept the premise on which you base your arguments, we could say that it would be logical to take the commission out of that sphere altogether and for it to have nothing to do with conduct. We believe that it is right to allow the commission to make comment, to have oversight of how conduct complaints are conducted and to ensure that organisations deal with conduct complaints properly. How conduct complaints are dealt with is a separate matter from dealing with the complaints themselves.

I would strongly resist any suggestion that the commission should take up individual conduct complaints. Equally, although I can see the force of an argument for removing the commission from the area of conduct altogether, I believe that it is beneficial to have another organisation scrutinise the process of handling conduct complaints. Although I accept the reasons for leaving the handling of conduct complaints with the Law Society, given the arguments that are developing about accountability, it is useful to have that overview of the process.

Colin Fox (Lothians) (SSP): I want to return to the more fundamental point that the convener began with. How important is the restoration of public confidence to the overall success of the new system? Is there a danger that, if we lose the public's confidence in the new system, we will be back to square one, and there will be another bill in due course?

Hugh Henry: I am not sure whether Colin Fox is referring to the conduct issues—

Colin Fox: I am referring to the bill overall. I noticed that the consultation document that the Executive circulated listed four options, none of which referred to all complaints being handled by the commission itself. In that context, I am asking about the public's concern about the bill striking out an option that they might have wanted to choose, whereby the handling of all complaints would be independent of the profession.

Hugh Henry: I would argue that what we have in the bill is a significant and radical initiative. I suppose that, to some extent, we also need to keep a sense of perspective. Although there are a number of what can often be high-profile complaints about the way in which the legal profession or individuals in it have conducted themselves, it is important to remember that such cases are still a minority of the vast number of cases handled. It would be unfair to categorise the legal profession as a complete basket-case in which no one does any work properly. That is just not true. The vast majority of work is handled to a very high professional standard and to the satisfaction of clients.

Where those high standards are not adhered to, the way in which complaints are handled has caused growing concern and has led people to ask why lawyers should investigate and adjudicate on other lawyers. In that sense, what we are doing is in tune with public expectation.

I would not start from the perspective that people will lose confidence in the proposals. I would start from the perspective that people want to see improvements on the current situation, and I would argue that we are offering a significant improvement and a more open and transparent system. Indeed, the proposals have caught the attention of people elsewhere. I received an e-mail from someone I knew in school and had not seen for years, saying that they were living on a remote island off the coast of Ireland and had seen an interview that I did with Irish television about the bill. Ireland is currently considering how its legal profession should be regulated, and there is a view that we have gone much further than Ireland is currently thinking of going, so people elsewhere are looking with some interest at what we are doing.

Colin Fox: I am glad that the bill is helping you to reunite with your old friends, but do you accept that one driver behind the bill is the awareness that there is insufficient public confidence in the existing system, which is, at least in part, why the proposals that you rightly describe as new and radical are being introduced? My anxiety is that if the public is not satisfied with the balance that we strike, we will have to go back to the drawing board. Is that a fair comment about the drivers of the legislation?

14:30

Hugh Henry: I do not think that it is particularly helpful to go back and discuss the reasons for introducing the bill. Rather than start with a negative view of this radical legislation, which I believe meets public and political expectations, I feel that many significant aspects of it will give the public confidence that anything that falls below the expected high standards will be dealt with thoroughly and properly.

The Convener: The legal profession has clearly stated its wish to retain ownership of disciplinary

processes for conduct complaints. However, members of the public have said that if the profession really needs to know about these matters, to tidy up its processes and to keep up to date with any problems, the proposed commission can simply feed its decisions back to it.

Hugh Henry: I am not sure that I fully understand your argument. If you are referring to concerns about how conduct complaints are handled, that is one matter, but if you are asking about how we help members of the public to process conduct complaints, I have to say that I do not want to get into that discussion. One grey area that we might have to examine is whether, in making a determination on a service complaint and deciding that a conduct issue remains to be dealt with, the commission should be able to refer the matter to the profession. I would not expect the commission to take a narrow view on that matter.

The Convener: It might be the way I asked the question—I have a frog in my throat. The profession has said very clearly that it wishes to retain ownership of the conduct complaints process to understand at first hand what might be going wrong and to learn from that. However, members of the public have told us that the commission can feed such information to the profession. The profession is now looking for a clear statement of your reasons for giving this work to the commission.

Hugh Henry: Do you mean our reasons for why the Law Society should not handle these complaints?

The Convener: Yes.

Hugh Henry: That is a fairly major point of argument and, indeed, takes us back to the genesis of and consultation on the bill. Put crudely and simplistically, the public have become concerned that a process in which the profession handles such complaints lacks objectivity and transparency. Our approach is probably in line with other recent developments such as the establishment of the police complaints commissioner, which has just been passed by Parliament; the growth in the number of commissioners; and the introduction of freedom of information provisions. People who are aggrieved about something now expect their grievances not to be handled by the people about whom they are complaining, and I hope that the bill's provisions will be seen in that context.

Colin Fox: Some witnesses have suggested that the boundaries not only between conduct and service complaints but between various conduct complaints are unclear and confusing and that a database of categories—including, for example, inadequate professional service, negligence and so on—would be helpful. Will you consider producing a code of conduct that sets out the various categories that particular complaints fall into?

Hugh Henry: Given that the commission will handle all complaints, I am not sure that we would need to categorise different complaints for it. It would be for the commission to determine whether a complaint is frivolous or vexatious and, if it is not, it should deal with the complaint as it sees fit.

I will leap ahead to a question that the committee might wish to raise about the £20,000 compensation limit. We will reflect on whether different categories of complaints might be necessary to provide safeguards and an assurance that there is no possibility of a fairly low-level complaint automatically leading to a settlement at the higher level. People need to know the boundaries. However, at the moment, I am not particularly of a mind to do that, as it does not happen with complaints to the Financial Ombudsman Service, which is able to determine whether a complaint is a low-level or higher-level complaint.

I can understand why people call for categorisation but, as far as we are concerned, the commission will deal with all complaints and that is fine.

The Convener: Did I understand correctly? Might you be considering a tariff? If so, would there need to be a code of practice to go with it, or would that be left completely to the commission?

Hugh Henry: We are not considering that. I said that, having listened to some of the comments that have been made and after having seen what comes out of the committee's report, we will consider whether further safeguards need to be built into the system to ensure that complaints are dealt with appropriately, so that fairly low-level complaints are not dealt with in exactly the same way as more serious complaints. The point that I made is that I am not persuaded of that need. I have heard some of the arguments and I will wait to see what comes out of the committee's report but, as far as we are concerned, it will be for the commission to decide how to handle all complaints.

Colin Fox: I will move on to talk about the commission's composition and structure. The bill contains a power for the Executive to change the commission's size and composition. The Subordinate Legislation Committee is concerned that the Executive's discretion to do that is unfettered, and is unconvinced by the Executive's response that any change in the commission's size and composition might be linked to the annual consultation and review of cost. Is it the Executive's view that stakeholders would have the greatest confidence in a commission that was

composed of nine members? If so, should not the bill protect that composition rather than open up the potential to change it later?

Hugh Henry: What we propose is robust. I want to avoid any suggestion that ministers could or should arbitrarily intervene to change numbers. However, suppose that a few years down the line Parliament and consumers were, for whatever reason, to express the strongly held view that the commission should be bigger or smaller. If we were to have no facility such as that which Colin Fox mentioned, how could we change the commission's size without primary legislation, which is cumbersome?

I can certainly assure you that ministers will not be able just to dip in if we are not happy with decisions, although we will need to reflect on that in legal terms. We want the commission to be independent and to be able to withstand proper public scrutiny, but I would hesitate to introduce rigidity that would make it difficult either for Parliament to alter the composition of the commission, should it see fit to do so in the future, or for ministers to do so for whatever reason.

Colin Fox: Are the powers to change the commission to guard against what might happen in the future?

Hugh Henry: To guard against what?

Colin Fox: You said that it might be necessary to change the composition of the commission if there was pressure from stakeholders to do so.

Hugh Henry: Yes. We have the powers to change the composition. Paragraph 2(7) of schedule 1 states:

"The Scottish Ministers may, subject to sub-paragraph (8) … alter the number of members".

The only condition that ministers cannot alter—nor do we want to—is that the number of non-lawyer members must at all times be greater than the number of lawyer members. We have specifically built in a non-lawyer majority.

Colin Fox: You do not envisage that provision being changed some time down the line—it is fairly rigid.

Hugh Henry: Yes. I believe that further legislation would be needed to change that provision.

Colin Fox: Some witnesses have suggested that there could be a conflict between the role that the commission will play in handling complaints and the role that it will play in regulating the profession. How do you see the commission being organised internally so that it carries out each role separately and is aware of its separate responsibilities?

Hugh Henry: Are you asking how the commission would be organised internally?

Colin Fox: Yes. How will it be organised to ensure that there is no conflict between its complaint-handling role and its role in regulating the profession?

Hugh Henry: I will have to take advice on that from officials. You have confused me by asking about the regulatory aspects. Unless I have missed something, I had not thought that the commission would regulate the legal profession.

The Convener: I refer you to sections 26, 27, 29 and 30.

Hugh Henry: They relate to a separate issue. They do not introduce provisions for the commission to regulate the profession. Section 26(1) provides for the commission to monitor how practice develops and to identify trends in how complaints are dealt with. Section 26(3) encourages the commission to produce reports and to develop protocols with professional organisations. Louise Miller can expand on that.

Louise Miller (Scottish Executive Justice Department): That is absolutely correct. The new commission will not be a regulator of the legal profession. We have not carried out a Scottish equivalent of the Clementi review in England and Wales and we are not changing the wider regulatory arrangements. The commission will be empowered to enter into protocols to share information with the professional bodies, and to provide guidance about best practice to determine what actions would minimise complaints and result in fewer dissatisfied customers.

The commission should be in a good position to do that, because it will be the gateway for all complaints and will adjudicate on all services complaints, so those functions flow quite naturally into one another. The commission will use the information that it acquires about what is going on out there with complaints to make recommendations to the profession about best practice, but that does not involve its being a regulator of the profession in the way that the Law Society of Scotland is the regulator of solicitors.

14:45

Colin Fox: Maybe I was overegging the pudding in calling the commission a regulator, but what I am driving at is that the commission clearly has regulatory functions if it has to look, for example, at best-practice recommendations that may emerge from the complaint-handling side of things. How will that be fed in and how will the changes come about? How might it be necessary to change existing practices?

Hugh Henry: You are right to acknowledge that use of the word "regulatory" was overegging the

pudding. What you described is not a regulatory function and the commission is not a regulatory body. We are talking about something more general. Yes, the commission can enter into protocols about how certain things happen, but it is not a case of empowering the commission to take action against the profession or against individual solicitors, other than when it deals with specific complaints that are before it.

Louise Miller: The question referred initially to possible conflict, but I am not sure that we envisage there being conflict. When the commission issues guidance about best practice, it will examine the track record of complaints and it will issue guidance that says, in effect, that because it has picked up a trend in complaints—a fair number of upheld complaints have arisen from particular circumstances—it recommends that the profession take action to prevent the circumstances that are causing a problem from arising in the future.

The Convener: Can you confirm, just for clarity, that there are no sanctions or powers that go with that and that it will be purely a recommendation?

Louise Miller: It will be purely a recommendation.

Hugh Henry: That is correct.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): I wonder whether the minister can help us on the internal side of the commission. We have received evidence from people who are unsure about how the commission will organise the day-to-day work of processing complaints. I know that there are mechanisms for the commission to establish as many committees as it wishes, and I know that the bill states that the majority of the commission's members must be non-lawyers—which adds a degree of assurance—but I do not know whether you expect all nine commissioners routinely to meet to handle complaints or whether it would be delegated to smaller groups, or to the chief executive, to determine whether complaints are vexatious or frivolous. It would be helpful, at stage 1, to understand how you envisage the commission operating.

Mike West (Scottish Executive Justice Department): We do not envisage that commission members themselves will deal with routine complaints. We envisage their having oversight of the work of the complaints adjudicators and the senior adjudicators of the commission. The commissioners will deal with complaints that raise policy issues or that might set precedents, and they would deal with appeals—under the bill, a sub-committee of the commission would do that. Generally, however, the function of members would be in policy oversight and considering precedents.

Jeremy Purvis: That is helpful. I have perhaps missed things that have been said in previous evidence, so if I had said that that is the first time we have been told that, you might have told me otherwise. I would have thought that adjudicators and senior adjudicators could therefore all be lawyers. Is that so?

Hugh Henry: They could be lawyers, but they would not necessarily have to be.

Jeremy Purvis: I asked the question because it is certainly the case that, although the commission and its committees—or committee, if it chooses to establish only the appeal committee—will have a majority of non-lawyer members, and although commission members will have only a strategic policy or oversight role, the actual handling of complaints could all be done by lawyers, which could give rise to concern.

Mike West: The adjudicators and senior adjudicators would be appointed for their relevant experience. It could be a false scare to suggest that there would be a majority of lawyers among the adjudicators. Some of the staff of the office of the Scottish legal services ombudsman with the best-quality experience have come from the financial services industry. Recruitment of adjudicators would be based on their relevant skills and experience. I do not think that that would lead to any concerns about lawyers being predominant among them.

Hugh Henry: There is a difference between lawyers who have been asked by the Law Society to carry out tasks on its behalf and then to adjudicate on its behalf—in effect reporting to the society of which they are members—and a person coming to work for an organisation and acting in a professionally independent way from the Law Society, notwithstanding the fact that they might themselves be lawyers.

I am not convinced that it would be proper to suggest that, although we want professional and competent people to carry out independent examinations, lawyers should be barred or excluded, like lepers. It would be wrong to discriminate against people who have the proper qualifications, ability and attitude and who will work for an organisation that will be completely independent of the Law Society. I hope that sufficient personal and intellectual rigour will ensure that such people do the job properly.

Louise Miller: It will be up to the commission to decide on the extent to which it wants to appoint people who have legal backgrounds. People will be able to compete openly with other applicants for jobs on the commission. Any lawyers who work for the commission will be employees of a body whose board members will be mostly non-lawyers. They will have to satisfy their employer about how

they do their jobs and will have to work according to precedents that have been set by commission members, either when taking important cases with precedent-setting value or when hearing appeals. Employees will, when they deal with cases at first instance, have to work within those parameters.

Jeremy Purvis: I stress that I am not wishing to raise fears. That was probably the first time that we have heard evidence on how the commission will be operated on a day-to-day basis, and it was important to hear it.

The Convener: I should say at this point that, if there are any matters that the minister and his team feel we should be enlightened on, or on which you have had further thoughts, we would be pleased to receive short communications from you.

Hugh Henry: Sure.

Colin Fox: I turn to the bill's provisions on mediation, which you can imagine is a skill that has been in great demand in certain quarters over the past weekend.

I draw your attention to the evidence from the Scottish Legal Action Group. SCOLAG suggested that there might be conflict between the commission's mediation role and its complaint-handling function. Might it be considered necessary to separate those two functions? Should the bill stress that rather more?

Hugh Henry: As Colin Fox will recognise, a good mediator is worth his or her weight in gold.

Colin Fox: How kind.

Hugh Henry: Sometimes, remarkable results can be achieved. I do not think that there is a conflict of interests there.

Colin Fox: SCOLAG is concerned that, if the commission gets involved in mediation, it will not be seen to be independent of the two parties.

Hugh Henry: That could draw us into a discussion about what mediation is exactly, and about whether an attempt at mediation implies a certain prejudice in the person who attempts to mediate. I see no problem with the commission trying to encourage people to talk to resolve their conflicts amicably and, if that fails, to then decide to investigate. Even before it gets to that stage, the commission will be able to refer complaints back to encourage some sort of negotiated settlement. The short answer to Colin Fox's question is no. An attempt to encourage mediation would not prejudice a subsequent rigorous investigation by the commission.

Colin Fox: Perhaps the nub of the question is this: If, in all good counsel, parties attempt mediation and push it as hard as they can until it fails, will that compromise the complaint-handling system thereafter? Do you see that possibility or are you still not worried about the distinction?

Hugh Henry: I do not envisage a problem. It is good practice to encourage parties to try to resolve problems to their mutual satisfaction. I see no reason why the commission could not rigorously interrogate and investigate a complaint if mediation had failed.

Bill Butler (Glasgow Anniesland) (Lab): You will be aware that several witnesses, including the Law Society, the Faculty of Advocates and SCOLAG, have expressed concerns about the new commission's independence from Government. They expressed concerns about schedule 1, in which ministers are granted power of appointment of members and power of removal of members where the member is

"unsuitable to continue as a member".

Schedule 1 also sets out ministers' role in setting members' remuneration, the lack of a minimum term of office for members and ministers' power of direction in exercise of the commission's functions. Colin Fox referred to mediation, which was another concern with which you dealt. Do you acknowledge those concerns? Is the Executive minded to amend any or all of those areas in order to meet witnesses' concerns?

Hugh Henry: Those concerns were raised in the context of the bill allegedly not being compliant with the European convention on human rights. Our legal advice prior to introduction of the bill was that it is ECHR compliant. We have re-examined the bill and we still firmly believe that it is ECHR compliant. Therefore, we do not think that the arguments that are raised by Bill Butler are relevant. However, it is proper for us to do everything in our power not just to ensure that the bill is ECHR compliant, but that it is as widely acceptable as possible.

If we need to ensure that there is absolutely no doubt that ministers will not be able to act inappropriately in the ways that Bill Butler suggested, we will make suggestions. At the moment, we believe that the bill is ECHR compliant, but if we can do something to improve it without compromising its fundamental principles, we will consider doing so.

Bill Butler: I am grateful for the minister's assurance that the Executive will do everything in its power to ensure ECHR compliance. Will the Executive turn its attention to the ministerial power of direction? We have received evidence that such direction would be general in character. In the light of Lord Lester's opinion, will you consider whether ministers need the power of direction in relation to the commission? Do you have any thoughts on that or are you in just the initial stages of exploring the subject?

15:00

Hugh Henry: That falls into the same category as the other issues to which I referred. We believe that the bill is ECHR compliant. We have no reason to think otherwise, but if there are steps that we need to take to improve the bill or to avoid doubt, we will consider them. We do not think that the powers of direction to which Bill Butler referred should cause concern, but we will reflect on the arguments that have been made.

Bill Butler: I have one last area to explore in relation to ECHR compliance. One of the worries that people have raised is about the lack of an external right of appeal. Do you see that as a real concern or do you think that having no such right of appeal is the right way to go?

Hugh Henry: We do not accept the argument that the lack of an external right of appeal compromises the bill's ECHR compatibility. We remain absolutely convinced that there is no need for an external right of appeal. We believe that what is proposed is rigorous and adequate. I think that to introduce an external right of appeal would raise issues on which we would all want to reflect.

One of the driving principles of the bill is that we want to ensure that the public are confident that complaints will be dealt with properly, quickly, efficiently and effectively. We have to gain consumer confidence. We do not want to make it easy for people to make frivolous or vexatious complaints but, where people have a genuine complaint, we want to make it easy for them to find out to whom to complain and we want them to be confident that their complaint will be dealt with quickly. We are, in a sense, simplifying the process. That does not meet with everyone's approval. If we were to have an external right of appeal, we would have to consider who would bear the financial burden of it.

Bill Butler: Professor Paterson made the point that that would drive up the costs for the complainer and thus defeat the objective of the commission.

Hugh Henry: Absolutely. Would the legal profession meet the costs of providing an external right of appeal? What would the external appeal body look like? Would it be fair for the profession to meet the cost of an external appeal if the complainer's argument was not upheld?

Bill Butler: The Law Society—

Hugh Henry: I just want to finish this point. Would it be fair for the cost in any way, shape or form to fall on the complainer, or non-lawyer? If either side had to have recourse to legal representation and the costs of a failed complaint fell on the unsuccessful party, would we then introduce the potential for them to claim legal aid, with all the implications that that would have? In many cases, the unsuccessful party, who might be a member of the public, would not qualify for legal aid, so the cost might fall on them. Would that not introduce a significant deterrent to people who have limited resources? The people with the deepest pockets would be able to afford to lodge an appeal, but others would be disadvantaged.

Far from allowing members of the public to access an external right of appeal, we could be introducing a perverse incentive for legal firms, which have access to legal back-up, to appeal every case in the knowledge that the other party would not be able to afford the costs of an appeal. That would have profound implications. Superficially, it might appear attractive, but I am not sure that it would be in the interests of what we are trying to achieve.

Bill Butler: What you say on costs and the complainer—the ordinary member of the public—is compelling, however I have one last point, which concerns something that the Law Society raised. Do you agree that, setting aside costs—although we cannot set them aside in reality—the correct body to hear an appeal would be the sheriff court?

Hugh Henry: Well, we cannot set them aside.

In a sense, such an appeal would defeat the whole purpose. We have attempted to create something that is easy to access, simple to pursue and not a financial burden on an individual member of the public who feels aggrieved. If a complaint got beyond the frivolous and vexatious test, the commission would deal with it.

If we introduced an appeal to the sheriff court, we would introduce the need for legal representation—at least, it would be advisable for a party that is represented in the sheriff court to have legal representation—and so we would go from the commission handling a complaint at no cost to the complainer, to the complainer having to go to the sheriff court, having to go to the expense of getting a lawyer without knowing whether they would be able to recover that expense and potentially being liable for the other side's costs should the action fail. We could argue that that would introduce the potential for those with the greatest resources to use that route if, for whatever reason, they did not want a commission decision to be upheld. That would fundamentally weaken what we are attempting to achieve.

Bill Butler: It is helpful for the committee to have that on the record. In my view, it is a compelling argument. I am obliged.

The Convener: Bill Butler listed a number of powers that ministers may or may not have. A number of witnesses from different backgrounds suggested that ministers should not appoint the commission's members but that some external

body that is perceived to be more independent should appoint them. Will you tell us why you have gone down the route you have chosen? From whom would you take advice on making appointments, bearing in mind that you would be appointing lawyers and non-lawyers?

Hugh Henry: I return to what I said to Bill Butler: we have listened to the arguments and we still believe that our proposal is valid. However, we will think carefully about what has been said and will wait and see what the committee's report says. If we can do anything to strengthen the bill by addressing those issues, we will, but it would be premature to indicate that that will happen.

There are a number of ways in which we might make these appointments, as is the case with appointments to other public bodies. For example, we could advertise and conduct interviews subject to the Nolan principles on appointments. There are fairly well-established procedures for making such appointments. Although they are nominally and technically ministerial appointments, rigorous safeguards are now in place concerning how those appointments are made and how people conduct themselves.

The Convener: Thank you for that clarity.

Maureen Macmillan: As you know, under the bill, the Law Society will deal with conduct complaints and the commission will have the power to examine the way in which complaints are handled. However, the outgoing Scottish legal services ombudsman said that it is not possible to work out whether a complaint has been handled properly without looking at its substance. Should the commission be able to take a view on the substance of the conduct complaint rather than simply be able to recommend that it be re-investigated?

Hugh Henry: The commission will have to take a general look at the substance of a complaint to work out what aspects it can legitimately deal with. If, after dealing with the complaint, it feels that a conduct matter remains, the matter should be referred either to the Scottish Solicitors Discipline Tribunal or to the Law Society under the new powers that will be introduced.

Maureen Macmillan's proposal might remove the distinction between service and conduct complaints. If the commission started to comment on conduct issues, it would be drawn into imposing disciplinary sanctions. We have never entertained that idea—and, as I said earlier, we would oppose any such move.

Maureen Macmillan: But you think that the commissioner should be able to refer a conduct complaint to the Scottish Solicitors Discipline Tribunal.

Hugh Henry: I ask my colleagues to confirm what will happen if the commission identifies any outstanding conduct issues.

Louise Miller: If the commission classifies a complaint as raising a conduct issue, it will refer that issue to the relevant professional body. As far as solicitors are concerned, the Law Society will decide whether a complaint is of a lower order that falls within the definition of unsatisfactory professional conduct and attracts censure, a relatively small fine and whatever, or whether it is a serious matter that should be prosecuted before the tribunal. In the latter case, the Law Society of Scotland will appoint a fiscal to prosecute the case.

Maureen Macmillan: But what if the Law Society decides not to prosecute such a matter before the tribunal? The Scottish legal services ombudsman has the power to refer the matter to the tribunal, although I believe that the former ombudsman only threatened to use it. Will the commission have such a last resort power? Is that a matter of process, or of substance?

Louise Miller: That power is not in the bill, because the former ombudsman never used it. If I remember rightly, she said in her evidence that, given the bill's other measures, that power is not necessary.

Maureen Macmillan: My impression was that she thought that the power was very useful and should be retained.

Hugh Henry: We will reflect on those points.

Louise Miller: I might not have remembered it correctly, but that is my recollection of the ombudsman's evidence. I will take another look at the *Official Report* and, if I can find the passage that I have in mind, I will forward it to the committee.

Jeremy Purvis: The commission will, in effect, oversee the handling of conduct complaints, but if it feels that the Law Society has not adequately investigated, say, a hybrid complaint or another complaint that it refers on, it will not be able to do anything about it.

15:15

Hugh Henry: It is correct to say that the commission would have no power over an individual conduct complaint. If we gave the commission such a power, we would take it into different territory. Where the complaint is hybrid, as Jeremy Purvis has outlined, the commission and the professional body would have parallel powers to make awards and to impose sanctions.

In the light of the evidence collected by the committee at stage 1, we will consider whether we

can introduce a simpler provision for the handling of hybrid complaints. We will look at that again. It could also be that the professional organisation might be required to compensate for the mishandling of a complaint.

There are issues that we will look at again to see whether we can make things simpler, but I would hesitate before engaging the commission in handling individual conduct complaints.

Jeremy Purvis: I appreciate that. If the comparison with the Independent Police Complaints Commission is not too much of a stretch, that commission will effectively be able to instruct the reinvestigation of a complaint that it is not satisfied was carried out correctly by the police force. Indeed, it is also able to approve the individual who oversees that complaint. I am interested in what would happen if the Scottish legal complaints commission had the power to instruct the payment of compensation to the client, but the Law Society determined that there was no misconduct. That would create the interesting situation in which a body that had not investigated the complaint could find guilt and order compensation where the body that had investigated the complaint had not found misconduct.

Hugh Henry: It would be wrong, in legal terms, to assume that the referral of a complaint issue to the Law Society indicated guilt, because the commission would not be determining guilt or otherwise in relation to that conduct complaint; the commission would be saying that it believes there is an issue that the Law Society should examine. It would be wrong for the commission to prejudice or predispose that complaint. Arguably, there could be a failure of service but no failure in relation to conduct, so we should be careful about suggesting that all service failures imply a failure in relation to conduct.

Mr Stewart Maxwell (West of Scotland) (SNP): I take the minister back, briefly, to his response to one of Mr Purvis's earlier questions about the appointment of lawyers as the investigators in the commission. That seemed to me to strike at the very heart of what we are trying to do, which is to get away from lawyers investigating complaints against lawyers. I understand the argument that people should not be barred from employment opportunities and that if they work for the commission they should do so to a professional standard, but surely public perception is as important as the reality. There must be other examples of bars to appointments. For example, there are political bars to appointments to various jobs, for obvious reasons where the perception of a conflict of interests might be just as damaging a real conflict of interests. Would it be appropriate to apply the same kind of rules when appointing investigators to the commission?

Hugh Henry: If the Law Society was appointing the investigators, that would be an issue and such appointments would not be allowed, but we are talking about an independent body appointing people. I do not think that the analogy with political restrictions is the same.

Generally, political restrictions apply to posts that carry a significant degree of seniority and the responsibility to implement policy decisions made by politicians. It could be prejudicial to have the individual engaged in a political process that may influence the policy decisions that they must implement. I suspect that that explains some of the thinking there. I am not here to give a justification for that, and I have my own views on political restrictions, but I would hazard a guess that those are some of the arguments that have been used.

If the Law Society appointed the adjudicators, there would be an argument there, but, to repeat the points that I made earlier, we are talking about an independent body seeking to attract qualified, capable and professional individuals who will work to the standards that are set by that body and who will be accountable to that body. The fact that someone has had legal training might be regarded as a bonus in some respects; looking at it in another way, it should not be regarded as a barrier.

People with certain professional backgrounds often become the most vociferous critics of the profession from which they come. It would be illogical to say that, because a person comes from a certain professional background, they should not be able to make any contribution to a debate that concerns that profession. It would be a matter for the commission. If the commission appointed people simply because someone from the Law Society picked up the phone and suggested that it fill up its membership with the society's placemen and placewomen, whom the society would keep its eye on, I would worry—but we are to have an independent organisation. It may appoint lawyers, but it might not. It might appoint people from different backgrounds. I would argue that having people from a range of backgrounds would be a healthy way to proceed.

Mr Maxwell: I will move on from that matter, although it is interesting that we could end up with lawyers investigating lawyers again, which is what, in my opinion, we were trying to get away from.

Hugh Henry: Perhaps I have been failing to get my point across. We have lawyers who are accountable, in a sense, to the Law Society, who are appointed by the society and who operate under the rigours of the society. We seek to prevent them from being the final adjudicators in relation to complaints about other members of the Law Society. We are talking about people who are

lawyers—those with legal training, whether or not they retain their membership—and who are employed by a completely independent body, over which the Law Society has no control or influence. That is a completely different thing. It is not the same argument at all. If I have given the wrong impression, I apologise. I wish to make it clear that the argument is different altogether.

The Convener: What I took you to say was that the people concerned are employees of the commission, which will have an expectation of their performance of duties for it.

Hugh Henry: Absolutely.

The Convener: That is separate from their legal or other professional qualifications.

Hugh Henry: Yes. You have put it so much better than I could have done. Thank you.

The Convener: Thank you. Can I have that in writing, please?

Mr Maxwell: Thank you for that summary, convener. I will move on to access to justice.

A number of witnesses gave written and oral evidence on their concern about a possible detrimental impact on access to justice in some areas. Some witnesses mentioned rural areas, others mentioned areas where certain types of law are practised. Some people highlighted the poorer areas in our society. The substance of their concern was that, because of the new levies and the increased maximum compensation level, people will be driven away from certain areas of practice. Do you accept that argument? Do you accept that it is possible that what they fear might happen?

Hugh Henry: No, I do not accept that argument.

Mr Maxwell: Not at all? Do you not acknowledge the argument that if a marginal amount of money was being made in some areas, it would not be worth continuing if people were continually being complained against? Different areas of law generate different volumes of complaints. Certain people might conclude that it is not worth carrying on in areas where a lot of complaints are generated.

Hugh Henry: We hear those arguments in relation to other aspects of the law. I will leave aside for the moment the matter of the complaints levy. I just wonder about this. I accept Stewart Maxwell's point about the possible tendency for people to complain in certain areas of activity. I do not have figures to hand, but we can imagine complaints being made about conveyancing work by people who feel disgruntled or dissatisfied about the way in which a house has been bought or sold. There could be complaints about criminal matters: people might feel that they have not received proper representation, and that it led to a judgment with which they were dissatisfied.

The same could apply in various areas of civil law, with disputes over divorce or the settlement of property. That can happen across a range of areas. Will that impact more on rural areas than on non-rural areas? I do not see why, other than in the case of one or two complaints made in a rural area having a disproportionate effect compared with those made in a major urban area, simply because of the scales involved.

The argument presupposes a negative, unconfident view of the world in which people think that their life will be turned upside-down because of the volume of complaints. I would have thought that people would have more confidence in their ability to resolve complaints. Indeed, we are trying to encourage people to resolve complaints. We considered a levy on the firms against whom complaints are made because we wanted to encourage a culture where complaints are resolved as early as possible.

The concerns also indicate a view that all complaints will lead to sanctions at the £20,000 level. I am not sure why people think that they will receive a plethora of complaints that the commission, following investigation, will find not only justified but so serious as to warrant a £20,000 fine or levy. If the commission found such a level of complaints, we would wonder what had been going on all these years. If such a volume of complaints has not come to light before—they are not being made—why should it suddenly happen just because a different body is conducting the work?

I expect the vast majority of complaints to be of a relatively low level, and that they may or may not justify some compensation at a lower level. Not all complaints will necessarily justify financial compensation. That will be a matter for the commission. If we accept the premise behind the arguments that Mr Maxwell has described, we could walk away and leave things as they stand. I am not persuaded that that is the right thing to do.

Mr Maxwell: So you are pretty confident that people in certain communities and areas of our society will not be denied access to justice, because you do not believe that individual lawyers or firms will pull out of certain areas of work. That effectively summarises the position: you do not believe that that will happen.

Hugh Henry: I would be tempting fate if I said that that will not happen, but I would wonder why a firm had so little confidence in it ability and efficacy that it decided to pull out of a certain area through fear of a £20,000 fine. I simply do not know on what basis a rational firm that has confidence in its professional competence would make such a decision.

15:30

Mr Maxwell: I think you are right, but let us speculate for a moment. What would you do if, in the light of experience, it was found that there were variations in the abilities of certain communities or individuals to access justice? What scope exists for making adjustments in the future?

Hugh Henry: Stewart Maxwell has raised the wider issue—which Maureen Macmillan has also raised with me on a number of occasions—of access to legal services in certain areas of the country and in certain areas of activity. That is a slightly separate issue, which I will leave aside.

We are talking about people pulling out of work as a consequence of the bill because of concerns about the profession-wide levy and/or the complaints levy or the potential fine or penalty that the commission would impose. If companies were pulling out of work because they were faced with a plethora of fines by the commission in certain areas, I would first of all want to look closely at why those companies were attracting such fines, as I am sure that the commission would do its work objectively.

Section 20 of the bill is entitled "Amount of levies and consultation". Stewart Maxwell has raised issues that are more to do with the potential financial penalty than to do with the levies. If there was a problem only with the levies, the commission would need to consider whether their impact varied in different parts of the country. If people were pulling out of work as a result of attracting financial penalties, that would be a separate issue, which companies themselves might want to address.

Maureen Macmillan: I hear what you say, but an awful lot of noise is being made out there. In a survey, the Scottish Law Agents Society found that 46 per cent of the solicitors who responded said that they will withdraw from certain types of work on the passing of the bill—they will not even wait to find out what complaints are made. How can you reassure them that they will not be heavily penalised by the passing of the bill?

Hugh Henry: I do not know whether they are the same companies that have told me that they are pulling out of criminal work because there is insufficient remuneration. Some companies have said that there is insufficient remuneration for civil work. There could be an overlap. If we are talking about different legal companies, we might find that 100 per cent of legal companies will pull out of all work because they fear the levies and the lack of remuneration in civil and criminal work. In that case, we would need to consider the waste of legal services throughout Scotland that we would have caused. However, I suspect that that will not happen.

There are issues in different parts of the country to do with people's ability to access appropriate legal representation. One issue that we might need to consider—which relates more to arguments about remuneration—is whether we should take steps to ensure that there is alternative access. For example, should we expand the public defender service, which is operating very successfully in Inverness? If private practices are unwilling to provide a service, should we step in with public provision? The bill does not cover such matters, but if lawyers pulled out of work because they feared the levies, we might have to consider other approaches that would allow lawyers to pursue more lucrative and remunerative work.

The Convener: We move on to questions on compensation for the client.

Jeremy Purvis: I might have misunderstood you, minister, but, in answers to earlier questions, I think that you said that companies may face fines of up £20,000.

Hugh Henry: It was probably inappropriate to use the word "fines". I apologise for that loose usage of language. I was referring to compensation payments.

Jeremy Purvis: That is helpful.

Can you give a bit of background explanation of why the maximum compensation payment has been set at a level that is four times higher than the previous maximum? You said that the concerns that some firms would withdraw their services because they were worried that they would receive fines of £20,000 were unjustified. Your point was that there was no justification for suggesting that sums of £20,000 would be awarded routinely, given the number of compensation payments of £5,000 that have been made and the pay-outs of that order that courts have made in successful negligence claims against lawyers.

Hugh Henry: If you are asking where the proposal came from, it is not something that originated from us. It first arose during discussions between my officials and representatives of the Law Society. It was suggested that we should try to be more comprehensive and to consider complaints and negligence together because that would avoid the need for negligence complaints to be dealt with in court, which incurs added expenditure, even though the settlements can be relatively low.

We reflected on that argument and thought that there was a degree of sense in it, so we introduced such a proposal in the bill. We should not assume for a moment that all the compensation awards will be at the upper end of the scale, but if there is a dispute about

negligence that can be resolved without people going to court, so much the better. Our proposal reflects the view that the more that disputes can be resolved without people having to go to court, the better. A wider spectrum of complaints than was originally envisaged will probably be covered. A similar proposal is being considered for England and Wales, so our bill will certainly not be out of step with theirs in that regard.

I am confident that the commission will behave competently and professionally. I stand to be corrected, but I think that the Financial Ombudsman Service can award payment of up to £100,000. However, even though such an award is possible, there is no suggestion that it has become the norm. I see no difference between the two situations. If such an arrangement can work in the financial sector, I see no reason why it could not do so in the legal profession.

Jeremy Purvis: Why should there be a difference between the amount of compensation that is payable for inadequate professional service and the amount of compensation that is payable for professional misconduct? There is quite a big difference between the amounts that are payable. The amount that will be payable for professional misconduct will continue to be £5,000, whereas the amount that will be payable for IPS—which will incorporate negligence—will be £20,000. If someone has incurred losses of £10,000 because of a solicitor's misconduct, they should try to ensure that their complaint is about negligence or IPS rather than misconduct.

Hugh Henry: I suggest that the scenario that Jeremy Purvis paints probably involves a complaint with both service and conduct elements. In such a situation, there would be no reason why the commission could not address the service issue that led to the financial loss that he described. The Law Society could address the conduct issue separately. I do not know whether a complaint would ever involve conduct alone, and it would be wrong of me to speculate. I do not know whether my colleagues could give a different example.

Louise Miller: On the first point, the power to compensate in conduct cases will not remain at £5,000; in fact, it is a new power that the bill will introduce. The professional bodies and the discipline tribunals cannot currently award compensation when a finding of misconduct is made, which has caused distress—some complainers who have had findings of misconduct against their solicitors have received nothing at the other end of the disciplinary process.

We have explained before that the compensation limits are different because the definition of a services complaint includes negligence aspects. The limit for services complaints is higher to allow issues that could have been brought to court as claims of professional negligence to be rolled up in services complaints.

The minister's description of the basic purpose of the compensation element in cases of misconduct is right. That will most commonly be used in cases that could have a service element, too. I do not know whether a case that involved purely conduct might attract compensation, although that could happen. Compensation could be awarded for inconvenience and distress, for instance. Negligence may well cause financial loss, too, but some professional misconduct or breaches of professional rules could cause the client inconvenience or distress, and it might be felt that that merited an award of a few hundred or even a few thousand pounds, if serious distress had been caused.

Jeremy Purvis: I accept all that. Some situations that would be considered to be misconduct—for example, a solicitor deliberately doing something that was serious and reprehensible—could also involve negligence and a solicitor's firm not providing a professional service.

My point is that as the compensation limits are different, a complainer who has experienced considerable financial loss will keep their fingers crossed that the commission will determine that their complaint involves IPS, because the best way to obtain redress will be to have a complaint considered to involve IPS or negligence. If the compensation limits for the two types of complaint are inconsistent, that puts the complainer in a difficult situation. I will leave you to ponder that, because it leads to my next question.

The minister talked about the potential for a head of complaint to cover negligence. I am anxious not to put words in your mouth, but I think that you said that you were reflecting on the potential for clarity about that. You will know that the former Scottish legal services ombudsman, the Scottish Law Agents Society and the master policy insurers have said that, for loss, a positive move would be a division between negligence, which could attract compensation, and other elements.

15:45

Hugh Henry: I clarify that we are not considering including negligence, because it is already in the bill. That was part of the development of our thinking about the £20,000 limit; it was suggested to us that such compensation should also cover negligence. We hope that the commission will deal with complaints of negligence fairly routinely. That would help to keep such complaints out of court, to avoid all the attendant expense.

Earlier, I described the potential for the commission to make an award of financial compensation when there had been negligence. There could also be a conduct-related element that may or may not attract a certain sanction, probably through the new power that the bill will give to the Law Society of Scotland.

We will continue to hold discussions with the people responsible for the master policy and the guarantee fund, but we have not yet seen any evidence that there will be a major impact on either.

Louise Miller: We have met people involved with the master policy and we hope to meet them again in the relatively near future. At the moment the Law Society considers services complaints that may have negligence elements, but because of the size of the self-insured amount and the upper limit for a services complaint, the master policy insurers have not so far had to be involved with services complaints at all. They are involved with larger claims—above the self-insured amount—that may go to court. I do not think that they have thought through what their response to the bill will be. We are therefore keen to continue our dialogue so that we can tease out some of the issues.

The Convener: At stage 2, will you make a specific comment that negligence settlements should be settled separately from IPS settlements?

Louise Miller: So far, we have not been attracted by that idea; we see a difficulty in introducing another category of complaint—especially when it would not affect which body dealt with the complaint. A complaint that was called a negligence complaint would still be dealt with by the commission.

Different issues would be involved. First, there would be different categories of complaint. It has also been suggested that there could be different categories of compensation: up to £5,000 for inconvenience and distress; and up to £15,000 for financial loss. Such compensation would be earmarked specifically. However, we are not sure whether such a system would be necessary, although it might be simpler to operate than having a separate category of negligence complaint.

We have not ruled things out. We are keen to talk to the insurers and find out more about their developing thinking and about the professional indemnity angle. Obviously, if new evidence emerges, it would be foolish to say that we will not consider it. However, at the moment we are not attracted to the idea of a separate category of negligence complaint. We might consider whether there should be separate categories of compensation, and we will consider the evidence on that.

The Convener: You will consider it and, I presume, deal with it at stage 2. Obviously, the committee is raising these issues now, at stage 1.

Louise Miller: Yes—if we are going to do anything about these issues, we will do so at stage 2.

Mr Swinney: Does the minister believe that the master policy offers adequate consumer protection?

Hugh Henry: To the lawyers?

Mr Swinney: No—to members of the public who use legal services.

Hugh Henry: We made our proposals because of concerns expressed by the Justice 1 Committee in the previous session of the Parliament about the length of time that it took to pay out under the master policy. The bill will give the commission powers to monitor the operation of the master policy. We think that our proposals will allow the commission to effect remedies that previously may have been provided through the master policy. If that can help to provide simplification and improve efficiency, so much the better. We have made no comment on the consumer friendliness of the master policy.

The Convener: Jeremy Purvis has a couple of points to make before we return to the funding of the complaint-handling system.

Jeremy Purvis: Minister, in their evidence, the insurers raised the concern that if the commission is to determine negligence while the courts are still able to do so in other situations, differential standards for determining negligence could develop. What is your view of that? If that is a problem, how can it be addressed?

Hugh Henry: The bill is not about removing the right of either party to settle in court what they regard as a fundamental legal dispute. No doubt the court would take into account any award that the commission made. If the court determined that a complaint was so serious that an even greater amount should be awarded, that would be a matter for the court. However, I suspect that such cases would be exceptional. In any event, such an outcome would not constitute a double penalty; it would simply be the court imposing a new penalty that would be partly offset by compensation that had already been made.

As I said, I think that any such case would be the exception rather than the rule. I would hope that, given the flexible way in which we are approaching the matter, most relatively low-level cases could be resolved by the commission without the need for people to go to court. However, I acknowledge that there will always be those who will want their day in court.

Jeremy Purvis: Insurers pay out for negligence and the commission will determine negligence and might order compensation for a considerable sum, which would be taken from the master policy. If there were differential standards, would the insurers not wish to test the matter in the courts in such situations? If they did so, would that not defeat the bill's purpose?

Hugh Henry: Insurers may well wish to do that. I cannot speculate on what they may or may not do. I am not sure that the bleak scenario of the commission paying out on huge claims is realistic. I see the potential for that to happen and for sizeable compensation claims to be made, but I see no justification for that becoming the norm, unless things have been happening of which we are not aware.

Jeremy Purvis: On third parties, the former Scottish legal services ombudsman raised in evidence the point that the definition of those who can complain includes third parties, but they are not included the categories that can receive redress. Is there a policy reason for excluding third parties from the commission's redress decisions?

Hugh Henry: I struggle to think what the direct financial interest of a third party might be. Normally, we would talk about a case being made by one party against another and the identification of a failure having an impact on that party. I do not know how there would be an impact on a third party in such cases.

The Convener: We received a document from one of your officials, which states:

"We intend to bring forward amendments which would ensure third parties who are directly affected and complain can also receive compensation."

Hugh Henry: That is the point that I was making. Where a third party is not directly affected, I struggle. Where a third party is directly affected and can show that, that is a different matter. If I understood the question, it was about widening the provision to include all third-party claims irrespective of whether the third party could show a direct link. I struggle with that. I do not know whether my officials can help me on that one.

Louise Miller: The bill's definition of who can make a services complaint specifically includes a third party who has been directly affected by inadequate professional services. That was a deliberate choice on our part. As drafted, the bill includes some references to "the client", but the expression needs to be wider than that, and we are working through those references before stage 2.

Hugh Henry: If there is an issue beyond third parties who are directly affected and have a direct interest, we will certainly consider it. However, at the moment, we think that the restriction to those who are directly affected is the proper way to proceed.

Jeremy Purvis: The point is that the party will be directly affected but will not necessarily be the client.

Hugh Henry: Yes.

Mr Maxwell: The Executive and officials have made much of the idea of the polluter-pays principle in discussions on the bill, but it seems that that principle has not been upheld in the funding arrangement. Irrespective of the outcome of a complaint against an individual lawyer—even if they are found not guilty and cleared of the complaint—they still have to pay the levy. Will you explain the thinking behind the polluter-pays principle, given that everyone will pay the levy irrespective of whether they are found guilty or not guilty?

Hugh Henry: Ultimately, it will be for the commission, in consultation with the profession, to decide how the levies will be set. When the bill is passed and is no longer within our ownership, the balance can change in whatever way the commission, in consultation with interested parties, thinks proper. The commission could indeed decide that, if a complaint is made but there is no case to answer, the firm should not pay. It could decide to opt for a profession-wide levy or for no levy on complaints.

We are attempting to encourage those against whom complaints are made to think about how they can avoid such complaints in future. That might be an incentive for firms to do all that they can to avoid a complaint being made. I have no strong view, frankly, about what should prevail ultimately. We thought that there was a forceful argument for having the balance that is set out in the bill. If others want to make the case that the levy should be distributed differently, it does not matter much to me, as long as all the relevant costs are covered.

All that we were attempting to do at the beginning was to set out something that we thought was coherent and which would contribute to firms and individuals taking a close look at how they conduct their business. Whatever is in the bill, it will ultimately be for the commission to set out new arrangements if it thinks that that is appropriate. What is included in the bill reflects what we have heard so far, but we will see what the committee's stage 1 report says as well.

Mr Maxwell: That is an interesting answer. I assumed that the Executive's view was that there should be two levies and that you had taken a policy decision on that.

Hugh Henry: That is correct.

Mr Maxwell: You seem to be saying something slightly different now. Perhaps I am putting words into your mouth—correct me if I am wrong—but you seem to be saying that the commission could decide to set the complaints levy at zero.

16:00

Hugh Henry: No, no. Well, yes, yes. How the commission decides to go forward with the levy would be a matter for the commission in consultation with those affected. The bill states:

"The Commission must, in January each year, consult each relevant professional organisation and its members on the Commission's proposed budget for the next financial year."

It continues:

"The proposed budget must … include … the proposed amount of the annual general levy and the complaints levy".

It does not say whether the complaints levy will be £1 or £1,000; that would be a matter for consultation. All that I am saying is that we recognise the argument for having a differentiation. Whether those against whom a complaint is made that is not upheld should make no contribution would, ultimately, be a matter for the commission.

We thought that there was an argument to be made, and we have heard several other arguments that have been made during the consultation. We will wait to see what the committee's report says before stage 2. If we think that we need to return to the issue at stage 2, we will. However, I have no hard-and-fast view of what the future might hold for that balance. That would be a matter for the commission.

Mr Maxwell: I am quite surprised by that. I had formed the view that you had a policy position on the matter and that figures had been quoted—rough estimates of what the general levy and the complaints levy would be. We seem to be moving on from that. You seem to be suggesting one of two things: either that you may reassess the policy and lodge amendments at stage 2, in the light of evidence, which is fair enough; or that you will leave it to the commission to set whatever levies and rates it sees fit to set, which is slightly different from where I thought we were. I have a complete lack of clarity around where we are. A policy memorandum was set out and there seemed to be an understanding of where we were; however, I am now not sure exactly where the Executive stands on the issue.

Hugh Henry: I will try to clarify. The policy memorandum sets out our policy view that, yes, there should be differential levies. There should be a general levy and a complaints levy, and we set out our arguments about why those should be set differently. We thought that there should be an incentive for firms to try to improve practice, resolve issues and avoid complaints. We felt that charging a general levy on its own would provide no incentive for firms against which complaints were made to address any potential offending behaviour; nor would that be fair on the rest of the profession. That remains our considered view on the best way in which to proceed.

Stewart Maxwell also asked whether we would propose any changes at stage 2. We have heard differing arguments about how the levies should be raised. We will wait to see what the committee's report says. If we think that a persuasive argument has been made by others and by the committee, we will reflect on that at stage 2. Our policy view has not changed, but we have said all along that we will listen and try to improve the bill—as we would with any other bill—as it goes through the parliamentary process.

The bill states that the commission's proposed budget must include

"the proposed amount of the annual general levy and the complaints levy".

Each year, the commission will have to consult on its budget and, as part of that process, it will have to consult on what the general levy and the complaints levy should be. The bill clearly gives the commission the power to determine what the annual general levy and the complaints levy will be. It will be for the commission, in consultation with the profession, to vary up or down either of those two elements to change their weighting. The bill does not prescribe a fixed relationship between the two levies, as it would not be appropriate for ministers to do that.

The Convener: We took evidence from individuals from Scotland Against Crooked Lawyers, who suggested that frivolous and vexatious regular complainers who had no grounds for complaint should be charged themselves. They were firm in suggesting that the innocent should not pay the polluter-pays charges. In your reflections, you might wish to consider that evidence, which your officials will have received.

Hugh Henry: I bow to the more detailed knowledge of Scotland Against Crooked Lawyers, but I would be fundamentally opposed to the introduction of a levy on complainers, as that would deter people from making genuine complaints.

I understand the superficial attraction of the suggestion in the context of someone acting completely maliciously and seeking to have a go at somebody. However, the commission can decide that a complaint is vexatious or frivolous and discard it at that point. It would be only if the complaint got by that initial hurdle that there would be any potential cost to a firm.

I caution the committee against introducing such charges. What one person might regard as completely malicious, another person might consider a forceful argument. That decision would be best left to the commission. I would not want to deter anyone who had a genuine grievance from making that grievance known.

Colin Fox: I welcome what the minister is saying in suggesting that the charges are a matter for the commission and that the commission's budget will be clearly attached to the levy. That is helpful and addresses the concerns that have been raised with us by people who think that it is simply unjust to penalise the innocent. Nevertheless, it was the committee's impression—it started with the bill team, from whom we took evidence first—that we were dealing with something that was hard and fast and that the Executive was committed to a set levy of £300 across the board and £150 for individual complaints. If the minister is offering us new evidence of the Executive's more flexible approach, that is welcome and the committee will take a different view of what we are dealing with.

Hugh Henry: Let me clarify the position. We have seen and heard nothing to suggest that our original proposals should be changed. We will reflect on what has been said so far, and we will wait to see what the committee proposes. Nonetheless, it has always been our view that, once the bill is passed, the level of both the general levy and the complaints levy will be a matter for the commission to decide, as will the relationship between the two levies. We have never suggested that the fees or the relationship between them that the Executive has proposed, following its consideration of the outline of the bill, will remain set for ever. I have no strong view one way or the other about what the commission might want to do in the future.

The Convener: Does John Swinney want to ask a question on that point?

Mr Swinney: My question is on the financing of the commission.

The Convener: I will let Stewart Maxwell finish his point first.

Mr Maxwell: Minister, I recognise the wording that you used from section 20(5)(a)(ii), which says that the commission's proposed budget must include

"the proposed amount of the annual general levy and the complaints levy".

However, I thought that that meant that there had to be an annual general levy and a complaints levy; in other words, both had to be set at an amount that was higher than zero. You seem to be suggesting that the commission would have the right to eliminate one of those levies, if it wished to do so, by setting it at zero. I had not considered that before. If you were unhappy with the levies that the commission set, would you or could you use your powers of direction to intervene?

Hugh Henry: Not if the commission had set out a competent budget, if proper consultation had taken place and if the commission could meet its financial obligations. We could not do anything if it decided that there would be a ratio of 1,000:1 or 2:1. We have said that the budget must include

"the proposed amount of the annual general levy and the complaints levy",

but we have not specified any figures in the bill or what the relationship between the two should be. We set out our preferred option to start the process and we still think that there is a persuasive and forceful argument for that. Other people have different views on the matter, which we will reflect on.

I do not know what the commission will conclude in the future after discussing matters with the profession. The profession might think that levying everyone for the whole amount—even though some people will never be involved in a complaint—is right, but the commission might take a different view. It might want to move the bulk of charges on to those against whom complaints have been made, or it might take the view that one or two complaints should be allowed before a charge is made. That is a matter for the commission. We simply ask that it produces a coherent and robust annual budget and that it spells out then what the two levies should be.

Mr Maxwell: I have one more question. In its report on the financial memorandum, the Finance Committee stated that it is

"concerned that while there is scope for some ministerial intervention with regards to staffing numbers and costs, there is no power of veto for Ministers in relation to the budget and levies being set by the Commission. The Committee believes there should be a more effective power of strategic financial scrutiny over the costs of the Commission to avoid the creation of a needless bureaucracy."

What is your view on that? There does not seem to be any cap on the budget, so the commission could in effect do what it wanted and you would have no power of veto or control over the budget.

Hugh Henry: Obviously, the new commission would be required to consult professional bodies, but we would not want those bodies to have a veto on what the commission wants to do. We would have the power to give directions on staff numbers and terms and conditions of appointment, which I hope would prevent empire building, although we will obviously have to reflect on that matter in the light of what I said in response to Bill Butler and consider whether inherent contradictions would be

introduced if any changes were made in that direction. The short answer to that question is that I do not know. We will have to ensure that everything else is consistent.

We would be open to considering additional powers to give the consumer and the wider public confidence. However, the paramount need is to ensure that the commission is independent and that there is no potential for political interference. Therefore, we would have to consider carefully anything that we were thinking of doing in response to anything that you have heard or that you might want to suggest. We would certainly not want to compromise the commission's independence for the sake of giving some guarantees. That might lead us back to ECHR issues that have been raised.

Mr Maxwell: I appreciate what you say about the importance of the commission's independence, but I am sure that you also accept that clear financial scrutiny of organisations such as the commission is needed. There is financial scrutiny of many organisations that are at arm's length from ministers.

Hugh Henry: The commission would be no different.

Mr Maxwell: Okay.

16:15

Mr Swinney: The minister was in the chamber last Thursday for the long debate on the Police, Public Order and Criminal Justice (Scotland) Bill, which will create the police complaints commissioner for Scotland. I am concerned that, on such issues, we should not create a self-perpetuating infrastructure. If we create an infrastructure, we should do so for a purpose.

I appreciate and understand the points that you made about the need for the commission to be independent, the need to protect the interest of the consumer and the need to handle complaints properly, but we need a mechanism for putting the brakes on the costs if a bureaucracy is created that does not reflect the case load or the workload of the organisation. I was pleased to hear what you said about reflecting on the need to construct a careful balance to protect independence, but there are also questions about whether the commission will become a financial burden on the profession. None of us wants that.

Hugh Henry: John Swinney is right to raise those concerns. It would be in nobody's interest if an inordinate burden was created because the commission was trying to justify its existence and its empire. There is a balance to be struck between the ability for someone to intervene and the commission's independence from political interference, which people want. That is a dilemma. On the one hand, the profession wants the body to be free from ministerial influence but, on the other, as John Swinney and others have said, there are those who want to ensure that someone—possibly ministers—could intervene if everything got out of control. We need to reflect on that.

On the wider issue of how the commission will fit in with the other bodies that were mentioned in the debate last week, the commission is slightly different because it will be funded by the legal profession. John Swinney suggested last week that we need to rationalise some of the bodies, but I would not want to suggest that the Scottish legal complaints commission would fit easily into that process.

Mr Swinney: I agree. I do not think that the commission is part of that argument, but it is part of the general debate about the size and scope of government.

Before stage 2, will the minister consider whether there is a role for Audit Scotland to carry out an independent assessment of the appropriateness of the commission's budget vis-à-vis the tasks that it performs? That could perhaps be done biennially or every five years.

Hugh Henry: I will reflect on the concerns that are being expressed about how we ensure that what is done is appropriate and commensurate with the responsibility that is allocated. I do not know what the conclusion will be, but we will certainly consider that.

Maureen Macmillan: The man and woman in the street might find that the part of the bill on legal aid will have a greater impact on them than will the parts on the legal profession. The minister will note that all the responses that we received on how legal advice by non-lawyers might work suggested that it should be paid for by grant funding rather than on a case-by-case basis. Will amendments on that appear at stage 2? The bill team suggested that they might. Have you had further thoughts on the matter?

Hugh Henry: We have always taken the view that grant funding would be a desirable development from a strategic perspective. It sits well with the other improvements to address supply problems and the contracting and direct employment of solicitors—that refers back to our earlier discussion about potential gaps in some areas of the country. The Scottish Legal Aid Board is developing some of the concepts in parallel with the bill. We are discussing with SLAB the grant funding of the non-legally qualified advice sector. We need to consider how case-by-case funding for the new registered advisers scheme in the bill will work.

It is not a question of having either one or the other; we foresee a role for both. There is an argument for case-by-case funding, but we accept that there is also an argument for grant funding. It was not easy to resolve this issue before the introduction of the bill, which is why there are no references to it. At stage 2 we hope to lodge amendments on some kind of grant-funding scheme, but we will wait to see the stage 1 report first.

Maureen Macmillan: Citizens Advice Scotland would like there to be grant funding. Which organisations or individuals do you foresee having case-by-case funding?

Hugh Henry: At this stage, it would be wrong to identify who would have case-by-case funding and who would qualify for grant funding. All we are saying is that both types of funding could have a role. In some areas of work, there could be an argument for case-by-case funding, but at stage 2 we will consider taking steps to ensure that grant funding is available.

Maureen Macmillan: Do you agree with me that grant funding would be more inclusive and would encompass people who cannot get legal aid funding at present?

Hugh Henry: Grant funding could be more inclusive, but it could equally be argued that case-by-case funding would respond more flexibly to levels of demand than would grant funding. I am not sure that it would be appropriate to rule out one type of funding, and we are willing to consider changes at stage 2 to allow grant funding.

Maureen Macmillan: Is it the intention that advice and assistance services that are offered by solicitors could, in future, also be offered by non-lawyers? SLAB has suggested that, as the bill is drafted, non-lawyers could offer only preliminary advice.

Hugh Henry: The bill does not attempt to create a parallel system, with people who are legally qualified and people who are not qualified both offering the same services. It is not about creating an alternative legal profession; it is about identifying areas in which non-lawyers may be as able to offer advice as are lawyers. I remember from my days as a welfare rights worker—and I am going back many years—that there were areas of the law to do with social security, disconnections and housing for which a range of community-based advisers were pretty familiar both with the law and with people's problems. However, we knew that there would sometimes come a stage—if a case had to go to court, for example, or if certain complexities arose—when we would have to access people with wider experience. That said, I remember that social security commissioners sometimes dealt with very complex legal arguments. There are still people out there who do that job exceptionally well. I mention that just by way of example.

Louise Miller: The point that SLAB raised is really a drafting point. Various steps can be taken towards receiving advice and assistance before someone gets as far as requiring full-blown legal aid. At the moment, only the most preliminary steps towards initial advice have been copied over into the provisions of the bill. Our legal advisers spotted that quite soon after the bill's introduction, without our having to draw their attention to it. It is a mistake and we intend to correct it.

Maureen Macmillan: That is fine.

Will mediation services come under these provisions? The funding of mediation services has been discussed during debates on another bill, and some organisations that offer mediation services hope that they might access funding through this route.

Hugh Henry: We will consider that matter carefully. I have a strong commitment to the development of mediation services, which can make a significant contribution. We have demonstrated financially and in our policies our support for mediation as a way of resolving conflict. It remains to be seen whether it would be appropriate to fund mediation through legal aid. I would not close my mind to that, but neither would I give you the assurance that such funding would automatically be available. If mediation can be viewed in the context of the type of cases that I was talking about as worth exploring, we will by all means consider it.

The bill is not a means to provide general funding for everything that we think is desirable in the advice sector. I think that organisations would suffer if we removed the responsibility for providing much of the advice and support work from those who currently fund such initiatives. However, mediation has a significant contribution to make and we will consider it carefully.

Maureen Macmillan: So funding from legal aid might perhaps be part of a bundle of funding. I do not want to put words into your mouth, although that is what I am doing.

Hugh Henry: We would consider what you suggest, but I can give no commitment that mediation would be covered. I have a strong personal commitment to mediation and the department has a strong policy commitment to developing mediation services. We recognise their value and significance. I hesitate to say whether the funding situation can be remedied by legal aid. If a case can be made that would fit within the parameters within which we are examining the area, there is no reason why mediation would not be covered. However, I do not want to raise

expectations that funding will be available to compensate for current funding problems.

Maureen Macmillan: I hear you.

Are you confident that robust quality-assurance mechanisms are in place or can be put in place for non-lawyer advice services? Should whoever provides such services be subject to the commission regime?

Hugh Henry: That would be difficult because we are talking about something specific. Other means may have to be sought to address that issue. Indeed, the provision of financing is a way of regulating such services. If the services did not meet the objectives on a case-by-case basis, clearly the financing would stop then or when grant funding was reassessed. If we did what you suggest, we would have to introduce a set of rules governing people who would not be subject to the same professional requirements. We might have to introduce levies. We need to consider how we can best go forward in that area. I do not know whether my officials have been involved in further discussion on that.

Louise Miller: We have not so far considered having registered advisers covered by the commission. We must bear it in mind that there is currently no profession of registered adviser; the profession is purely embryonic. Such people will be able to access advice and assistance funding only in areas that ministers will prescribe. Many people in the advice sector who do not represent specialist agencies will not be able to access funding for the full range of what they do. Many of those who eventually sign up for funding might not use it in every case that could qualify. A characteristic of such agencies is that they often get funding from a variety of sources. They may get local authority grants and, once the bill goes through, they may get grants from the Scottish Legal Aid Board. To an extent, they will probably mix and match their funding to cover their costs.

At this stage, we felt that it would be disproportionate to impose on registered advisers the full rigour of the commission, the levies and all the other measures that relate to the regulation of the legal profession. If we did that from the outset, I suspect that very few people, if any, would sign up to be registered advisers. If a profession of registered adviser takes off, further down the line some thought will have to be given to whether it is still adequately regulated. In the meantime, we will rely on the SLAB code of practice and the threat of deregistration if people do not comply with those standards.

16:30

The Convener: Jeremy Purvis will ask the final question, which is on rights of audience.

Jeremy Purvis: The bill contains a proposal for the extension of rights of audience to non-lawyers—it is in section 42, I think. As you may know, we recently received evidence that suggested that people could be assisted by a lay advocate, who would play a similar role to that which is performed by a McKenzie friend, a mental health advocate or an immigration adviser. Does the Executive have a view on opening up the civil courts to a lay supporter for a party litigant who is willing to take an oath of faithful representation?

Hugh Henry: We are using the bill to extend rights of audience. Jeremy Purvis raises a wider issue that we had not considered. Although there are no plans to do what he mentioned, I am not sure that I would dismiss the idea out of hand. I will wait and see how the debate develops. Currently, we have no such plans.

Colin Fox: Can I clarify that you are saying that you have no plans to introduce a provision that would allow people to use a McKenzie friend or a lay advocate?

Hugh Henry: That is correct. We will see how the debate develops.

The Convener: I thank the minister and his officials for making themselves available for a lengthy evidence session. We remind the minister of his promises to write to us on various issues. The clerks will liaise with his officials on the information that has been requested.

We will have a five-minute break before we go on to item 2.

16:33

Meeting suspended.

16:37

On resuming—

The Convener: Before we finish item 1, I must put a question to the committee. Do members agree to take in private consideration of the draft report on the Legal Profession and Legal Aid (Scotland) Bill at future meetings?

Members *indicated agreement*.

The Convener: I thank John Swinney for his attendance.

Petition

Justice System (Child Sex Offenders) (PE862)

16:38

The Convener: I welcome Paul Martin, who joins us for item 2. Petition PE862 was submitted by Margaret Ann Cummings. It calls on the Scottish Parliament to urge the Scottish Executive to conduct a full review of the current system for dealing with and monitoring convicted child sex offenders. The Public Petitions Committee referred the petition to us. Members have received a cover note from the clerk, which sets out the background. The purpose of today's consideration is to ask the committee what actions, if any, it wishes to take. A number of choices are available to us.

Before we make our decision, I ask Paul Martin, who has a constituency involvement in the petition and has spoken on the petitioner's behalf at the Public Petitions Committee, to say a few brief words.

Paul Martin (Glasgow Springburn) (Lab): As the committee will know, Margaret Ann Cummings—who is here today—submitted her petition on 7 June last year. She has followed its progress closely. Although it is recognised that the Executive has responded to the petition in legislation, there are a number of outstanding issues, which are set out clearly in the members' paper. One of those is housing allocation policy as it relates to the relocation of registered sex offenders. Another issue is how effective Megan's law is in the States.

One proposal that I suggested to the Public Petitions Committee, which it has referred to this committee, was identifying a number of issues that arise from the petition that Margaret Ann Cummings has lodged and inquiring further into whether the legislation that the Executive produced can be added to. Another idea is to consider the best examples of managing sex offenders throughout the world. Members will appreciate that, given the concerns that Margaret Ann Cummings and the community have raised since the tragedy of Mark Cummings's murder, we want to learn the lessons. The Executive has responded positively, but we could still constructively deal with several outstanding issues.

The committee might wish to consider an inquiry, which could include evidence from holding a videoconference with experts in the States who deal with Megan's law. I know that we have taken evidence in videoconferences with other parts of the world; I remember doing that as part of the Justice 1 Committee for its prison estates review inquiry.

The Convener: As the Parliament progresses towards the end of the second session, the committee has quite a workload. That is not an excuse, but a fact of life. Another bill is to come to us. However, the issue that the petition raises is very serious and has been well aired in the media. The issue has arisen in the Parliament in various forms and not just through the petition.

Does the committee wish to seek written evidence on any of the matters that the petition raises, to seek oral evidence from the petitioner, the minister or any other relevant individual or group or to take any other action? Paul Martin described a modern way of taking international evidence. I open comments to committee members.

Bill Butler: Obviously, everyone in Scotland is aware of the tragic and awful murder of Mark Cummings. Paul Martin was correct to say that the Executive and the Parliament have taken a range of measures that seek to deal with the management of people who have been convicted of child sex offences. The Management of Offenders etc (Scotland) Act 2005, the Police, Public Order and Criminal Justice (Scotland) Bill, which we passed last week, and Professor Irving's report, "Registering the Risk", are positive steps forward.

Paul Martin raised a couple of issues that Margaret Ann Cummings relates in her response to the Scottish Executive's letter. He mentioned housing allocation and comparable systems abroad—he referred to Megan's law. Margaret Ann Cummings also mentions issues such as the assuming of an alias, and the reclassification of child sex offenders to distinguish paedophiles from other sex offenders. She mentions other issues, but those are the four main points that I recollect from her response to the Executive's letter.

As the convener said, it is a fact of life that as we approach the end of the session, the committee's time is constrained. I suggest that important issues remain to be examined fully. I accept entirely what Paul Martin said on behalf of his constituent and what his constituent said in her response to the Executive's letter. However, if we examined the issues, what we did would be rather piecemeal, given what is on our plate.

I suggest that we refer the petition back to the Public Petitions Committee, not as a matter of batting it back to that committee so that it remains in limbo, but with regard to the issues that are outstanding. I did not know this, but I have been informed that the Public Petitions Committee is now able to institute a full-scale inquiry. I think that

that committee would be in a much better position—and, I hope, have more time—than this committee to examine comprehensively the important issues that remain. I suggest that constructively as a means by which the outstanding matters could be interrogated by a committee of the Parliament.

16:45

Jeremy Purvis: Bill Butler has ably set out the differences that remain. There are other issues, including the proposal for specific courts and how many sex offenders would be settled into an area. Those are complex issues that require detailed responses. I am sympathetic to the call for a more thorough inquiry; however, I disagree with Bill Butler's suggestion. This committee has done quite a bit of work on the petition so far. We have received a briefing from the officials in taking forward the Irving recommendations and we have had an evidence session with the minister. We have also scrutinised some of the proposals to change the legislation, as Bill Butler outlined. I therefore think that it would not be a big burden on the committee to extend our work to look in detail at some of the issues that Paul Martin has raised.

When we considered our advance work programme, there were a couple of slots for potential evidence sessions. I suggest that, if the committee feels that it wants to do more work on the petition—which I believe would be a good thing—we should ask the minister to come back not only to update us on where the Executive is on implementing some of the non-statutory Irving recommendations, but to respond to the further points in the petition. There are other issues, which the committee raised in connection with the Police, Public Order and Criminal Justice (Scotland) Bill—for example, regarding children's hearings—that require a degree of consideration by the Executive in written evidence. We could perhaps get that in time to decide whether we want to have the minister before us in one of our sessions. I would be keen on our doing that as a minimum.

I am more relaxed about whether we should take comparative evidence from elsewhere in the world on the specific aspect of Megan's law. I would not be opposed to that. The question is whether SPICe is able to undertake a desk exercise on whether research has been carried out, to enable us to decide whether the committee needs to take evidence directly. I am open to either of those suggestions. I would be interested to know what happens elsewhere, as it is a complex issue.

As the first stage, however, I would welcome an update from the Executive to the committee. We would then be able to decide whether we should invite the minister and the petitioner to give us oral evidence.

Colin Fox: I am sure that the whole committee is aware of the public's anxieties about the current process for handling convicted child sex offenders. The petition highlights the other side of a report that was produced by Professor Irving. I note that the petitioner lodged the petition almost a year ago, and I am pretty sure that she will be anxious for us to get on with this as soon as possible. I lodged a bill that took two and a half years to come before the Parliament for debate. The petitioner will be looking for an assurance that the matter will be dealt with thoroughly and the complexities gone into. She will also want an assurance that the matter will be dealt with promptly, as she has waited for a year already. My concern—given the workload that the clerks outlined to us last week, which frightened us to death—is whether the committee can deal with the issue soon enough.

The petitioner is probably anxious for the petition to be dealt with as early and as thoroughly as possible. However, we must consider what is the earliest at which we can deal with the petition and when we can do it justice by taking video evidence from abroad. Paul Martin's suggestion about that was reasonable because the petition deals with a worldwide phenomenon. We should invite the petitioner and the minister—and others—to give evidence to the committee. It seems to me that we would need at least two evidence-taking sessions, and perhaps another for video evidence.

I am happy for the committee to deal with the petition. I agree with Jeremy Purvis that, given that the committee has already considered Professor Irving's report, it would make sense for us to continue the matter. However, what can we say to the petitioner about when we can deal with the petition? It seems to me that we cannot deal with it before the summer recess, so can we figure it in for after the recess? I am sure that the petitioner's concern is not whether the Justice 2 Committee in particular deals with the petition, but that whichever committee deals with it starts gathering evidence timeously and ensures that the petition is not lost in a morass. I suppose that that does not help our consideration of whether we can do the petition justice in the next six months. That is an open question on which I seek guidance from the convener and the clerks.

Maureen Macmillan: I agree with what Colin Fox said. It is important that the petition be dealt with as quickly as possible, irrespective of which committee deals with it. The Public Petitions Committee might be able to deal with it more quickly than we can. It might also be more appropriate to send the petition to the Public Petitions Committee again because of the cross-

cutting nature of what must be considered—for example, housing policy, with which this committee is not used to dealing. The Public Petitions Committee may be more cross cutting in considering all aspects, rather than just the legal aspects, of preventing reoffending by child sex offenders.

Mr Maxwell: I agree with much of what has been said. The Executive has already dealt with a number of points that the committee raised and its proposals are welcome. Some points may be dealt with by the sentencing bill that we will get later in the year, but we do not know yet. In the context of our workload, the convener referred to another bill coming to the committee. However, if memory serves me right, we will deal with two bills: a member's bill and an Executive bill.

It is almost a year to the day since the petition was lodged. The petitioner has a right to expect the Parliament to treat the issue with the seriousness that it deserves. I would prefer the Justice 2 Committee to deal with the petition. Jeremy Purvis made good points about relevant work that we have already done, including the areas that we debated last week and other issues with which we have dealt. I agree with Paul Martin's suggestion of taking video evidence from abroad. We should take video evidence from America or wherever, if that is appropriate.

I am happy for this committee to deal with the petition, but I think that we should undertake a full and proper inquiry. That would mean not only inviting the minister, the petitioner and other interested groups and bodies to give evidence, but taking video evidence. For example, there is a specialised person in the sex offenders unit in HMP Peterhead from whom we could take evidence. A full inquiry would entail inviting a range of bodies and individuals to give evidence and undertaking visits. However, given our timetable between now and the end of the parliamentary year, I do not think that we could do justice to such an inquiry. I would not like to start with, for example, an evidence session of an hour with the minister or somebody else, then just say, "Well, that's as far as we can take it because we don't have any time." Either we do an inquiry properly or we find another committee that can. It is important for an inquiry to be done properly and promptly. I struggle to see how we can fit an inquiry into our timetable, without evidence to the contrary. I agree with Maureen Macmillan's point about housing policy, but I think that the petition deals mostly with justice aspects, so it would be appropriate for the Justice 2 Committee to deal with it, if we can find time to do so.

The Convener: That was a helpful set of comments. The clerks have advised me that there would be some time on Tuesday 20 June and Tuesday 27 June to deal with the petition. However, given our current scheduled workload, we already run the risk of requiring two meetings a week, rather than one, when we come back in September.

Members also raised the point of committee members' expertise. Since I have been a member of the committee, we have been unable to conduct an inquiry, which is an essential part of parliamentary committees' work, because of our legislative schedule. I have been approached by other committees about which committee is most relevant to consider the Christmas Day and New Year's Day Trading (Scotland) Bill. The question of whether we will try to accommodate an inquiry involves the Minister for Parliamentary Business, the Parliamentary Bureau, the Minister for Justice and the Executive—obviously, because of the work that it has already done and its input—but also the Public Petitions Committee. We have to consider whether it could allocate time.

I support the idea that there should be a full-scale inquiry. We should either do it properly or not do it at all. I have great sympathy with the idea that the Parliament should consider the matter because it is a matter of public concern. I have no argument with that whatsoever, and I agree that we would have to take evidence from the various agencies that have been mentioned. Those agencies have to implement current legislation and possible future legislation and to provide appropriate staffing. Any committee that considers the matter will have to deal not just with the petitioner and the ministers but with the other organisations that are involved, many of which have been mentioned this afternoon.

I wonder whether the committee would allow me, before next week's meeting, to discuss the matter with the Minister for Parliamentary Business, the Parliamentary Bureau, the Minister for Justice and the Public Petitions Committee to see whether we can agree on where the petition should be placed and whether one of the committees can accommodate it, bearing it in mind that the Justice 2 Committee has expertise in the field and that we have finished dealing with the Police, Public Order and Criminal Justice (Scotland) Bill. However, if we are to make the right decision, we have to seek other people's views because it is the bureau and the Minister for Parliamentary Business that are in charge of the workload. We have some input into that, but we have to seek others' views before we can say yes or no.

I get the impression that the committee is minded to do the work, but our ability to do it justice is restricted because we have a compressed timetable before the Parliament is dissolved next year for the election. If we start the

work and then the Parliament is dissolved there is no guarantee that another committee will be willing to carry on where we left off. That is unsatisfactory for the petitioner and others, given the importance of the issue. I ask the committee to give me guidance on what it would like me to do.

Bill Butler: You sum up the position well, convener. The issue is a matter of serious public concern—everybody knows that. Colin Fox and others made the point that we want the matter to be dealt with thoroughly and promptly, given that it is a year since the petition was lodged.

I agree that you should discuss with the Minister for Parliamentary Business and the Public Petitions Committee the best way to progress these important matters. That is the best way forward. I agree that, in the next week, you should try to come to an arrangement whereby we can deal with these outstanding and serious matters.

Jeremy Purvis: I agree whole-heartedly with that. However, there is something that we can do now. The correspondence from the Minister for Justice in response to the petition is at least seven months old. We could write to her and ask for a response to the outstanding issues that Margaret Ann Cummings mentions in her letter and an update on where the Executive is with implementing the Irving recommendations. We can do that this week without prejudicing any other decision that is taken, and that will start the ball rolling. Whatever type of inquiry is held and whoever does it, it would be useful for us to do that. At least we will be taking action immediately.

The Convener: I have great sympathy with that view. Are there any other comments?

17:00

Paul Martin: I appreciate that there are timetabling issues. David Davidson used to be a member of the Local Government and Transport Committee and will appreciate the timetabling challenges that all committees face. In fact, I am meant to be at a Local Government and Transport Committee meeting at the moment—it is dealing with stage 2 of a bill.

As has been said, the petition was lodged on 7 June 2005. It will soon be the second anniversary of Mark Cummings's tragic death. The petitioner and members of the local community have raised their concerns constructively. The community has engaged with the Parliament and the Executive—it has met the minister—to change the current regime. I stress that concerns have been raised constructively; no vigilantes, who people always picture when communities are affected by such matters, have been involved.

There must be a committee inquiry of some sort. The petition has been batted about. The Public Petitions Committee considered it and referred it to ministers, and it has now come to the Justice 2 Committee. I am sure that we all appreciate the petitioner's anxieties in that respect.

I appreciate what has been said about not concluding the work by the end of the session, but we can at least have a target of completing it by then and dealing with key aspects of the matter. One aspect that alarms me incredibly is housing allocation. There is no housing allocation strategy. I do not want to get into the petition's details—I know that the committee is not doing so—but that is an example of the kind of issue that must be identified to be worked on. If key work is identified at an early stage, the Executive can respond in the interim even before the committee concludes its work. It would be wrong for the Executive to say that it will wait until the Justice 2 Committee completes its work before it takes any action. Influencing the debate while the issues develop would be helpful. Obviously, committee evidence taking is a powerful part of the Parliament's work. The committee could take evidence and influence how people think.

There is a wide range of views on housing allocation, and we must consider how to deal with it. As Jeremy Purvis said, we could pull together the existing evidence and mark it against what is in Margaret Ann Cummings's petition. The petition is good—it is clear about what it wants to achieve. We could consider the outstanding issues and have an inquiry. If that inquiry is not concluded, at least there will have been some influence. I appreciate the pressures that the committee is under, but if we do as I have suggested, we will serve the petitioner and the local community well. That community has served us well by being constructive and patient and reflecting on the issues that we face.

The Convener: I hear what you say, and you have heard what the committee has said. I think that we should make a formal decision the week after next when we have heard from others. In the meantime, I have no objection to writing to the Minister for Justice to obtain information that would be useful to any committee. Doing so would give us an opportunity to negotiate with people who have control over the workload that results from the Government's legislative programme. We respond on behalf of the Parliament and the people to proposed Government legislation.

Mr Maxwell: I have a question for Paul Martin. Earlier, I said that most of the issues that are involved are justice issues, and it is clear that a justice inquiry should be undertaken in the round. I am not trying to say that one issue is more important than another, but Paul Martin said that housing allocation had not been tackled at all. If housing allocation is one of the primary

outstanding problems—I know that there are others—would it be relevant for the Communities Committee to tackle it if it has enough time to do so?

Paul Martin: I will clarify what I said. Housing allocation is an issue for the Communities Committee, but the release programme for sex offenders is a justice issue. There is a crossover, but the primary issue is the monitoring process that is followed on the release of registered sex offenders. Significant progress has been made, but significant outstanding issues must be considered. It would be helpful to do so.

The Convener: Thank you for so clearly expressing your views to the committee on behalf of your constituent on a matter of great public concern. If you would kindly leave the matter with us, we will do our homework and find out what we can do. We need certain answers from other people before we can say yes or no to what has been asked and before we can refer the petition anywhere.

The public session of the meeting is now closed.

17:05

Meeting continued in private until 17:26.

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

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

The deadline for corrections to this edition is:

Friday 9 June 2006

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

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

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

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

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

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

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

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

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

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

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

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

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron