The Committee will meet at 2pm in Committee Room 1.

1. Council of the Law Society of Scotland Bill (in private): The Committee will discuss lines of questioning for the witnesses.

2. Items in private: The Committee will consider whether to discuss agenda item 6 in private. The Committee will also consider whether to discuss questions for witnesses for its inquiry into alternatives to custody and the Prostitution Tolerance Zones (Scotland) Bill in private at its next meeting.

3. Convener’s report: The Committee will consider the Convener’s report.

4. Council of the Law Society of Scotland Bill: The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   David Preston, President, Douglas Mill, Chief Executive, Michael Clancy, Director and Philip Yelland, Director, the Law Society of Scotland and David McLetchie MSP,

   Martyn Evans, Director and Sarah O’Neill, Legal Officer, Scottish Consumer Council,

   Linda Costelloe Baker, Scottish Legal Services Ombudsman and

   Jim Wallace MSP, Deputy First Minister and Minister for Justice.
5. **Subordinate legislation:** Jim Wallace MSP (Minister for Justice) to move—

S1M-3502 Jim Wallace: The Legal Aid (Scotland) Act 1986 Amendment Regulations 2002 (Draft)—That the Justice 1 Committee, in consideration of the draft Legal Aid (Scotland) Act 1986 Amendment Regulations 2002, recommends that the Regulations be approved.

6. **Witness expenses:** The Committee will consider whether to approve travelling expenses for a witness.

Alison Taylor  
Clerk to the Committee, Tel 85195

The following papers are attached for this meeting:

**Agenda items 1 and 4**  
Note by the Clerk (private paper) \( J1/02/39/1 \)  
Submissions received by the Committee for the Council of the Law Society of Scotland Bill:  
Law Society of Scotland \( J1/02/39/2 \)  
Scottish Consumer Council \( J1/02/39/3 \)  
Scottish Legal Services Ombudsman \( J1/02/39/4 \)  
SPICE briefing on the Council of the Law Society of Scotland Bill \( J1/02/39/5 \)  
Summary of submissions received by the Committee for the Council of the Law Society of Scotland Bill \( J1/02/39/9 \)

**Agenda item 5**  
Note by the Clerk (SSI attached) \( J1/02/39/6 \)

**Agenda item 6**  
Note by the Clerk (private paper) \( J1/02/39/7 \)

**Papers not circulated:**

**Agenda item 4**


**Papers for information circulated for the 39th meeting, 2002**

Submission from Joyce Nicoll regarding the Mental Health \( J1/02/39/8 \)
(Scotland) Bill and inquiry into alternatives to custody
Submission from John Thomson regarding the Title Conditions (Scotland) Bill
Justice 1 Committee

Submission from the Law Society of Scotland

The Council of the Law Society of Scotland Bill

BACKGROUND

The Bill arises from three proposals by the Council to remove any doubt about the powers of the Council -

1) to delegate their statutory functions to a committee or sub-committee or some other person;

2) to provide for the appointment of sub-committees in the scheme for the constitution of the Council; and

3) to provide for the appointment of non-lawyers to be members of a committee or sub-committee and, as appropriate, for the non-lawyers so appointed to form a majority in the committee or sub-committee to which they have been appointed.

The Law Society of Scotland ("the Society") is a statutory body corporate established by the Solicitors (Scotland) Act 1980 (c.46) ("the 1980 Act"). Under section 1 of the 1980 Act, the Society has as its objects the promotion of the interests of the solicitors' profession in Scotland; and the interests of the public in relation to that profession.

The Society regulates the profession of solicitors in Scotland and every practising Scottish solicitor is a member of the Society. The 1980 Act confers functions upon the Society but provides that the business of the Society is to be conducted by the Council and the Council may generally act for and in the name of the Society (section 3(1) and Schedule 1, paragraph 11). The Council consists of members elected by the Society. The constitution of the Council and of their committees is regulated by a scheme made by the Council and approved by the Society (Schedule 1, paragraphs 2-5). Statutory functions are conferred upon the Council by the 1980 Act and by other enactments,
including in particular the functions under sections 42A-C of the 1980 Act of determining and dealing with complaints made by a member of the public about inadequate professional services provided by a solicitor.

The background to the first proposal is that in 1999, questions arose as to whether the Council had power to delegate or arrange for the discharge of their statutory functions by some other person or body. These questions arose because of the common law rule that, where statutory functions are conferred upon a person, that person cannot generally delegate those functions to be discharged by someone else unless that person is authorised to do so either expressly or by necessary implication. This common law rule is not absolute and is subject to certain qualifications and exceptions but it may be argued that the functions of the Council do not fall within those qualifications and exceptions. There is no express provision in the 1980 Act which enables the Council to delegate their functions, even to their own committees or to a member of the staff of the Society. It may also be difficult to imply such a power, in view of the statutory precedents which exist where express powers to delegate are conferred upon a body, including, in particular, the powers conferred upon the Council of the Law Society of England and Wales to delegate their functions in section 79 of the Solicitors Act 1974 (c.47), as amended by paragraph 16(2) of Schedule 18 to the Courts and Legal Services Act 1990 (c.41).

In these circumstances, the Council decided in 1999 that, on balance and until a suitable legislative opportunity could be found to rectify the position, the safer course would be to make arrangements for its functions to be discharged by the Council. However, the burden of doing so is adversely affecting the Council's ability to provide speedy and effective regulation of the profession. The Bill, therefore, remedies this in section 1 by inserting a new section 3A into the 1980 Act which provides expressly that the Council may delegate or arrange for the discharge of their functions (other than excepted functions) by a committee, sub-committee or an individual. There are ancillary provisions enabling a committee or a sub-committee to sub-delegate the functions delegated to them but only with the approval of the Council. However, it is expressly provided in the new section 3A(10) that the new powers are without prejudice to any other power which the Council may have to delegate their functions. This is intended to preserve whatever arguments there may be for saying that the Council may already have powers to delegate their functions or at least certain of their functions.
The background to the second and third proposals arises out of the fact that the Council is required by paragraph 2 of Schedule 1 to the 1980 Act to prepare a scheme providing for "](d) the appointment and constitution of committees". The scheme containing the Constitution of the Law Society of Scotland only provides, in paragraph 22, that "The Council shall establish such Committees as it considers necessary". No reference is made to the appointment of sub-committees even although they have been appointed in the past. Equally, no reference is made as to whether persons other than members of the Council or the Society (i.e. non-solicitors) can be members of such committees or sub-committees, even although some have been appointed in the past. In order to remove any doubt about the position, section 2 of the Bill confers express powers upon the Council to make provision for such matters in the scheme and to enable lay persons to form a majority upon any committee or sub-committee to which they are appointed.

The provisions in the Bill are modelled upon those which apply to the Council of the Law Society in England and Wales in section 79 of the Solicitors Act 1974 (c.47), as amended by paragraph 16(2) of Schedule 18 to the Courts and Legal Services Act 1990 (c.41).

DELEGATION OF DECISION MAKING

The details of delegation are still being finalised; however, the following represents the thinking of the Client Care Committee on how delegation would operate in practice in relation to complaints handling:-

a) Delegation to Committees/Sub-committees

The Client Care Committees would be expected to deal with the decision making process and to be able to make the following decisions namely:-

1) to uphold or dismiss a complaint that a solicitor had provided an Inadequate Professional Service; and

2) to impose sanctions as set out in Section 42A(2) of the Act. Furthermore, it may be the case that Client Care Committees will be able to deal with complaints with professional misconduct and to:-
i) instruct a prosecution to the Scottish Solicitors’ Discipline Tribunal;
ii) dismiss the complaint of professional misconduct and express a view that the conduct is unsatisfactory or;
iii) dismiss the whole complaint.

However, this is an issue of policy on which the Society’s Council is yet to decide.

b) Delegated Powers to Individuals

There is also a need to have certain powers delegated to individual Directors, Deputy Directors and Case Managers.

The matters that require delegated powers on a formal basis are as follows:-

1) to allow Case Managers to determine whether or not a complaint should be investigated – there is the safeguard at this level in that a complainer can take a refusal to investigate to the Scottish Legal Services Ombudsman who can recommend that the matter is investigated;

2) to close files where matters are satisfactorily resolved and where the complaint is abandoned by the complainer not following through;

3) to issue Notices in terms of Section 15, 42B and 42C of the Act – if there is concern about individual Case Managers doing this then it might be appropriate for the Deputy Director or Director to have that power delegated to them with a view to ensuring matters progress as quickly as possible without the need to involve Committees approving the issuing of Notices and incurring delay.

Delegated powers can apply to any of the Society’s many Committees in the regulatory and non-regulatory areas.

The policy behind new section 3A(5) is to ensure that the Council shall not delegate to individuals the functions under section 33(1) or section 42A in relation to the determination of complaints. A clarificatory amendment may be necessary.
to ensure that arrangements can be made to allow individuals to identify whether a complaint is one of professional misconduct or inadequate professional services over which the Council has jurisdiction.

c) **Appointment of Non-lawyers**

In relation to the appointment of non-lawyers, it should be noted that many of the Society’s Committees already have non-lawyers as members. As well as the Client Relations Committees, non-lawyers are members of the Mental Health and Disability Committee, the Tax Law Committee, the Intellectual Property Committee, the Pensions Law Working Party and the Law Reform Committee. The Society greatly values the contribution of non-lawyers to the decision making process. The Bill, if passed, will provide a solid basis in law for the deployment of non-lawyers in the Society’s committees.

Michael Clancy  
Director  
Law Society of Scotland  
8 November 2002
Justice 1 Committee

The Council of the Law Society of Scotland Bill

Submission from the Scottish Consumer Council

The purpose of the Scottish Consumer Council is to make all consumers in Scotland matter. We do this by putting forward the consumer interest, particularly that of disadvantaged groups in society, and by working with those people who can make a difference to achieve beneficial change.

We welcome the opportunity to submit evidence to the committee on the Council of the Law Society of Scotland Bill. We have long been concerned with ensuring that regulation of the legal profession in Scotland operates in the interests of Scottish consumers. Our main concern regarding the Bill is to ensure that the interests of complainers are protected when they complain to the Law Society of Scotland about a solicitor.

We support the aims of the Bill, particularly in relation to the Society’s complaints-handling functions. When we gave evidence to Justice 1 committee on its inquiry into regulation of the legal profession, we supported the Society’s suggestion that it should be able to delegate powers to a complaints committee which includes lay people.¹

At present, the final decision on complaints must be taken by the full Council, which raises issues about the unequal treatment of the complainer and the solicitor who is complained about. Only solicitors can be members of the Council, while committees have lay members, giving greater transparency and balance to the complaints process.

We discussed the wording of the Bill with the Law Society before it was introduced. We are happy with the final wording of the Bill, particularly in relation to Section 1(5), which expressly provides that the Society’s complaints-handling functions cannot be delegated to an individual. Such an exclusion is essential to ensure that the procedure is fair to complainers, and protects their right to a fair hearing under Article 6 of the European Convention on Human Rights.

¹ Scottish Parliament Justice 1 Committee Official Report, Meeting No 2, 2002, 22/102, Col 3077
Sarah O’Neill
Legal Officer
Scottish Consumer Council
11 October 2002
Justice 1 Committee

The Council of the Law Society of Scotland Bill

Submission from Scottish Legal Services Ombudsman

Thank you for inviting me to comment on the above Member’s Bill. I am of course, familiar with the history that underpins the Law Society of Scotland’s wish to be able to delegate decision making powers. I have no observations to make on the wider management issues covered by the Bill, but I do have comments to make on the way the proposed changes would impact on complaint handling.

1. First, I support the removal of one of the many steps that complaints have to wind their through in the Law Society’ complex complaint handling process. When the Law Society obtained the Opinion on delegation and decided that Council of the Law Society should not delegate decisions it was, in my view, unfortunate, that Council was simply added in as an additional step in the process rather than taking a more radical re-structuring review. The current arrangements lengthen the complaints process and add to its complexity and repetitive nature.

As outlined in my recent Annual Report, I am also critical of the way Council has approached its duties. For example;

- I think it unfair that a complained against solicitor has the right to have a member of Council make oral representations at the Council meeting which considers the complaint when the complainant has no such right.
- I have identified cases where Council has not accepted, and not given adequate reasons for not accepting, recommendations by a Reporter (who conducts a detailed examination of the solicitors’ files) and Committee that a complaint should be upheld and the solicitor prosecuted before the Scottish Solicitors Discipline Tribunal for professional misconduct.

In general terms, it is unreasonable for a large body with busy agenda to give the time and detailed attention necessary to making informed and balanced decisions on complaints, especially given a process that generates a very large amount of paper.

2. The Bill as drafted is not, in my view, sufficiently specific in relation to complaint handling. I asked the Law Society to write to me to confirm its intentions with regard to complaint handling arrangements if the Bill becomes enacted. In the absence of a reply, I consider that the draft Bill allows too much discretion.
Over the years my predecessor Ombudsmen made a number of recommendations about having non lawyer involvement in the resolution of complaints, yet the Bill does not secure the steps gained.

I ask the Committee to consider adding a requirement to the Bill that all complaints about the conduct of and service provided by Members of the Law Society should be determined by a Committee which must include a proportion of people who are not Members, one of whom may be appointed as Chair.

The Committee may wish to note that the consumer organisations generally recommend that 75% of members of a complaint handling body should be from outwith the trade or professional body.

3. My reasons for recommending that the obligation should be in statute is best explained by an example of the steps that the Law Society is willing to make as a result of recommendations by the Scottish Legal Services Ombudsman compared with when a body such as the Financial Services Authority has the power to approve or disapprove complaint handling arrangements.

- My predecessor Ombudsman recommended in 1994 that the Law Society should require solicitors to issue engagement letters – to confirm the nature of the business to be undertaken, the timescales, the likely costs or the way the solicitor would charge for the work, what was not going to be done, and how to raise any queries. The Law Society rejected the recommendation. The Ombudsman repeated the recommendation in 1996 when it was again rejected by the Law Society. In a third attempt in 1998, narrowing the focus to a requirement to provide information about fees, the Law Society accepted the recommendation, amending the Code of Conduct in mid 2000. The Code of Conduct for Scottish solicitors is, however, said to be for guidance only, and Council has confirmed that a breach of the Code does not necessarily constitute misconduct, and it has declined to uphold a complaint where there has not been a letter of engagement. By way of contrast, where the Financial Services Authority muscle has been used, the Law Society has made terms of engagement letters for incidental investment business a mandatory Practice Rule.

4. My second observation is about the need for co-ordination and common standards. The Law Society has made slow progress in establishing standards of performance against which to assess complaints. Its stated position is that each complaint is dealt with in isolation from others, even though they may relate to the same solicitor(s) and show similar incompetence. The Justice Committee will note from my recent Annual Report that I have made recommendations to the Law Society aimed at better co-ordination by using the findings in complaints to improve the quality of legal services and to protect consumers from failing and inadequate solicitors. The one advantage of Council making the final
decision on all complaints is that it has had a broad oversight. That role would be lost unless there is a specific Law Society Committee charged with strategy and co-ordination. The model that I have in mind is of a Law Society Complaints Committee which oversees a number of sub-Committees directly engaged in the determination of complaints.

I recommend that the Justice Committee considers adding a requirement to the Bill that the Law Society should have a single Committee responsible for complaint handling strategy and co-ordination.

5. I have suggested in my response to the Justice 1 Committee Options paper on its Inquiry into the Regulation of the Legal Profession that complaints should be dealt with in three stages – Is the complaint upheld? What is the appropriate redress for the complainant? What measures are necessary to protect the public? This third step may involve taking a decision to mount a prosecution for professional misconduct before the Scottish Solicitors Discipline Tribunal. I suggest that the Justice Committee might wish to take evidence from the Law Society to ascertain its plans on who would take such a decision. My own view is that the decision would sit comfortably with the single complaints oversight Committee outlined above.

6. Finally, I understand that the Law Society wishes this Bill to be narrowly focussed and uncontroversial to make sure that it does not lose its slot in a busy Parliamentary timetable. It is, in my view, unfortunate that the Law Society has not seized the opportunity afforded by the Bill to put right a problem with its powers to order compensation to a client if a complaint about inadequate professional service is upheld. The maximum of £1,000 was set in statute and requires primary legislation to bring the level up to a current similar value.

I ask the Committee to consider adding to the Bill an amendment to Section 42A of the Solicitors (Scotland) Act 1980 as amended, to uprate the £1,000 maximum by inflation and to allow further upratings without the need for primary legislation.

Linda M Costelloe Baker
Scottish Legal Services Ombudsman
4 November 2002
COUNCIL OF THE LAW SOCIETY OF SCOTLAND BILL

FRAZER MCCALLUM

The Council of the Law Society of Scotland Bill (SP Bill 60) is a Member’s Bill, introduced by David McLetchie, MSP. It arises from proposals of the Council of the Law Society of Scotland to remove certain doubts about its powers.

This briefing looks at the constitution and functions of the Law Society and the Council; the background to and content of the Bill; the relevance of the provisions in the Bill to the inquiry currently being carried out by the Justice 1 Committee of the Scottish Parliament into the Regulation of the Legal Profession; and possible ECHR issues.

The Bill is due to be considered by the Justice 1 Committee, at Stage 1, on 19 November 2002.
KEY POINTS OF THIS BRIEFING

- The Bill arises from proposals of the Council of the Law Society of Scotland (‘the Council’) to remove certain doubts about its powers.


- Section 1 of the Bill provides for the delegation of statutory functions of the Council to committees of the Council, sub-committees of such committees and individuals.

- Doubts about whether the law, as it currently stands, allows the Council to delegate its statutory functions to committees and sub-committees led to the Council suspending such delegation in 1999. This is said to be “adversely affecting the Council’s ability to provide speedy and effective regulation of the profession” (Explanatory Notes, para 8).

- The suspension of delegation, that took place in 1999, did not wholly prevent the use of committees (and sub-committees) in carrying forward the work of the Council. Committees are still used to consider areas of work covered by the statutory functions of the Council and to make recommendations to the Council on such matters. However, it is the Council that implements any decisions in such areas. In addition, committees are used in relation to areas of work that are not covered by the statutory functions of the Council (eg consideration of how to respond to consultation papers).

- Section 2 of the Bill would require the Council to prepare a scheme for the appointment and constitution of sub-committees. It would also empower the Council to make provision for persons other than solicitors to be members of committees and sub-committees and, indeed, for such persons to form a majority of members.

- The Bill generally leaves the Law Society and the Council with discretion as to how the powers it contains might be used (eg it does not state when delegation should take place or when lay persons should be present on a committee).

- The Justice 1 Committee of the Scottish Parliament has, as part of its inquiry into the Regulation of the Legal Profession, considered a number of issues which are relevant to the Bill, including the delegation of functions of the Council and the role of lay persons.

- One possible ECHR issue arising in relation to the proposals contained in the Bill concerns Article 6 (right to a fair trial). However, although any decision to refuse to issue a practising certificate to a solicitor might be held to be a determination of civil rights (within the meaning of Article 6), case law suggests that this is not likely to lead to a breach of the Article.
INTRODUCTION

The Council of the Law Society of Scotland Bill (‘the Bill’) is a Member’s Bill, introduced by David McLetchie, MSP on 6 September 2002. Published along with the Bill are Explanatory Notes (and other accompanying documents) (‘the Explanatory Notes’). These were prepared by the Council on behalf of David McLetchie, MSP.

The Bill comprises three sections and, according to the Explanatory Notes (para 5), arises from three proposals of the Council to remove certain doubts about its powers:

- “to delegate their statutory functions to a committee or sub-committee or some other person;
- to provide for the appointment of sub-committees in the scheme for the constitution of the Council; and
- to provide in that scheme for the appointment of lay persons to be members of a committee or sub-committee and for the lay persons so appointed to form a majority in the committee or sub-committee to which they have been appointed.”

This briefing looks at:

- the constitution and functions of the Law Society and the Council;
- the background to and content of the Bill;
- the relevance of the provisions in the Bill to the inquiry being carried out by the Justice 1 Committee of the Scottish Parliament into the Regulation of the Legal Profession; and
- possible ECHR issues.

THE LAW SOCIETY OF SCOTLAND AND THE COUNCIL

The Law Society was established in 1949 and is now governed by the Solicitors (Scotland) Act 1980 (‘the 1980 Act’). All practising solicitors in Scotland are members of the Law Society.¹ There is also provision for honorary members and non-practising solicitor members (see Stair, vol 13, para 1144).

The Law Society acts as the statutory regulator of the solicitor profession in Scotland. Section 1 of the 1980 Act provides that the role of the Law Society shall include the promotion of: (a) the interests of the solicitors’ profession in Scotland; and (b) the interests of the public in relation to that profession.

Section 3 of the 1980 Act provides that the business of the Law Society shall be conducted by the members of the Council. In written evidence to the Scottish Parliament’s Justice 1 Committee, the Law Society (2001, p 6) stated that:

---
¹ As at 31 October 2000 there were 8,609 solicitors holding practising certificates (Law Society 2001, p 6).
“The Council consists of forty-four elected members of the Law Society supplemented by a number of ex officio members, for example the immediate past President, and not more than nine co-opted members including public sector and academics. The members of the Council are elected from a broad range of professional backgrounds and localities in Scotland on a constituency basis by the 8,609 solicitors with practising certificates and serve for three-year terms, retiring by rotation, although they are eligible for re-election.”

The Council performs various functions conferred upon it by legislation (primarily the 1980 Act). The Law Society (2001, p 3) outlined the statutory functions of the Council in its evidence to the Justice 1 Committee:

- “maintains the Roll of Solicitors in Scotland;
- regulates the admission of solicitors and issues practising certificates;
- ensures Continuing Professional Development is carried out;
- deals with restrictions on practising;
- makes professional practice rules;
- makes accounts rules;
- intervenes in practices;
- maintains the Guarantee (or compensation) Fund and provides for the Master Policy for Professional Indemnity;
- investigation of complaints of professional misconduct and inadequate professional services;
- governs the admission and removal of Notaries Public; and
- other miscellaneous issues such as registered European Lawyers and rights of audience in the Higher Courts.”

However, the work carried out by the Law Society and the Council is not limited to the functions which legislation obliges them to carry out. For example, various committees of the Council are involved in considering issues of law reform and possible responses to consultation papers. Further information on the functions, powers and duties of the Council is set out in the evidence of the Law Society (2001) and in Stair (vol 13, paras 1145 – 1152 and 1202 – 1210).

THE BILL

Background

The Bill arises from three proposals of the Council to remove doubts about its powers in certain areas. The first of these relates to the power of the Council to delegate its statutory functions to a committee, sub-committee or some other person. The background to this first proposal is outlined in the Explanatory Notes (paras 7 – 8). Briefly, it arises from concern that the law, given that there is no express provision in the 1980 Act empowering the Council to delegate its statutory functions, does not currently allow such delegation.2 Prior to 1999, various statutory functions of the Council were with the approval of the Council discharged by committees and sub-committees. However, questions were raised about the validity of this practice

---

2 Express powers of delegation are conferred upon the Council of the Law Society of England & Wales by section 79 of the Solicitors Act 1974.
and, in 1999, the Council decided to suspend the practice until legislation could be enacted clearly setting out such powers of delegation. The Explanatory Notes (para 8) state that suspension of the practice of delegating various functions to committees and sub-committees is “adversely affecting the Council’s ability to provide speedy and effective regulation of the profession”. The Law Society has commented that this has been a particular problem in relation to its role in the investigation of complaints against solicitors of professional misconduct and inadequate professional services.

It should be noted that committees (and sub-committees) of the Council are, even following the limitation of their use outlined above, still involved in carrying forward much of the work of the Law Society. One must, firstly, draw a distinction between the power to make recommendations and the power to take final decisions and, secondly, between the statutory functions of the Council and other areas of work.

The suspension has not wholly prevented the use of committees in areas of work covered by the statutory functions of the Council – committees are still used to consider such areas and to make recommendations to the Council. However, it is the Council that implements any decisions in such areas, by debating any evidence submitted by a committee and either agreeing or not agreeing any recommendations of the committee.

Committees are also used in relation to important areas of work which the Law Society and the Council are not obliged to undertake (eg consideration of responses to consultation papers). In relation to such non-mandatory matters, a committee might carry out some action on behalf of the Law Society (eg submitting a consultation response) prior to the Council considering the matter. This type of flexibility is considered necessary by the Law Society in order to deal with such areas of work in a reasonably speedy and effective manner.

The background to the second and third proposals, concerned with the appointment of sub-committees and with the appointment of lay persons to both committees and sub-committees, is also discussed in the Explanatory Notes (para 9). They state that, as things stand, there is no express provision allowing such appointments. Again, it is said that the proposals are aimed at clarifying the law by setting out clear powers to make such appointments.

**Commentary on sections**

The Explanatory Notes (paras 11 – 29) provide a fuller commentary on the sections of the Bill and should be read in conjunction with this brief commentary.

Section 1 of the Bill would amend the 1980 Act, inserting a new section 3A into that Act. Section 3A(1) would allow the Council to delegate its statutory functions (see page 5 above) to any committee of the Council, sub-committee of such a committee,

---

3 The Law Society has stated that, despite the absence of express provision for the appointment of lay persons to committees, non-lawyers are members of a number of committees – the Client Relations Committees, the Mental Health and Disability Committee, the Tax Law Committee, the Intellectual Property Committee, the Pensions Law Working Party and the Law Reform Committee.
or to any individual. Such an individual could include a lay person and need not be a member of the Law Society’s staff.

Section 3A(2) and (3) provide for sub-delegation of functions: (a) by a committee to either a sub-committee or an individual; or (b) by a sub-committee to an individual. Such sub-delegation would, however, be subject to restrictions. Firstly, any sub-delegation would be subject to the approval of the Council, and secondly, sub-delegation by a sub-committee to an individual would only be allowed to an individual who is a member of the staff of the Law Society. It may be noted that the staff of the Law Society includes both lawyers and non-lawyers.

The powers of delegation set out in the Bill would also be subject to a number of restrictions concerned with particular functions of the Council. Section 3A(1) and (10) provide that the legislative functions of the Council under the 1980 Act (referred to as ‘excepted functions’) could not be delegated (whether to a committee, sub-committee or individual). In addition, section 3A(5) provides that delegation to an individual would not be allowed for certain Council functions concerned with allegations that a solicitor has provided inadequate professional services or is guilty of professional misconduct.

Section 3A(9) provides that any delegation (or sub-delegation) of a function: (a) would not affect the responsibility of the Council for the exercise of that function; (b) would not prevent the Council from exercising the function; and (c) could be revoked at any time.

Section 2 of the Bill, amending Schedule 1 to the 1980 Act, is concerned with the second and third proposals outlined above. It would expressly require the Council to prepare a scheme for the appointment and constitution of sub-committees (the Council is currently required to prepare such a scheme in relation to committees). Section 2 would also expressly empower the Council to include, within any scheme for the appointment and constitution of committees and sub-committees, provision for persons other than solicitors to be members and also for such persons to form a majority of members. The Explanatory Notes state that, whilst current practice is to include non-solicitors on committees, it is thought appropriate to make express provision for this.

It may be noted that sections 1 and 2 of the Bill would expressly allow the Council to delegate its functions (also allowing the possibility of sub-delegation by committees and sub-committees) and empower it to provide for persons other than solicitors to be members of committees and sub-committees. The Bill does not, however, seek to set out how those powers should be used (eg it does not state when delegation should occur or when lay persons should be present on a committee).

Section 3 of the Bill provides for commencement of the Act one month after the date of Royal Assent.
INQUIRY INTO THE REGULATION OF THE LEGAL PROFESSION

The Justice 1 Committee of the Scottish Parliament is currently carrying out, and is due to report on in the near future, an inquiry into the Regulation of the Legal Profession (‘the RLP Inquiry’). The remit of the RLP Inquiry was formally announced on 19 June 2001 but was subsequently revised so as to focus on complaint handling within the legal profession (including both solicitors and advocates) rather than covering all regulatory issues (see Justice 1 Committee 2002, paras 2 – 7).

The scope of the RLP Inquiry is, in many respects, much wider than the scope of the Bill. It is not solely concerned with the solicitor profession and considers a wide range of issues relevant to the regulation of complaint handling. The Bill proposes changes within the existing regulatory framework for the profession, whilst one of the key issues being considered in the RLP Inquiry is whether the present regulatory framework for complaint handling is appropriate (see Justice 1 Committee 2002, paras 12 – 16). However, the scope of the provisions contained in the Bill also go beyond the focus of the RLP Inquiry in that their potential impact on the regulation of the solicitor profession is not restricted to complaint handling.

Although the scope of the RLP Inquiry is different from the subject matter of the Bill, it has included consideration of issues relevant to the Bill. The Justice 1 Committee (2002, para 27) stated that:

“One of the main problems is that statute constrains what the [Law] Society can do. One example is the inability to have lay input at the final stage of the complaints process because the (...) Council cannot delegate this function. The Law Society of Scotland told the Committee that it could improve turnaround times if it had such delegated powers (...). It is promoting a draft Bill to address the difficulties that the absence of delegated powers presents.”

The Justice 1 Committee (2002, para 37) also noted that:

“The importance of some level of lay involvement for an effective complaints system has been acknowledged by some witnesses to ensure that the profession does not proceed with a bias towards its own.”

In relation to the above points, the Justice 1 Committee included the following two discussion points in its inquiry options paper (Justice 1 Committee, 2002, Annexe A): 4

“Discussion point 9: The Committee favours the introduction of delegated powers to allow final decisions about complaints to be made by Committees of the Law Society rather than the Council. Do you agree?”

“Discussion point 10: Are you of the view that lay involvement in the complaints process for the Law Society of Scotland and the Faculty of Advocates should be increased? If so, how could this be achieved?”

4 Responses to the inquiry options paper were sought by 26 June 2002.
As discussed above, the Bill would allow the delegation of many of the functions of the Council. These functions include the issuing of practising certificates to solicitors. Any decision to refuse to issue a practising certificate might be held to be a determination of civil rights as the effect of such a refusal would be to prevent a person from pursuing his or her profession.

Article 6 of the ECHR provides that in the determination of his or her civil rights a person is entitled to a fair and public hearing before an independent and impartial tribunal established by law. However, it has been held that it is not necessary to look at each stage of the process in deciding whether this requirement is met. The decision making process is looked at as a whole. If the whole process is compatible there is no conflict with Article 6.

The Council’s decision to refuse to issue a practising certificate is, in accordance with section 16 of the 1980 Act, subject to subsequent control by the Court of Session, which can examine both the law and merits of a decision. The provisions in the Bill would not affect the right of a person to appeal to the Court of Session. Thus, even if it is possible that the delegation of functions could result in a determination being made by a committee, sub-committee or individual which or who, considered in isolation, did not meet the requirements of Article 6, case law on the interpretation of the Article supports the view that the process as a whole would still satisfy those requirements. A number of judgements on this point are noted below.

The European Court of Human Rights stated in its judgement in the case of Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 E.H.R.R.1 (at para 51) that:

“Whilst Article 6(1) embodies the ‘right to a court’ (...) it nevertheless does not oblige the Contracting States to submit ‘contestations’ [disputes] over ‘civil rights and obligations’ to a procedure conducted at each of its stages before ‘tribunals’ meeting the Article’s various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system.”


“(…) even where an adjudicatory body determining disputes over ‘civil rights and obligations’ does not comply with Article 6(1) in some respect, no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).”

---

5 Article 6 of the ECHR is a Convention right in terms of section 29(2) of the Scotland Act 1998.
Also, in the Petition of Tehrani for judicial review of a decision of the United Kingdom Central Council for Nursing Midwifery and Health Visiting, Lord MacKay of Drumadoon in the Court of Session stated at paragraph 55 of his judgement dated 25 January 2001:

“In my opinion, cases such as Le Compte, Van Leuven and De Meyere, Albert and Le Compte and Bryan establish that, as far as such tribunals are concerned, no breach of the Convention arises if the tribunal is subject to control by a court that has full jurisdiction and itself complies with the requirements of Article 6(1).”

BIBLIOGRAPHY


*Internet references*


JUSTICE 1 COMMITTEE

The Legal Aid (Scotland) Act 1986 Amendment Regulations 2002

Note by the Clerk

Background

1. These draft regulations aim to make civil legal aid available to those utilising the appeals process for both the Social Security Commissioner and the Child Support Commissioner. Those applying for civil legal aid will be subject to the statutory tests of financial eligibility, probable cause and reasonableness as prescribed in the Legal Aid (Scotland) Act 1986.

Social Security and Child Support Commissioners

2. The Social Security Commissioner and Child Support Commissioner are judges who determine appeals on issues of law arising under the Social Security Act 1998 and (since 1992) the Child Support Act 1991. Commissioners are appointed directly by the Queen on the recommendation of the Lord Chancellor and the Lord Advocate. At present there are eighteen full time Commissioners for Great Britain, of whom three are based in Edinburgh and normally sit to hear appeals there.

3. Appeals to the Commissioners for Great Britain come from the tribunal systems covering the whole of England, Scotland and Wales under the Social Security and Child Support Acts. The Commissioners provide judicial control over these tribunal systems on matters of law. Appeals may only be brought to the Commissioners with leave, so as to limit the cases dealt with to those where a significant point of law is involved.

4. A further appeal on law (also with leave) can be made by the Commissioners themselves to the Inner House of the Court of Session in Scotland and the House of Lords. In practice, appeals and references from the Commissioners occur in only a tiny minority of the cases dealt with by them. For the majority of people who become involved in the system, the Commissioner will take the final decision on any issue of law in their case.

Ongoing Committee work on legal aid

5. Committee members may recall that in the Committee’s 8th Report of 2001 on Legal Aid, the Committee recommended that various revisions should be made to broaden the scope of legal aid. Paragraph 25 of the report states;

‘The Committee is of the view that it would be beneficial to review the range of excepted proceedings to determine whether there is a need for extension. The Committee recommends that the Executive examine how access to legal aid could be made available to support a wider range of tribunals and panels. The Committee also recommends that the Executive examine the most effective form and method of delivery of legal aid for tribunals and panels.’
6. In January 2002, the Minister for Justice responded to this recommendation stating that the Executive intended to extend legal aid to proceedings before the two Commissioners (letter attached). This instrument gives effect to this commitment.

Consultation and further work by the Executive
7. In addition, the Executive has also consulted relevant organisations including the Scottish Legal Aid Board and the Commissioners themselves mainly on the practicalities and interpretation of the regulations. The Executive has also consulted regarding the fact that these regulations will only be operational in Scotland and such civil legal aid will therefore not be available to the Commissioners elsewhere in the UK. The Executive has stated that it will not be possible for the tribunals to refer cases to Scottish Commissioners for the purposes of making civil legal aid available via these regulations. However, the Committee may want to question the Minister further about the practicalities of how the regulations will operate in Scotland in relation to the situation in the UK.

8. The Executive has laid further related negative regulations separately to prescribe that the Scottish Legal Aid Board may only make civil legal aid available where any further appeal is to the Court of Session; exempt awards by the Commissioners from the normal clawback arrangements of legal aid costs; as well as allow the Board to sanction the use of counsel if necessary. These supporting negative instruments are likely to be considered by the Committee shortly. Committee members may wish to take this opportunity to question the Minister about these instruments and their link to the draft regulations.

Consideration by the Subordinate Legislation Committee
9. The Subordinate Legislation Committee considered the regulations on at its 29th meeting of 2002 on 29 October. In its 38th report of 2002, the Subordinate Legislation Committee determined that the attention of the Parliament need not be drawn to this instrument.

Procedure
10. The instrument was laid on 8 October 2002 and is due to come into force on 28 November 2002. Under Rule 10.6, the draft Regulations being subject to affirmative procedure, it is for the lead committee to recommend to the Parliament whether the instrument should come into force. The Minister for Justice has, by motion S1M-3502 (set out in the Agenda), proposed that the Committee recommends the approval of the Regulations. The Minister for Justice will attend to speak to and move the motion.

11. At the end of the debate, the Committee must decide whether or not to agree to the motion, and then report to the Parliament accordingly. Such a report need only be a short statement of the Committee’s recommendation.
JOHNSTON,

Justice 1 Committee Report on Legal Aid Inquiry

I read with great interest your Committee’s report on its recent inquiry into the operation of the legal aid system in Scotland. I would like to thank the members of the Committee for their contribution to discussion on a complex and important area of policy.

The Committee’s report ranges widely, and addresses a large number of issues, some of them technical and specific and others much broader. The recommendations the Committee addresses to the Scottish Executive, the Scottish Legal Aid Board, and the Law Society of Scotland are similarly wide in scope. Many of them call for a considerable amount of further research or technical work. My officials have been considering, together with the Board, how to take forward such work.

In these circumstances, I hope you will understand that I do not propose at this stage to go into detail in responding to the Committee’s report, nor do I intend here to address each of the specific recommendations in turn. I understand that it is proposed that we should have an opportunity to discuss the report in detail in Parliament. In the meantime, I propose to respond to the report in fairly broad terms.

From the perspective of the Executive, the Committee’s recommendations fall into four broad categories. Firstly, some recommendations address issues where action has, in fact, already been taken:

- Following a review by the Board, we have agreed changes to the urgency provisions to make it easier to get emergency help;
- We have announced a further extension of the contribution period for civil legal aid;
- In addition to providing legal aid for proceedings before employment tribunals, we have announced our intention to extend legal aid to proceedings before the Social Security Commissioners, the Child Support Commissioners and the VAT tribunal, and we have restated our commitment to consider the position for other bodies on a case-by-case basis;
- We have sent the Committee the report by the Scottish Legal Aid Board on its research into the reduction in applications for civil legal aid;
- We have also sent you the report by the working group on a Community Legal Service.
A second group of recommendations concern issues on which work is already in hand. In this category, I would draw attention to the following:

- My officials and the Board are considering the interaction of the benefits system and the legal aid system, bearing in mind the forthcoming benefit changes announced by the UK Government;
- My officials and the Board will also be reviewing eligibility for legal aid, in relation to both capital and income;
- We understand that the Law Society is finalising proposals for an increase in fees for civil legal aid work, linked to the introduction of a quality assurance mechanism and to other improvements in the operation of the civil legal aid regime. We hope to receive them before long, and will consider them carefully but promptly when we do. We attach particular importance to the issue of developing appropriate and rigorous quality assurance mechanisms;
- We also understand that the Faculty of Advocates has been working on the possible development of a system of graduated fees, and look forward to seeing its proposals in this respect;
- We plan to commission independent research into the impact of the fixed fee regime for summary criminal legal aid in the course of the coming year.

I will report back to the Committee on all of these issues in due course.

A third group of recommendations are broader and more far-reaching in nature, and will require very careful consideration before policy conclusions can be reached – notably, but not solely, in the context of developing a Community Legal Service for Scotland. This is the case in relation to:

- The suggestion to extend legal aid to cover representative bodies;
- The general wish expressed in the report to simplify the legal aid system (as opposed to consolidating recent changes, which is a different and essentially technical issue);
- The proposal to give wider powers to the Scottish Legal Aid Board to take strategic decisions on the provision of legal services;
- The question of whether to launch a broad review of the civil justice system in Scotland.

I should note in passing that some of the changes which the Committee would appear to envisage would require substantial amendments to primary legislation. As you will appreciate, the Executive will have to bear that fact in mind in deciding whether and how to proceed in the short term.

Finally, I think it only fair to say that there are one or two points on which we do not agree with the views expressed in the Committee's report:

- We do not think that the way to address any perceived difficulties in the operation of the small claims procedure is by making legal aid available;
- We do not see any persuasive evidence of anomalies or incoherences in the merits test;
- We are not persuaded that there is a case for making legal aid available for the very limited number of excepted proceedings.

As I have indicated, my officials are working with the Board on a number of the issues raised in the report. One essential component of that work will be costing possible changes to the system. I expect this to be a resource-intensive exercise, which will take some time to complete. I will of course report to the Committee on financial aspects together with the relevant policy conclusions - and, where appropriate, any relevant proposals for reform. However, it is not possible at this stage to
produce any reliable cost estimates on the basis of the broad recommendations in the Committee's report.

I should also underline the fact that there are a range of competing demands for the resources available in the Legal Aid Fund – as the Committee's report itself illustrates. There are also a number of existing pressures on current levels of provision: although, as you are aware, the Legal Aid Fund is not cash-limited. I will have to take careful account of the financial impact of any changes to the legal aid system, as well as their impact on improving access to justice for those who need it, in deciding how to proceed. In that context, it would be most helpful to have an idea of the Committee's key priorities for change among its numerous recommendations. I shall look forward to discussing this and other issues with the Committee in due course.

Yours sincerely,

JIM WALLACE
Justice 1 Committee

Mental Health (Scotland Bill and inquiry into alternatives to custody

Submission from Joyce Nicoll

The following submission may be useful for today’s considerations both of penal reform and mental health.

Part 1.:-

I am a member of the Institute of Directors and since 1993 have been involved with heading up multi-disciplinary projects relating to regional economic and sustainable development.

Prior to which I set-up and directed an institute specialising in the treatment of substance misuse in Germany for over 10 years. We were one of the first centres ever to offer methadone replacement & glue-sniffing therapy. We also treated other forms of addiction including alcohol abuse and eating disorders as well as gambling addiction. We strongly recognised the need for a flexible set of measures to address substance misuse and the need to integrate with other services.

For £1m/year we treated on average 300 people…ca £3,000/head!

The institute was pioneering in its integrated support for drug abusers. Such was its tangible success, that the state of Hamburg decided to formally offer treatment at this centre, and others following our approach, as an alternative to imprisonment.

From our experience with drug and alcohol abuse, I know it is certainly possible to offer effective and constructive services that will reduce secondary crime, assist dealing with addiction and assist integration back into the community.

This requires proper and integrated financing and training of personnel plus an integrated approach.

The level of financing required makes clear economic sense compared with the direct & indirect costs of imprisonment.

Today saw the broadcast of figures for England, showing that resources allocated to the health service for the provision of drug abuse services had not been used for these purposes and that surpluses remained.

As a professional I am shocked at the acceptance and level of both drug and alcohol abuse in Scotland. We must get to terms with this. Your committee recommendations may help in this process.

......
Part 2.

I only drafted this just now, so please accept ant clumsiness of expression & grammar!

You will be aware of the significant number of inmates there due to unpaid fines/bills etc.
This causes massive social and economic break-up of the families concerned.
The threat of imprisonment is more likely to drive people into petty crime and rouge lenders to help address their immediate debt.

I feel it is vital that the committee outlaw the use of imprisonment as a penalty for unpaid household related bills. Including council tax, unpaid parking fines, overdue utilities & credit card bills etc.
This threat and penalty stresses and can destroy the positive fabric of the most fragile households in Scotland/UK.
Eg a single parent may inadvertently incur a parking fine & because they don’t have a spare £30 to pay within 14 days then incurs £60, £90 & ultimately a criminal record.
Similarly, banks charging £30 for per returned direct debit, can cause a serious spiral in financial management for the poor ultimately getting so out of hand, due to the lack of financial ability to correct the situation, that imprisonment is threatened. The irony here being that the person had tried to be responsible by setting up the direct debit, and in many cases because of third party delays finances were not on the account at the time needed.
Someone with disposable income would find it no problem to pay the fine or penalty on time.
Similarly the fines do not act as deterrents or ease traffic congestion, as shown by the constant increase in fines and congestion, rather they serve as a legally endorsed revenue generator, disproportionately financed by those who can least afford it. Nor can they serve to “make” someone pay if the money is simply not there.

Perhaps one should try & define a clause whereby personal and household fines resulting from inflated late payment/excess overdraft penalties etc are not subject to imprisonment,
Or where the penalty charger is in a position to be able to self determine the level of the charge and as such is complicit in causing the problem in the first place, as they could always have had the option to waver the charge or to take into account personal financial circumstances.

One could also consider such a ruling for personal loan lenders, in order to discourage unsuitable lending and at extraordinary rates that people are unable to meet. Eg even with bank rates at 4%, most loans are around 11%, with many credit cards and HP still on 15-20% or even 29%. By definition those going for such loans, must be desperate and not have better rates available to them. So which party is behaving in an unscrupulous manner, and should be considered for going to jail?
It may perhaps be economic to consider offer

Good luck in your considerations!

Joyce Margaret Nicoll
BSc(Hons):Dipl.Psych;Dipl.Klin.Psych;MBDP;MBPS.MIoD.
12 November 2002
Introduction

1. The Justice 1 Committee issued a call seeking views from all interested parties on the general principles of the Council of the Law Society of Scotland Bill (“the Bill”) on 9 September. Responses were sought by 4 November 2002. This note summarises the responses received.

Background

2. The Bill is a Member's Bill, which was introduced on 6 September under Rule 9.14 of the Parliament's Standing Orders by David McLetchie MSP. The Bill makes provision about the discharge of functions of the Council of the Law Society of Scotland, the appointment of sub-committees and the appointment of lay members as members of committees and sub-committees of the Council.

3. The Explanatory Notes state that the Bill arises from 3 proposals by the Council which aim to remove any doubt about the powers of the Council which are:

   • to delegate their statutory functions to a committee or sub-committee or some other person;

   • to provide for the appointment of sub-committees in the scheme for the constitution of the Council; and

   • to provide in that scheme for the appointment of lay persons to be members of a committee or sub-committee and for the lay persons so appointed to form a majority in the committee or sub-committee to which they have been appointed.

Number of Responses

4. At the time of writing, the Committee had received a total of 41 responses to the general call for evidence. Of these, 20 responses were submitted by individuals, including solicitors. A range of organisations responded to the call for evidence, such as, the Law Society of Scotland, the Law Society of England and Wales, Office of the Immigration Services Commissioner, Scottish Consumer Council, Scottish Conveyancing & Executry Services Board, the Scottish Law Agent’s Society and the Scottish Legal Service Ombudsman. The Scottish Executive has not submitted written evidence.
Detailed summary of views

5. A number of respondents were supportive of the aims of the Bill and thought that the Bill would increase the effectiveness of the complaints system and speed up the time taken to handle complaints. Equally a number of those who submitted written evidence felt that the Bill did nothing to address the fundamental issue of self-regulation. The detailed summary of the evidence is provided below.

The Law Society of Scotland

6. The Law Society advises that the detail of delegation to committees has still to be finalised. Additionally, the Society’s Council has yet to decide whether committees will be able to deal with complaints of professional misconduct and be able to instruct a prosecution; dismiss a complaint of professional misconduct and express a view that the conduct is unsatisfactory; or dismiss the whole complaint. The Society states that some matters require to be delegated to individuals. For example to allow case managers to determine whether or not a complaint should be investigated; to close files where matters are satisfactorily resolved and where the complaint is abandoned by the complainer and to issue certain notices under the Solicitors (Scotland) Act 1980. The Society highlights that the Society’s Committees already have a number of non-lawyers as members.¹

Scottish Legal Services Ombudsman

7. The Scottish Legal Services Ombudsman supports the simplifying of the Council’s procedure, although states that the Bill is not sufficiently specific about complaints handling and allows too much discretion. The Ombudsman requests that the Committee consider adding a requirement to the Bill that all complaints about the conduct of and service provided by Members of the Law Society should be determined by a committee, which must include a proportion of people who are not members, one of whom may be appointed as Chair.

8. There is a need for co-ordination and common standards. It is suggested that a Law Society Complaints Committee be set up which oversees a number of sub-committees directly engaged in the determination of complaints. The Ombudsman says that it is unfortunate that the Law Society has not used the Bill to put right the problem with compensation to a client if a complaint about inadequate professional service is upheld. The maximum of £1,000 was set in statute and requires to be amended by primary legislation to bring the level up to a similar current value. Further upratings should not be required to be amended by way of primary legislation.²

¹ Law Society of Scotland, Written Evidence, October 2002, LSS35
² Scottish Legal Services Ombudsman, Written Evidence, November 2002, LSS33
Scottish Consumer Council

9. The Scottish Consumer Council supports the aims of the Bill, particularly in relation the Society’s complaints handling. In written evidence to Committee, the Consumer Council was supportive of the suggestion that the Council of the Law Society should be able to delegate powers to a complaints committee, which includes lay people. They explained that currently the final decision on complaints has to be taken by the full Council which raises issues about unequal treatment of the complainer and the solicitor who is complained about. The Consumer Council is content with Section 1(5) of the Bill which they understand expressly provides that the Society’s complaints-handling functions cannot be delegated to an individual. This provision is essential to ensure the procedure is fair to complainers and protects their right to a fair hearing under Article 6 of the European Convention on Human Rights.3

Scottish Conveyancing & Executry Services Board

10. The Board welcomes the Bill. They assumed that the Bill increased lay representation for all complaints committees and not all committees of the Society and state that the strength of the Board’s complaints procedure is in the 75% lay representation. They consider that it would be incongruous and unacceptable if those practitioners already registered with the Board should then be subject to a different regime.4 (given that the Board is soon to be abolished and its functions transferred to the Law Society).

Office of Immigration Services Commissioner

11. The Commissioner’s Office welcomes the Bill. The Commissioner has a keen interest in ensuring that the Law Society of Scotland operates efficiently and effectively because the Commissioner’s Complaints Scheme encompasses the investigation of complaints concerning the fitness and competence of any persons providing immigration advice or services including members of professional bodies. Complaints against a member of a designated professional body, such as the Law Society, would be for that body to investigate in accordance with its rules and procedures. The Commissioner considers that there should be a minimum of delay in dealing with complaints therefore the delegation of some of its functions to committees is welcomed. Also welcomed is the proposed change to enable the greater use of lay person involvement, as it believed that involvement of lay members will facilitate within the Society a greater appreciation of the concerns held by the clients of the profession.5

The Law Society of England and Wales

12. The Society welcomes the broad principles of the Bill and supports the objective of the Bill to enable the Law Society of Scotland to delegate functions. It believed the provision to underpin the appointment of lay persons to committees was a

---

3 Scottish Consumer Council, Written Evidence, LSS15
4 Scottish Conveyancing & Executry Board, Written Evidence, 22 October 2002, LSS18
5 Office of the Immigration Services Commissioner, Written Evidence, 24 October 2002, LSS19
positive step. In England and Wales, lay members form the majority of members of Adjudication Panels that consider complaints.6

The Scottish Law Agents Society

13. The Law Agents Society suggests that there should be specific provision for delegating powers in relation to an over-arching or supervising Complaints Committee. This should ensure uniformity of approach and decision-making, by informed senior people without having to go to the Council. They would be content if the Bill as drafted, allowed for this.7

Individuals

Self-regulation

14. The most frequently raised issue was whether the Law Society should be looking, in any case, at complaints against lawyers, as an independent complaints system was the only way to address concerns about self-regulation8. Other comments received were that the Bill would further disenfranchise people9 and that the Bill was just a window-dressing exercise and would do nothing in helping the people of Scotland.10 One respondent suggested that complaints pursuant to the Financial services Act 1986 should be withdrawn from the Society. The Ombudsman should be able to instruct the Society to undertake a course of action, and impose financial or other sanctions should the Society fail to investigate complaints in an efficient and timely manner and have authority to direct compensation be paid.11

Discretion to delegate functions

15. There was great concern from individuals with the way the Bill has been drafted, as it was considered to leave the Law Society with too much freedom of choice. For example, Section 1, which inserts Section 3A(1), Discharge of functions of the Council of the Law Society in to the Solicitors (Scotland) act 1980, uses the term “may” when “will” is considered to be more appropriate. A small number of respondents also sought clarity on what functions are excepted functions under Section 1.12 It was stated in one submission that in recent years investigating and determining complaints by clients of solicitors has been entirely transferred to committees which breaches statutory authority, as only the Council and the President are competent under the original statutes. The Bill seeks to legitimise this position and will do nothing to address the criticisms of the complaints system.13 Concern was expressed that the Bill does not address the unsatisfactory handling of client complaints as the proposal allows the Council to

6 The Law Society of England and Wales, Written Evidence, 5 November 2002, LSS39
7 Scottish Law Agents Society, Written Evidence, 11 November 2002, LSS40
8 Mr William Burns, Written Evidence, 13 September 2002, LSS1
9 Margaret Jacques, Written Evidence, 31 October 2002, LSS29
10 Mr David Emslie, Written Evidence, 2 November 2002, LSS30
11 Mr Anthony Dunlop, written Evidence, 4 November 2002, LSS23
12 Mr William Burns, Written Evidence, 13 September 2002, LSS1
13 Mr John Allison, Written Evidence, 31 October 2002, LSS22
retain control over the composition, election and placement of personnel and the numerical make-up of all committees and sub-committees.14

Committees consideration of professional misconduct complaints
16. There was some support from individuals that the use of delegated powers would save time and make the present situation more efficient. However there was concern though that the procedure will not protect solicitors if a committee made a “bad” decision, say for instance recommending prosecution. It was explained that under existing procedures the committee Convener would move the Committee Minute i.e. support the view of the Committee, rightly or wrongly. This should be addressed.15 This view was supported, and advanced that if a Committee composed of non-lawyers makes a finding on professional misconduct, that finding is no longer to be subjected to scrutiny by the Council, therefore it is considered that their decision may be open to Judicial Review on the basis that they were not qualified to make the test. A lay panel would be required to have expert evidence laid before it about what the average lawyer thinks about a particular course of action.16 Another respondent was also concerned that a majority of lay members may have an unwelcome impact on the consideration of solicitor misconduct. He suggested that a specialist committee should be formed to deal with misconduct matters.17

Appointment of lay members to committees
17. There were a number of views expressed on the number of lay members on committees. One respondent thought that committees should be made up only of lay people.18 Another advocates 50/50 split of legal members and lay representatives or majority in favour of lay persons.19 It was suggested that as the Law Society will appoint lay members they will not be seen as being impartial.20 There was also concern that as drafted the bill leaves Sections 42A(1) and (2) and Section 33(1) of the Law Reform Act 1990 solely in the hands of the Law Society without any lay involvement.21

Delegation of complaints handling to an individual
18. Where delegation is to an individual, it was considered that where that individual leaves their position, the complaint should be referred back to the Council to decide which person or committee completes the task.22

Procedures and standards relating to complaints handling
19. There was a concern that committees may be operating without clear procedures and making judicial decisions without offering a fair trial to the accused parties. Procedures should be a matter of public record so that the handling of particular

14 Ms Joan Pentland-Clark, Written Evidence, 4 November 2002, LSS36
15 Mr James McCann, Written Evidence, 18 September 2002, LSS3
16 Mr Paul Burns, Written Evidence, 15 October 2002, LSS12
17 Mr David O’Donnell, written Evidence, LSS37
18 Mr James Robb, Written Evidence, 21 October 2002, LSS16
19 Mrs A M Maslin, Written Evidence, 29 October 2002, LSS20
20 Mr John Allison, Written Evidence, 31 October 2002, LSS22
21 Mr David Docherty, written Evidence, 1 November 2002, LSS26
22 Mrs A M Maslin, Written Evidence, 29 October 2002, LSS20
cases can be measured against the established procedures.\textsuperscript{23} It was suggested that the Law Society should be obliged to publish in the Law Society Journal all decisions of the Scottish Solicitors’ Discipline Tribunal.\textsuperscript{24}

Other issues raised in written evidence
20. One respondent requested that the Committee concluded its inquiry into Regulation of the Legal Profession before the Bill is considered further.\textsuperscript{25} Another issue raised was the possible temporary nature of the legislation as the delegation of powers can be revoked at any time (Paragraph 23 of the Explanatory Notes).\textsuperscript{26}

Summary of issues raised
21. There appeared to clear areas of concern emerging from the written evidence. These are:

- Lack of detail concerning how Council functions will be delegated in practice;
- Uncertainty whether committees will be able to consider complaints of professional misconduct;
- Whether it is appropriated to delegate functions to an individual;
- Level of discretion retained by the Council of the Law Society;
- Proportion of lay people (whether chair of a committee should be a lay person);
- Need for co-ordination and common standards for complaints handling by committees;
- Legislative opportunity to uprate the maximum compensation from £1,000; and
- Whether committee should be allowed to consider complaints of professional misconduct.

\textsuperscript{23} Mr Brian Allingham, Written Evidence, LSS21
\textsuperscript{24} Mr James Orr-Ewing, Written Evidence, 4 November 2002, LSS38
\textsuperscript{25} Mr John Allison, Written Evidence, 31 October 2002, LSS22
\textsuperscript{26} Ms Moira Reekie, Written Evidence, 4 November 2002, LSS31
Lord James Douglas-Hamilton MSP.
Justice 1 Committee
Scottish Parliament
George IV Bridge
Edinburgh EH99 1SP

TITLE CONDITIONS (SCOTLAND) BILL

Dear Sir,

At the Justice 1 Committee Meeting held on 10th September, questions were raised as to whether Retirement and Sheltered Housing should be separately defined. In my own submission, I stated that a clear definition was essential.

To this end, I enclose copy of a letter from the Group Legal Adviser of Miller Homes, who developed my property, which clearly states that a difference does exist.

I would therefore, request that the terms of the above Bill, show clearly that RETIREMENT AND SHELTERED are not one and the same.

Yours faithfully,

[Signature]

JOHN THOMSON.
Mr J Thomson  
Plot 46  
20 Craiglea Place  
EDINBURGH  
EH10 5QD  

5 November 2002  

Dear Mr Thomson  

DEVELOPMENT AT CRAIGLEA PLACE, EDINBURGH  

Further to my letter of 14 October 2002, I have now had a chance to look at the background to the issue that you have raised.  

You will note that on page 14 of the Deed of Conditions it is clearly stated that “all the Flats shall be used and occupied in all time coming as retirement homes” which confirms that you are living in a development of retirement homes and not sheltered housing. I understand the reference in the Deed of Conditions to sheltered housing was in order to achieve certain concessions for residents such as a cheaper TV licence.  

Indeed, I am not aware of any permanently employed staff on site dealing with the needs of residents (other than a resident secretary who is dealing purely with administrative matters to do with the management of the estate), nor any other features of sheltered housing at the development.  

To conclude, the Deed of Conditions restricts the use of the development to retirement properties and there are no features of sheltered housing within the development. I trust that this adequately deals with your concerns.  

Yours sincerely  

PAMELA J SMYTH  
Group Legal Director
Purpose
This memorandum has been prepared by the Scottish Executive to assist consideration by the Justice 1 Committee of the Council of the Law Society of Scotland Bill ("the Bill"). This memorandum sets out the Executive’s views on the Bill, which was introduced on 6 September 2002, and confirms that it has the Executive’s support.

Background
The Solicitors (Scotland) Act 1980 ("the 1980 Act") empowers the Council of the Law Society of Scotland ("the Council") to conduct the business of the Law Society of Scotland ("the Society") and exercise the functions conferred by the Act in relation to the solicitors’ profession in Scotland. In January 2000 the then Dean of the Faculty of Advocates, in an Opinion to the Society, advised that the 1980 Act did not provide the Council with powers to delegate its functions to its Committees. The Society concluded that the only way in which its Council could operate within the powers conferred upon it by the 1980 Act was for formal decisions to be made by the Council itself.

We understand that the effect has been to slow down the progress of the Council’s business and to increase the workload of the Council very substantially, and that the impact has been felt most keenly in the regulatory areas of the Council’s work. Complaints against solicitors for example are dealt with by five Client Relations Committees, which include lay members. Decisions of these committees are now handled as recommendations to the Council, resulting in delays of up to two months, as the committees’ recommendations need to be intimated to both parties to the complaint so that they have the opportunity to comment before the complaint is finally determined.

The Bill seeks to remove these difficulties by enabling the Council to delegate the exercise of its functions to committees, sub-committees or individuals, subject to certain exceptions. The Bill also provides express authority for the Council to appoint non-solicitors to its committees, confirming the Council’s existing practice of ensuring substantial lay representation on its Client Relations Committees. In the Executive’s view lay involvement on these Committees is beneficial and serves to increase public confidence and transparency.

The Scottish Executive’s View
The Scottish Executive fully supports the Bill and its purpose.

The Executive notes that the scope of the Bill has been tightly drawn. The long title to the Bill makes clear that its purpose is confined narrowly to remedying the
limitations in the Council’s powers to delegate functions, thereby removing the acute problems these limitations have been causing to the efficient discharge of the Society’s business.

It is appropriate that the Bill does not otherwise attempt to adjust the existing statutory arrangements for self-regulation, or to anticipate general recommendations which might result from the Committee’s current inquiry into regulation of the legal profession. The Executive agrees with discussion point 9 of the options paper issued by the Justice 1 Committee in relation to that inquiry (which indicates that the Committee favours the introduction of delegated powers to allow final decisions about complaints to be made by Client Relations Committees of the Law Society rather than the Council).

The Executive considers that enactment of the Bill should help the Society to meet the recommendation made by the Scottish Legal Services Ombudsman in her 2001 and 2002 reports that the Society’s complaint resolution process should take no longer than 9 months.

**Competence**

Section 29 of the Scotland Act 1998 sets out the limits of the legislative competence of the Scottish Parliament. The regulation of the solicitors’ profession is not covered by the reservation of the Regulation of the Professions in Head G in part II of Schedule 5 to the Scotland Act 1998. It is therefore considered that the provisions of the Bill relate solely to devolved matters. In addition there is nothing in this Bill that it is considered might infringe either the European Convention on Human Rights or any rights or obligations conferred under Community law. Consequently the Executive is satisfied that the provisions of this Bill are within the legislative competence of the Scottish Parliament.

**Financial Implications**

There are no public expenditure implications.

**Consultation**

The Scottish Executive understands that the Bill has been the subject of limited consultation, including the Scottish Consumer Council; and considers that further consultation would not be necessary insofar as the Bill seeks to do no more than to correct a technical defect in the 1980 Act.

**Conclusion**

The Scottish Executive fully supports the Bill. Given its important purpose and carefully defined scope, Scottish Ministers hope that the Bill will make good progress through the Scottish Parliament.

Scottish Executive
11 September 2002
I am writing you in connection with Council of the Law Society of Scotland Bill which was introduced by David McLetchie MSP on 6 September. I understand that the Parliamentary Bureau has assigned this Bill to your Committee for consideration.

The Executive fully supports this Bill for the reasons set out in the attached Memorandum. If I can provide any further assistance, please do not hesitate to get in touch.

JIM WALLACE