JUSTICE 2 COMMITTEE

AGENDA

11th Meeting, 2006 (Session 2)

Tuesday 25 April 2006

The Committee will meet at 2.00 pm in Committee Room 4.

1. **Legal Profession and Legal Aid (Scotland) Bill:** The Committee will take evidence from—

   Louise Miller, Mike West and Chris Graham, Access to Justice Division, Scottish Executive.

2. **Legal Profession and Legal Aid (Scotland) Bill – witness expenses:** The Committee will decide whether to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses in the inquiry.

3. **Items in private:** The Committee will consider whether to reflect on the main themes arising from the evidence received relating to the Legal Profession and Legal Aid (Scotland) Bill in private at subsequent meetings.

4. **Legislative Consent Memorandum on the Police and Justice Bill (in private):** The Committee will consider a draft report on memorandum LCM (S2) 4.1 on the Police and Justice Bill, currently under consideration in the UK Parliament.

Tracey Hawe/Alison Walker
Clerks to the Committee
Papers for the meeting—

Agenda Item 1

Members are reminded to bring with them copies of the Bill, Explanatory Notes and Policy Memorandum, available from Document Supply or from the Parliament’s website:

Lines of questioning (PRIVATE PAPER) J2/S2/06/11/1

Legal Profession and Legal Aid (Scotland) Bill, Regulatory Impact Assessment J2/S2/06/11/2


SPICe briefing on Complaints about the Legal Profession J2/S2/06/11/4

SPICe briefing on Legal Aid J2/S2/06/11/5

Agenda Item 4

Draft report (PRIVATE PAPER) J2/S2/06/11/6

Letter from the Scottish Executive (PRIVATE PAPER) – to follow

Documents circulated for information only—

Letter from Stewart Maxwell MSP, enclosing correspondence from Mr Thomas Donnelly, 27 March 2006

Letter from the Justice 1 Committee, regarding the Scottish Court Service, 30 March 2006

Letter from Stewart Mackenzie to the Convener, Justice 2 Committee, 11 April 2006

Documents not circulated—

Reports by the Edinburgh Study of Youth Transitions and Crime:
 Number 6 – Patterns of Referral to the Children’s Hearing System for Drug or Alcohol Misuse
 Number 7 – Adolescent Smoking, Drinking and Drug Use
 Number 8 – Gang Membership and Teenage Offending
 Number 9 – Family Functioning and Substance Use at Ages 12 to 17

If any Member wishes to obtain a copy of any of these, please contact the Clerk.

Forthcoming meetings—

• Tuesday 2 May 2006, 2pm, Committee Room 5
• Tuesday 9 May 2006, 2pm, Committee Room 2
LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

FULL REGULATORY IMPACT ASSESSMENT

1. Title of proposal

1.1 The proposal is to establish a new regulatory body to deal with complaints about lawyers that will be independent of the legal profession. This will be achieved through the provisions of the “Legal Profession and Legal Aid (Scotland) Bill” that was introduced to the Scottish Parliament on 1 March 2006.

2. Purpose and intended effect

Objectives

2.1 The Bill stems from policy aimed at increasing public confidence in the system for the handling of complaints against lawyers. It follows on from an inquiry held by the Justice 1 Committee in the first session of the Scottish Parliament and subsequent policy development and consultation. Given that efficiency, transparency and accountability are all essential to building public confidence in the complaints handling system, the Scottish Executive aims to achieve its policy objective by resolving disputes quickly and through a system that is more independent and more user-friendly than is presently the case.

2.2 The main purpose of the Bill is therefore to establish a new statutory body, independent of the legal professional bodies, to handle complaints about the service provided by practitioners. Practitioners include solicitors, advocates, conveyancing or executry practitioners and persons exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. A firm of solicitors, an incorporated practice, and a limited liability partnership whose members are solicitors are also included within the definition of practitioner.

2.3 The policy of the Scottish Executive is that complaints from clients should be dealt with wherever possible at source by the law firm, lawyer or other practitioner who provided the service in question. The new body, the Scottish Legal Complaints Commission, will act as a gateway to receive those complaints about practitioners which could not be resolved at source. It will refer back “premature” complaints to local level, which are complaints which the complainer has not previously communicated to the firm or practitioner in question and given them a reasonable opportunity to resolve. The Commission will take over the handling of complaints about inadequate professional service from (the Law Society of Scotland and the Faculty of Advocates) and will be independent from the legal professional bodies. The office of the Scottish Legal Services Ombudsman (SLSO) is to be abolished.

2.4 The legal professional bodies and their discipline tribunals will retain responsibility for professional discipline. The Commission will accordingly refer complaints about the conduct of lawyers to the professional bodies for investigation,
but will have powers to oversee the way in which conduct complaints are handled and will be able to enforce its recommendations. The Commission will be led by a board which will have a non-lawyer majority and a non-lawyer Chair. Commission decisions will be subject to internal review by the Commission's review team. Any further appeal would be only by way of judicial review. The proposed new complaints handling arrangements are intended to provide a quicker and informal dispute resolution service for both complainers and practitioners.

2.5 If the Scottish Parliament duly passes the Bill and the Bill is enacted by the end of 2006, it is anticipated that the Commission will become operational in early/mid 2008.

Background

2.6 Under the existing statutory system, complaints against legal practitioners are dealt with by the professional bodies, the Law Society of Scotland and the Faculty of Advocates. Statute provides for the Scottish legal services ombudsman (SLSO) to review the way in which a professional body has handled a complaint but not the merits of the decision. In November 2002 the report of the inquiry by the former Justice 1 Committee acknowledged public concern about the principle of lawyers policing other lawyers and, having considered written and oral evidence, the Committee made a number of recommendations aimed at improving public confidence in the complaints handling system for the Scottish Executive and the professional bodies to follow up. Though the professional bodies have made significant improvements in the intervening period, there has remained a public demand for greater independence and oversight.

2.7 In light of research findings, the findings of the inquiry by the former Justice 1 Committee and the analysis provided by the Scottish Legal Services Ombudsman in successive Annual Reports, the Executive took the view that further change was needed. In the summer of 2005, the Executive published a consultation paper entitled “Reforming complaints handling, building consumer confidence” setting out options for reforming the system of handling complaints against legal practitioners by introducing a greater degree of independence and oversight into the existing system. The outcome of the consultation showed strong support for reform and in particular for a model involving an independent complaints handling body headed by a non-lawyer Chair and with a non-lawyer majority.

2.8 The Bill is therefore intended to create a Scottish Legal Complaints Commission (independent of the legal professional bodies) to take over the handling of complaints about service from the legal professional bodies and the office of the SLSO. In keeping with the views of the majority of those who responded to the consultation, the Commission will be a body independent of the legal profession led by a board composed of a non-lawyer Chair and a non-lawyer majority. Appointments to the Board would be made by Scottish Ministers and to ensure transparency and fairness would be subject to public appointments procedures and the scrutiny of the Commissioner for Public Appointments in Scotland.
2.9 Although the Law Society of Scotland has made significant progress in improving its complaints handling systems, the response to the consultation made it clear that more fundamental change was required to build public confidence. Current arrangements for complaints handling are set out in the Solicitors (Scotland) Act 1980 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The latter Act sets up the Scottish Legal Services Ombudsman and imposes duties on the professional bodies in relation to complaints handling (though the Faculty of Advocates is otherwise a non-statutory body). This means that primary legislation is required in order to respond effectively to public concern.

3. Consultation

- Within Government

3.1 Consultation at official level has been ongoing throughout the drafting of the Bill with the Department for Constitutional Affairs, the Home Office Immigration and Nationality Directorate, the Department for Trade and Industry and the Insolvency Service, the Financial Services Authority and the Financial Ombudsman Service, and the Office of Fair Trading.

- Public Consultation

3.2 The Executive published its consultation document Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland on 11 May 2005. Copies of the consultation paper and a related leaflet were distributed to a wide range of suppliers and users of legal services in the private, public and voluntary sectors. The consultation paper set out options for reforming the handling of complaints against legal practitioners in Scotland by introducing a greater degree of independence and oversight into the system.

3.3 By the final cut-off date for receipt of responses, 490 submissions had been made with 85% received from members of the public. Just below 5% of responses were submitted by solicitors. The remaining respondents represented a range of different sectors including consumer groups and local government. The majority of responses from members of the public were from people who had asked the Law Society of Scotland to investigate their complaint against their solicitor. An analysis of the written consultation responses was published on 26 October 2005.

3.4 Respondees highlighted a number of considerations such as cost, complexity of arrangements and conflicts of interest which were important to them in selecting their favoured option. The majority view was opposed to the status quo because of concern about its perceived bias towards solicitors and inherent conflict of interests.

3.5 The response to consultation demonstrated strong support for the reform of the complaints handling system. In particular, the majority favoured a model where an independent complaints handling body would be set up and headed by a board with a non-lawyer Chair and a non-lawyer majority. The new body would handle complaints
of inadequate professional services itself and would oversee the investigation by the professional bodies of conduct complaints. The consultation paper also included a number of other issues which feature in the Bill's provisions, such as oversight of the Law Society's Master Policy and Guarantee Fund and various measures requested by the Law Society such as its own powers relating to unsatisfactory professional conduct.

4. **Options**

Four options for change were included in the consultation paper and these, together with the "do nothing" option, are considered below:

4.1 **Do nothing.** Under this option, all complaints would continue to be investigated by the relevant professional body and the Scottish Legal Services Ombudsman would continue to have a range of powers to monitor complaints, receive handling complaints from members of the public and make recommendations (but not enforce them). There would be no additional costs but the current lack of public confidence in the system would likely continue.

4.2 **Option A: Enhanced status quo.** Under this option, the current arrangements for investigating complaints would remain unchanged but the Ombudsman would be given the following stronger powers: to investigate the original decision made by the professional body (as opposed to the manner in which the decision was made); to enforce her recommendations (as opposed to simply making recommendations); to conduct general audits of the complaints files of the professional bodies (a new power); to prescribe general timescales for the resolution of complaints by the professional bodies (as opposed to suggested timescales); to direct the professional bodies to investigate a complaint (a new power).

4.3 **Option B: Single gateway with oversight powers.** Under this option, the Scottish Legal Services Ombudsman would act as a "single gateway" to receive and sift all complaints about legal practitioners where the complainer was dissatisfied with attempts made to resolve the complaint by the law firm or legal practitioner. Specifically, the Ombudsman would determine if complaints should be investigated; would have powers to require a professional body, law firm or legal practitioner to respond to a complaint; would give directions on how the complaint should be investigated; and monitor performance. However, the Ombudsman would not have the power to overturn a decision by a professional body or make a casework decision him/herself.

4.4 **Option C: Single gateway with substantive complaints handling function.** Under this option, the office of the Scottish Legal Services Ombudsman would become a single gateway which would receive all complaints and, most significantly, would investigate most complaints itself. It would deal mainly with complaints of inadequate professional services (IPS) in-house and refer most complaints about conduct to the legal professional bodies. At present approximately 70% of complaints concern inadequate professional services, about 20% relate to conduct and about 10% have elements of both service and conduct.
4.5 **Option D: Creating a new independent complaints handling body, with a board led by a lay chair and with a lay majority.** This option is similar to Option C above but would set up an independent body as the gateway to receive all complaints that could not be resolved at source. It would deal with complaints about inadequate professional services, including any element of negligence, the maximum compensation available being £20,000. Conduct complaints would continue to be dealt with by the professional bodies and relevant Tribunals. The new body would have the powers to assess what constitutes a complaint; to investigate a complaint; to order redress and to oversee professional indemnity and compensation fund arrangements operated by the professional bodies. The body would be funded by the legal profession. Its board would be composed of a mixed membership but with a non-lawyer chair and overall non-lawyer majority. The Executive believes that this option is the one which is most consistent with views expressed in response to consultation.

5. **Costs and benefits**

- **Sectors and groups affected**

5.1 The reform of the complaints handling system will impact on both clients and legal practitioners. There are almost 10,000 solicitors holding practising certificates and some 470 practising advocates in Scotland. The Law Society of Scotland received 3,734 complaints in 2004 and 4,849 in 2005, these figures reflecting a peak in complaints about the alleged mis-selling of endowment mortgages. A similar peak was experienced by the Scottish Legal Services Ombudsman, who received 395 complaints in 2004 and 505 complaints in 2005 about the way in which the professional bodies had handled a complaint. In recent years the Faculty of Advocates has received between 20 and 50 complaints about advocates each year.

5.2 At present, the cost of complaints handling is largely borne by the legal profession, though the Scottish Executive funds the office of the Scottish Legal Services Ombudsman. In 2005/06 the Law Society of Scotland’s estimated budget for complaints handling was £2.1m; and the budget for 2005/06 for the office of the Scottish Legal Services Ombudsman was £0.38m. The estimated costs of the Faculty of Advocates were £0.1m. The Financial Memorandum for the Bill estimates the running cost of the Commission to be approximately £2.26m for 2008/09 and £2.40m from financial year 2009/10 onwards. Transitional costs of about £0.45m are expected to be incurred in financial year 2008/09. Accordingly, the new system could be viewed as only marginally more expensive than the status quo, taking account of the fact that the legal professional bodies will continue to be responsible for professional discipline.

5.3 The Law Society of Scotland presently finances its complaints handling function from the income it receives from the fees paid by solicitors each year for their practising certificates. It is intended that the Commission will be funded through two levies – the first an annual general levy to be paid by all practitioners and the second a complaints levy payable by a practitioner or law firm as a charge for a dispute resolution service provided by the Commission in respect of eligible
complaints (excluding vexatious or frivolous complaints) which the practitioner or law firm have not been able to resolve at source.

- **Benefits and costs of options**

  The following benefits and costs are additional to those that would have been incurred if no action were taken.

  **5.4 Do nothing option**

  **Benefits**
  5.4.1 There would be no tangible benefit to maintaining the status quo. Notwithstanding the reforms already introduced by the legal professional bodies themselves, the public concern about the independence of the complaints handling system identified by the former Justice 1 Committee’s inquiry would continue – as evidenced by the consultative response. Therefore there would be no additional economic or social benefit.

  **Costs**
  5.4.2 There would be no additional economic or social cost. However, as noted above the current lack of public confidence in the system would continue.

  **5.5 Option A: Enhanced status quo**

  **Benefits**
  5.5.1 Economic – this model is based on the current system which is familiar to consumers. The enhanced powers to be given to the Ombudsman would in part respond to consumers’ wish for a greater degree of independent oversight of the current system. However, the consultative response indicates that this measure would not go far enough in itself to generate public confidence.

  5.5.2 Social – there would be no additional social benefit.

  **Costs**
  5.5.3 There would be no significant additional economic or social costs attached to this option. However, the current lack of public confidence would continue.

  **5.6 Option B: Single gateway with oversight powers**

  **Benefits**
  5.6.1 Economic – with all complaints being routed through and sifted by a single gateway, there should be more consistent decision-making on the eligibility of complaints. There would be marginal economies of scale from basing the handling of consumer complaints on one body; and more significant economies in replacing a committee-based adversarial complaints
handling process by an inquisitorial process involving adjudication by
dedicated case managers. This represents a benefit in administrative
efficiency.

5.6.2 Social – An independent sift of complaints and an independent
assessment of whether a complaint was eligible would build confidence in the
fairness of the system.

Costs
5.6.3 Economic – this option could be seen as adding a further layer of
bureaucracy with little improvement in return. As a mere “post-box” for
complaints, it has the potential to lead to inefficiency in working practices
through duplication of effort as both the gateway and the professional bodies
read and assess complaints correspondence. There would also be a possibility
of additional effort should complaints be sent direct to the professional bodies
and have to be re-routed through the gateway.

5.6.4 Social – this option could be seen as not going far enough in
promoting independence. Given that complaints decisions would still lie with
the professional bodies it would leave the system too weighted in favour of
regulation by the professional bodies. Therefore there would be little gain in
consumer confidence.

5.6.5 Administrative – this option would increase the workload of the
Scottish Legal Services Ombudsman and it is estimated that administrative
costs would be approximately £0.1m per annum in addition to the
Ombudsman’s current budget.

5.7 Option C: Single gateway with substantive complaints handling function

Benefits
5.7.1 Economic – A single gateway structure would generate administrative
efficiency given that it would provide a single point of entry for complaints –
as noted in option B above. Given that the gateway would also now have
investigative and decision-making powers in relation to complaints about
inadequate professional services, there should be greater consistency in
complaints casework decisions. Also, greater consumer confidence might
prompt more consumers to complain. The prospect of increased regulatory
costs would provide legal practitioners with a greater incentive to improve
their standards of service and seek to resolve disputes at source. Consumers
would benefit as a result.

5.7.2 Social – members of the public would be more likely to accept the
casework decisions of this type of body given that it would operate
independently of the legal professional bodies. This injection of independence
and impartiality would enhance consumer confidence in the complaints
handling system. Also, with a single office holder in charge, the complaints
handling process might benefit from the “human touch” – where bureaucracy
gains a personality and consumers can clearly understand the familiar role and
functions of an Ombudsman.
Costs

5.7.3 Economic – the overall cost of the complaints system may rise as a result of more consumers complaining and increased regulatory costs incurred by practitioners might be passed on to consumers. However as noted above the prospect of increased regulatory costs might encourage practitioners to improve standards of service in order to avoid complaints in future.

5.7.4 Social – if the Scottish Legal Services Ombudsman were to be in charge in a system without any checks and balances, his/her impartiality might be perceived to be compromised. This might reduce the level of confidence in the new system by both consumers and practitioners. Similarly, this model might place too much power in the hands of one individual.

5.7.5 Administrative – the operational costs of the oversight body would be roughly equal to the budget of the office of the Scottish Legal Services Ombudsman and the current budgets of the professional bodies for their complaint handling functions. Although no transitional costs have been calculated specifically for this option, they would be similar to those of Option D below i.e. £0.45m.

5.8 Option D: Creating a new independent complaints handling body, with a board led by a lay chair and with a lay majority.

Economic Benefits

5.8.1 The driving up of standards, greater consistency in decision-making and administrative efficiency gains have already been set out in Option C above. The provisions of the Bill which implement option D introduce one further important element – this being the handling of the independent body led by a board (the Commission) of complaints about inadequate professional services including any element of negligence, with compensation of up to £20,000. This means that negligence complaints that previously would not have been brought to court due to concerns about litigation costs possibly exceeding awards of compensation, will be able to be assessed without cost to the complainant. Again this is likely to provide a good incentive for practitioners to improve standards of service and to resolve disputes at source.

5.8.2 The funding of the Commission through two levies (the general levy and the complaints levy) will also act as an incentive to drive up standards as practitioners will seek to resolve complaints at source rather than pay the Commission the complaints levy to do so on their behalf.

5.8.3 In addition, the new complaints handling system is intended to provide complainants with a speedier and more user-friendly resolution of their concerns. This will be achieved by the Commission adopting an inquisitorial style of resolution (as opposed to the adversarial system currently in place) and by the case management of complaints by adjudicators rather than
committee-based decision making. Therefore there will be a further administrative benefit.

Social Benefits

5.8.4 The management of the Commission by a board composed of lawyers and non-lawyers but with a non-lawyer chair and majority will assure complainants of even-handedness and allow for legal expertise when this is needed. It also builds on important aspects of the current system operated by both the Law Society of Scotland and the Faculty of Advocates which involve non-lawyers on complaints committees.

5.8.5 The investigation of low level negligence complaints by the Commission will benefit the public in access to justice terms. At present negligence claims must be raised as a court action with the expense that such an action would entail. Under the new arrangements, cost will no longer be a barrier to clients seeking justice.

5.8.6 Given that the Commission will operate independently of the legal profession and in a more user-friendly manner, the public will have confidence in its decisions and processes.

Economic Costs

5.8.7 The operating costs of the Commission are likely to be broadly similar to the combined budgets of the legal professional bodies and the SLSO as noted in Option C above. There will be an additional cost for the remuneration of the board though this is not anticipated to be a major cost. However, the change in funding from practising certificate fee/subscription-based to levy-based has led to concerns on the part of the Law Society of Scotland that small firms may be driven from the market if a significant number of complaints are brought against them giving rise to multiple payment of the complaints levy or significant awards of compensation. Also the Law Society of Scotland believes that practitioners may decline to undertake certain types of work which are more likely to give rise to complaints and this will reduce access to justice and consumer choice in legal representation. However the balance between the levies and the amounts of the levies will be a matter for the Commission itself to decide. The Commission will however be required to consult the profession each January on its draft work plan and budget for the following year.

5.8.8 Some concern has been expressed by the Law Society of Scotland that professional indemnity insurance costs might rise as a result of the Commission dealing with complaints about inadequate professional services, including any element of negligence, with a maximum compensation level of £20,000. No evidence is available however which would suggest that such insurance would either become unavailable or that premiums would rise disproportionately.

5.8.9 Social costs – there are no additional social costs.
5.8.10 *Administrative costs* - the Scottish Executive will provide start-up funding for the establishment of the Scottish Legal Complaints Commission but will not contribute to its annual running costs in normal circumstances. The start-up costs will cover costs in relation to the process of appointing the members of the Board of the Commission, of recruiting staff and of setting up the Commission’s office. These start-up costs which should be non-recurring are estimated at around £0.45m.

5.9 **Summary of Operating and Transitional costs**

5.9.1 The table below sets out the estimated operating costs and transitional costs associated with each of the options described above.

<table>
<thead>
<tr>
<th>Option</th>
<th>Estimated operating costs per annum from 2008/09 (£m)</th>
<th>Estimated operating costs per annum compared with “Do nothing” option (£m)</th>
<th>Estimated transitional costs (£m)</th>
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<tr>
<td>Do Nothing</td>
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<td>3.01</td>
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5.9.2 **Explanatory Note:** Costs for 2008/09 are based on the estimated costs of the complaints handling functions of the professional bodies and the Scottish Legal Services Ombudsman for 2005/06 and extrapolated at 5% increase per annum. Therefore the estimated operating costs as set out in column two above are based on the combined estimated complaints handling costs of the Law Society of Scotland (£2.1m in 2005/06), the Faculty of Advocates (£0.1m in 2005/06) and the Scottish Legal Services Ombudsman (£0.38m in 2005/06). Option A is estimated to add no cost to those incurred under the Do Nothing option, whereas Option B adds only an extra £100,000. The costs of Options C and D are based on the estimated costs for the Commission as set out in the Financial Memorandum that accompanied the Bill – these being £2.16m and £2.26m respectively. Option D is estimated to cost approximately £100,000 more than Option C because of the additional cost of remunerating board members. To those figures we need to add the cost to the professional bodies of handling conduct complaints. For the Law Society, an estimated 30% of solicitor complaints are conduct related. For the Faculty of Advocates, the split between conduct and service is not known and therefore a provision of £100,000 has been made. The costs of the office of the Scottish Legal Services Ombudsman have not been included in the costs of Options C and D as the role of that office would be subsumed by the Commission.
Small/ Micro Firms Impact Test

5.10 There are about 470 practising members of the Faculty of Advocates and 52 complaints were made in 2004. There are approximately 10,000 solicitors in Scotland and 3,734 complaints were received by the Law Society in 2004. Small businesses are classified as having fewer than 50 full-time employees. Given that according to Law Society figures, 95% of solicitors work in firms with one to nine partners and advocates are self-employed, then it can be seen that the vast majority of lawyers work in a small firm environment. However, as explained below, it is not anticipated that the operation of the Commission will have a significant or disproportionate effect on small and micro firms.

5.11 The Bill transfers existing complaints handling functions but does not otherwise introduce a completely new regulatory regime. As previously mentioned, the Bill provides for the existing roles of the Law Society, Faculty of Advocates and the Scottish Legal Services Ombudsman in handling or reviewing the handling of, complaints about service to be transferred to the Commission. Although the Commission will be able to deal with services complaints including any element of negligence (the latter not being possible under current arrangements), the regulatory burden on the profession will not be significantly increased.

5.12 Also, the cost of operating the Commission will not be significantly higher than current arrangements. As previously mentioned, there will be some changes to how the system is funded. For example, at present, the Law Society funds its complaints handling system through a proportion of the fee income it receives from the annual issue of practising certificates to its members. The cost of a practising certificate is currently £550 per annum and the amount spent on complaints handling (both IPS and conduct complaints) by the Law Society of Scotland in 2005 was approximately £2.1m. For purely illustrative purposes, the Financial Memorandum accompanying the Bill estimated the general levy at £120 and the complaints levy at £300 based on 4,000 complaints and the division of the Commission’s running costs of £2.4m in 2009/10 evenly between the two levies. It will be for the Commission to determine the amount and proportion of both levies and therefore it is not possible to be definite about these figures at present.

5.13 The Law Society of Scotland claims that small High Street and rural practices tend to generate more complaints because the nature of their work and the client base they serve and are therefore likely to be disproportionately vulnerable in relation to the complaints levy. The Society has expressed concern about the degree of hardship that may therefore be suffered by small firms by the application of the complaints levy. However, to date the Law Society has not presented any hard evidence to substantiate its concerns. In particular there is no information on the extent to which complaints received by the Society tend to relate to such firms. The Bill does enable the Commission to determine different amounts for the complaints levy in different circumstances. To date the Law Society has not confirmed whether it will reduce the fee for the practising certificate in light of service complaints being transferred to the Commission.
6. “Test Run” of business forms

6.1 No business forms will be involved in the proposed legislation.

7. Competition assessment

7.1 The legislation will maintain a consistent regulatory regime for all practitioners in Scotland. It is not anticipated that the new complaints handling system will have a significant impact on competition as such, though the existence of an efficient and responsive dispute resolution service which attracts public confidence is important to the efficient operation of the legal services market in Scotland. The arrangements for complaints handling will apply equally to all new and existing providers of legal services. In terms of possible financial barriers, the levels of both the general levy and the complaints levy will be determined by the Commission after consultation with the legal professional bodies and will be set at a level which is reasonably sufficient to meet the Commission’s expenditure. The levies will also apply equally to new and existing providers of legal services.

7.2 As mentioned above, the effect of the complaints levy (a new funding feature being introduced by the Bill) on small firms cannot be accurately assessed at present because of a lack of data on the extent to which complaints might be disproportionately concentrated within this grouping.

8. Enforcement, sanctions and monitoring

The Bill contains provisions that will enforce/ foster accountability, transparency and redress at all levels of the complaints handling process.

8.1 General roles and responsibilities: The Commission will play a direct role with respect to the monitoring and investigation of service complaints. It will also have an oversight role for the complaints handling process as a whole. The Commission will be able to issue guidance about how practitioners deal with complaints about professional conduct or professional services. Such guidance may include recommendations about standards for complaints handling systems, reflecting the interest of the Commission in the dissemination of best practice about local complaints handling systems generally.

8.2 The legal professional bodies will continue to deal with conduct complaints. The Scottish Solicitors' Discipline Tribunal will continue to hear cases of alleged professional misconduct prosecuted before it by the Law Society, but now with equal membership of lawyer and non-lawyer members. The Faculty of Advocates will continue to hear conduct cases through its Complaints Committees and Disciplinary Tribunal which include equal numbers of lawyer and non-lawyer members.

8.3 Enforcement and sanctions on practitioners: The Bill will raise the maximum amount of compensation from £5,000 to £20,000 for service complaints which will include any element of negligence. Directions made by the Commission in
relation to the payment of compensation will, if necessary, be enforceable through the courts. The Commission will be empowered to secure documents relevant to its investigations. In the event that a practitioner does not provide the Commission with information or documents relevant to a complaint it is considering, the Commission may apply for a court order under Schedule 2 to the Bill. The introduction of a new category of conduct complaint, unsatisfactory professional conduct, will enable the Law Society to deal with low level conduct cases itself and to apply sanctions. With regard to the annual general levy and the complaints levy, the Commission will be able to recover any unpaid sum as a civil debt from the practitioner who is liable to pay it.

8.4 Enforcement and sanctions on professional bodies: In the event that the Commission upholds a complaint about the handling of a conduct complaint by a professional organisation, it will be able to recommend that the organisation pay compensation to the complainer for loss, inconvenience or distress of up to £5,000. The Commission will also be able to recommend that the professional organisation investigate a conduct complaint further or reconsider a conduct complaint or consider exercising its powers in relation to the practitioner concerned. The Bill will empower the Commission to enforce its recommendations.

8.5 Monitoring of the Commission: Through its gateway function, the Commission will record the number and categories of complaints received and will therefore be in a position to monitor outcomes. The Commission's own casework decisions will be subject to internal review should either a practitioner or complainant wish to appeal a Commission decision. The Commission will be required to produce an annual report which Scottish Ministers will lay before Parliament. The Scottish Executive will arrange for its own monitoring of the overall position on complaints to ensure that its policy objectives in this area are being met by the new arrangements. Though not required by the Bill, it is intended that the Commission should appoint an independent assessor to consider complaints against the Commission.

9. Implementation and delivery

9.1 A provisional implementation plan is attached at Appendix A. It sets out the key elements of the implementation and delivery strategy. The plan includes a location review; the recruitment of the staff and board of the Commission; bids for financing the start-up costs; the dissolution of the office of the Scottish Legal Services Ombudsman; liaison with key stakeholders; the transitional arrangements.

9.2 The plan is subject to change in light of amendments that may arise in the parliamentary passage of the Bill and matters arising from discussions with stakeholders.

10. Post-implementation review
10.1 It is intended that a full post-implementation review will take place within three years of the Commission becoming operational. The review will assess relevant issues such as whether policy objectives have been met; impacts have been as expected; consequences have been as expected; whether compliance levels indicate that the enforcement powers of the Commission and the professional bodies under the new arrangements are effective. Essentially the review will question whether the powers and the remit of the Commission are appropriate to meeting Ministers’ policy objectives. The review will be carried out in consultation with stakeholders.

10.2 On a more regular basis, Ministers will obtain feedback on the performance of the Commission through reporting requirements provided for in the Bill. For example, the Bill requires the Commission to prepare an Annual Report which will be laid before Parliament. The Report will set out the discharge of the Commission’s functions during that year and such actions as the Commission proposes to take in the following year in pursuance of its functions. Annual accounts must also be sent to Ministers and the Auditor General for Scotland. The Commission will also be required to report on trends in practice that result in complaints being made. The Commission must also publish its rules and procedures (and any variance thereof) after consultation with Ministers and relevant stakeholders. Therefore, there are a number of means by which Ministers can form an assessment of the Commission’s performance in relation to policy objectives.

10.3 It is further intended that there will be a Management Statement drawn up between the Executive and the Commission and this will include measures on accountability and effectiveness. The Statement will set out relevant targets and performance indicators so that Ministers can assess on an annual basis whether the Commission is achieving its objectives. However, it should be remembered that the Commission is intended to be independent and impartial and is not to be funded by the Executive, hence the degree of oversight has to reflect these considerations.
11. Summary and recommendation

11.1 The table below summarises the estimated costs and benefits of the options described in section 5.

<table>
<thead>
<tr>
<th>OPTION</th>
<th>BENEFITS</th>
<th>COSTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do nothing</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>A</td>
<td>Economic</td>
<td>Economic</td>
</tr>
<tr>
<td></td>
<td>1. Based on current system and so has the benefit of familiarity for complainers and practitioners.</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Social</td>
<td>Social</td>
</tr>
<tr>
<td></td>
<td>2. Gives additional powers to the Scottish Legal Services Ombudsman which would help improve public confidence.</td>
<td>1. Is not enough in itself to increase the impartiality and independence of the system to boost public confidence.</td>
</tr>
<tr>
<td>B</td>
<td>Economic</td>
<td>Economic</td>
</tr>
<tr>
<td></td>
<td>1. Single point of entry for complaints has an administrative benefit.</td>
<td>1. Adds a further layer of bureaucracy with little improvement – duplication of effort as gateway and professional bodies scrutinise complaint letters.</td>
</tr>
<tr>
<td></td>
<td>Social</td>
<td>Social</td>
</tr>
<tr>
<td></td>
<td>2. Independent sift of complaints would reassure the public that complaints could not be unfairly rejected.</td>
<td>2. Without decision-making powers, the system would remain too weighted in favour of the legal profession.</td>
</tr>
<tr>
<td></td>
<td>Administrative</td>
<td>Administrative</td>
</tr>
<tr>
<td></td>
<td>3. An increase in the workload of the Scottish Legal Services Ombudsman would lead to increased expenditure for his/her office of £0.1m.</td>
<td></td>
</tr>
<tr>
<td>OPTION</td>
<td>BENEFITS</td>
<td>COSTS</td>
</tr>
<tr>
<td>--------</td>
<td>----------</td>
<td>-------</td>
</tr>
<tr>
<td>C</td>
<td><strong>Economic</strong>&lt;br&gt;1. Single point of entry brings administrative benefit.&lt;br&gt;2. Dealing with all IPS complaints brings greater consistency to decision-making.&lt;br&gt;3. Independent status of gateway may prompt more people to complain - the prospect of increased costs of complaints may act as an upward driver of standards of service and/or a greater effort to conciliate complaints at source.&lt;br&gt;&lt;strong&gt;Social&lt;/strong&gt;&lt;br&gt;4. Independence and perception of impartiality would boost confidence of the public in the system.&lt;br&gt;5. Single office-holder provides figurehead whom the public can identify – personalises the system.</td>
<td><strong>Economic</strong>&lt;br&gt;1. Confident consumers may complain more which would increase the costs of the system. If these costs were passed on to clients the costs of legal services would rise.&lt;br&gt;&lt;strong&gt;Social&lt;/strong&gt;&lt;br&gt;2. If the SLSO were to head up the gateway then this might compromise his/her impartiality. This model might place too much power in one pair of hands.&lt;br&gt;&lt;strong&gt;Administrative&lt;/strong&gt;&lt;br&gt;3. Transitional costs likely to be in the region of £0.45m.</td>
</tr>
<tr>
<td>OPTION</td>
<td>BENEFITS</td>
<td>COSTS</td>
</tr>
<tr>
<td>--------</td>
<td>----------</td>
<td>-------</td>
</tr>
<tr>
<td>D</td>
<td><strong>Economic</strong></td>
<td><strong>Economic</strong></td>
</tr>
<tr>
<td></td>
<td>1. Single point of entry brings administrative benefit.</td>
<td>1. Increased confidence on the part of consumers may mean they will complain more which could increase the costs of the system, though law firms and practitioners may seek to resolve a proportionately higher level of complaints at local level. If a proportion of additional costs of the Commission were to be passed on to clients by way of increased fees, the costs of legal services would rise.</td>
</tr>
<tr>
<td></td>
<td>2. Commission dealing with all service complaints brings greater consistency to decision-making.</td>
<td>2. Practitioners may decline to take on types of work that are more likely to give rise to complaints. This may lead to a reduction in consumer choice.</td>
</tr>
<tr>
<td></td>
<td>3. Independent status of gateway may prompt more people to complain—the prospect of increased costs of complaints may act as an upward driver of standards of service and/or a greater effort to conciliate complaints at source.</td>
<td>3. Professional indemnity insurance premiums might rise as a result of increased compensation for inadequate professional services, including elements of negligence.</td>
</tr>
<tr>
<td></td>
<td><strong>Social</strong></td>
<td><strong>Social</strong></td>
</tr>
<tr>
<td></td>
<td>4. Independence and impartiality will be assured by involvement of lawyer and non-lawyer members of the Board.</td>
<td>5. Clients may experience access to justice problems if practitioners decline to take on casework that is by its nature more likely to generate a complaint.</td>
</tr>
<tr>
<td></td>
<td>5. Investigation of low-level negligence cases will improve access to justice for the public.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>6. More user-friendly style of case investigations will boost public confidence.</td>
<td>6. Transitional costs likely to be in the region of £0.45m.</td>
</tr>
</tbody>
</table>
11.2 Ministers have selected Option D as the basis for the provisions contained within the Legal Profession and Legal Aid (Scotland) Bill. Their decision acknowledged the strong message from the consultative response that a greater degree of independence was required in the complaints handling system and that this was most likely to be achieved through the creation of a new body, independent of the legal profession, and led by a board with a non-lawyer majority and chair. The Bill is therefore intended to create such a body and thus meet the policy objective of improving consumer confidence in the complaints handling system.

12. Declaration and publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed...... Hugh Henry

........................ Date........7 April 2006.............

Hugh Henry, MSP
Deputy Minister for Justice
Scottish Executive
1. Set up project team, including people with project management skills, previous experience of setting up a new body and experience of infrastructure/building projects.

2. Set up working groups to take forward (a) location review, including accommodation and support services; (b) to consider pensions issues; (c) staffing; (d) finance; (e) IT provision; (f) Commission HR functions; (g) Pay Policy; and (h) legal advice for Commission.

3. Carry out location review for Commission.  

4. Proposals for the continuing involvement of stakeholders on relevant aspects of setting up of the Commission, including transitional arrangements.  
   Timing: 2006/07

5. The preparation of a transitional provisions order under section 48 of the Bill.  
   Timing: 2007

6. Advertising, interviewing and appointing of shadow Commission members, and the appropriate timescale.  
   Timing: early 2007

7. Advertising, interviewing and appointing of (a) Chief Executive and Finance Director and (b) other staff by shadow Commission, and the appropriate timescale.  
   Timing: mid 2007

8. Setting up of shadow Commission.  
   Timing: mid-2007

9. Set up arrangements to monitor and review progress of Commission.  
   Timing: 2007-08

    Timing – to be determined

11. Arrange dissolution of the office of the Scottish Legal Services Ombudsman and prepare relevant orders (under section 17 of the Bill).  
    Timing: Prepare 2006-07, but mainly 2007-08
Summary of the Committee's recommendations and comments

The Committee reports to the Parliament as follows-

Options for reform

1. A number of options for reform of the current regulatory framework emerged in the course of the inquiry, which fall broadly into two camps: a completely independent system and joint regulation with increased independence from the professional bodies. The Committee is not persuaded by the option of a completely independent system for the regulation of the legal profession and believes that it would be more effective to maintain the present system of joint regulation, namely self-regulation with the additional independent regulatory mechanism of the Ombudsman, but with increased independence. The Committee believes that the present system should be reformed, in order to make it more acceptable to consumers, and more representative of the public interest. It has explored the options for achieving this and these are outlined below.

Single gateway

2. The Committee believes that it is vital that the public perception of the complaints systems is that it is both fair and transparent. The Committee is in favour of the creation of a single gateway for complaints against the legal profession which it believes will improve the public perception of the complaints system and play a valuable oversight role.

Powers of the Ombudsman

3. The Committee believes that the role of the Ombudsman is crucial in ensuring that the complaints process is open and transparent. The Committee recommends that the powers of the Ombudsman should be augmented. The Committee believes that this will increase consumer confidence in the complaints system and provide for greater independent oversight.

Power to investigate the substance of the original decision made by the professional body

4. There is an expectation on the part of consumers that the Ombudsman will
investigate the merits of a complaint. The Committee believes that without this power, the Ombudsman does not have the capacity to address the real issues of concern to the complainant. The Committee therefore recommends that the Ombudsman should be given the statutory power to investigate the substance of a complaint rather than simply the way it has been dealt with by the professional bodies.

Power to enforce recommendations

5. The Committee believes consumer confidence in the Ombudsman is undermined by the fact that it is not possible for the Ombudsman to enforce recommendations. The Committee therefore recommends that the Ombudsman should be given the statutory power to enforce recommendations.

Power to conduct general audits

6. The Committee believes that granting the Ombudsman the power to conduct general audits would allow for more effective monitoring of professional bodies' complaints systems. The Committee therefore recommends that the Ombudsman should be given this statutory power.

Power to prescribe general timescales

7. The Committee believes that it is vital that complaints are dealt with as speedily as possible, for the sake of both the complainant and the solicitor. The Committee therefore recommends that the Ombudsman should be given the statutory power to set appropriate target timescales and to monitor adherence to them.

Power to direct professional bodies to investigate a complaint

8. The Committee is concerned about the number of complaints which are not investigated by the Law Society of Scotland (Law Society) and believes that the power to direct a professional body to investigate a complaint would help to ensure that there is independent input into the decision about what constitutes a complaint. The Committee therefore recommends that the Ombudsman should be given the discretionary statutory power to direct professional bodies to investigate a complaint.

Funding

9. The Committee acknowledges that increasing the powers of the Ombudsman will require additional funding. The Committee believes that it is important that the independent element of the system is not funded by the legal profession and recommends that the Government should fund the increased costs incurred by the Ombudsman's office as a result of the Committee's proposals. The Committee believes that the professional bodies should continue to fund their own complaints systems.

Recommendation for reform

10. The Committee believes that the most effective regulatory system is one that involves the legal profession taking direct responsibility for setting its standards, monitoring compliance, and having primary responsibility for providing consumer redress (as discussed below), but with the key dimensions of lay involvement and
rigorous independent scrutiny. The Committee believes that the regulatory reforms outlined above will have a significant impact on the service received by the consumer. The Committee also believes that there are a number of reforms required to the way in which the professional bodies handle complaints, as discussed below.

**Law Society of Scotland**

*Dual role of the Law Society*

11. The Law Society is charged with the promotion of the interests of the solicitors profession in Scotland and of the interests of the public in relation to that profession. It has been suggested in evidence that there may be a conflict of interest and that the Law Society cannot always represent both interests fairly. With regard to removal altogether of conflict of interest or potential conflict of interest, this could be addressed by creating firewalls between those in the profession who are subject to a complaint, and the complainant. Such a system exists in England and Wales where the Office for the Supervision of Solicitors has been set up to deal specifically with the handling of complaints and has a guarantee of independence from the Council of the Law Society. The Committee recommends that the Law Society consider the creation of firewalls, namely by establishing procedures where there is a clear separation of interests and demarcation between the interests of the complainer and the solicitor subject to the complaint.

*Accessibility of the complaints system*

12. The Committee believes that it is vital that the complaints system is transparent and accessible. The Committee recognises the work done by the Law Society in developing its leaflet and helpline aimed at clients, but believes that more could be done to increase the transparency and accessibility of the system. The Committee therefore recommends that the Ombudsman should be given the power to make recommendations on the operation of the complaints procedures of the professional bodies.

*Setting Standards*

13. The Committee recommends that there should be lay involvement in the setting of standards for professional bodies to ensure that the consumer's voice is represented from the very outset.

*Definition of a complaint*

14. There are two definitions of a complaint against a solicitor: inadequate professional services (IPS) and professional misconduct. There appears to be confusion amongst consumers about the division of complaints between IPS complaints and conduct complaints. The Committee is encouraged that there was a lot of support in evidence for clarifying and simplifying the definition of a complaint. The Committee recommends that the distinction between conduct and IPS complaints should be removed. A "complaint against a solicitor" should be redefined in statute, and the new definition should be simple and widely drawn. This should be supported by an education campaign aimed at both the profession and the wider public.
**Negligence**

15. The Committee is aware that professional bodies are often too ready to reject a complaint on the basis that it involves negligence, where it may be that IPS is also involved. This is clearly linked to the interpretation of the term IPS. The Committee acknowledges that it is already possible for professional bodies to investigate complaints which involve both IPS and negligence, but it appears that many are rejected on the grounds that the complaint should be pursued through the courts. The Committee therefore highlights that the professional bodies should investigate the IPS element of a complaint, even where there may also be allegations of negligence. The single gateway and the new power of the Ombudsman to direct a professional body to investigate a complaint will play an important role in ensuring that such IPS complaints are investigated and not dismissed as negligence to be pursued through the courts.

16. The Committee recommends that the Law Society should examine its procedure for dealing with complaints involving negligence and consider setting up an arbitration scheme for dealing with such complaints. The Committee also recommends that the Law Society should examine the merits of the Troubleshooter scheme and report back to the Committee on other ways of addressing problems experienced by complainants in pursuing negligence cases in court. Finally, the Committee recommends that the Scottish Executive should examine the merits of allowing professional bodies to investigate small negligence cases up to a certain financial limit, and report back to the Committee on its findings.

**Redress**

17. The Committee believes that redress should be available to the complainant regardless of the classification of the complaint. The Committee therefore recommends that compensation should be offered for a complaint about an individual solicitor's conduct where it is established that loss has been suffered as a direct result of the solicitor's conduct.

**Compensation levels**

18. The Solicitors (Scotland) Act 1980 (the 1980 Act) sets at £1,000 the maximum level of compensation which the Law Society or the Scottish Solicitors Discipline Tribunal may order a solicitor to pay a client in relation to inadequate professional services. The maximum award of £1,000 has not been increased since 1990 and the Committee believes that it should be uprated and kept in line with inflation thereafter. The Committee does not accept that there should be no maximum limit, as there have to be parameters within which those awarding compensation can work. The Committee recommends that the maximum compensation level should be increased to £5,000 with a mechanism for annual uprating in line with inflation.

19. The Committee believes that there should be consistency in the awarding of compensation and supports the suggestion that the professional bodies should issue guidance on this matter in order that the consumer knows how the award has been determined. Such guidance should be placed in the public domain. This will be particularly important given the proposed delegation of powers (as discussed below).
Delegated powers

20. Under the 1980 Act, the Council of the Law Society has to look at each complaint made to the Law Society and to determine the outcome. The Council of the Law Society comprises of 51 solicitors who are elected on a geographical basis or who are co-opted, such as people in public service or in-house lawyers. There is no lay involvement in the Council. The lack of lay involvement in the Council raises serious questions about the fairness of the complaints process.

21. The Committee believes that it is unfair that the adversarial approach to dealing with complaints in the Council does not allow the complainant the opportunity to be heard, whereas solicitors can lobby Council members to present their case. The Committee is also concerned that the requirement for the Council to consider every complaint slows down the process and contributes to time delays in addressing complaints. The Committee recommends that the power to determine the outcome of all complaints should be delegated to committees of the Law Society.

Conciliation

22. When it receives a complaint, the Law Society will seek to have the matter resolved in the first instance between the firm and the dissatisfied client. This process is referred to as conciliation. The Committee believes that the conciliation process is key to the complaints handling system and could resolve many complaints at an early stage. The Committee recommends that the conciliation process should be strengthened and that a practice rule should be introduced to require firms to have a complaints procedure, with a delegated person within a firm to deal with complaints. The Committee also recommends that conciliation services should be provided to small firms and sole practitioners and that the conciliation process should have strict time limits to ensure that it is not used as a method to stall genuine complaints.

Lay involvement

23. The Committee believes that lay involvement in the complaints process is crucial for promoting consumer confidence. The Committee recommends that lay representation on committees of the Law Society dealing with all complaints should be at least 50%.

Scottish Solicitors Discipline Tribunal

24. The Committee believes that the independence of the Scottish Solicitors Discipline Tribunal would be enhanced if its solicitor members were appointed by an open selection process rather than recommended by the Law Society and appointed by the Lord President and if lay membership were increased. The Committee recommends that members of the Scottish Solicitors Discipline Tribunal should be appointed by an open selection process. The Committee also recommends that the membership of the Scottish Solicitors Discipline Tribunal should be made up of 50% lay people. It should also be possible for the Scottish Solicitors Discipline Tribunal to be chaired by a lay person, with the assistance of a legally qualified clerk.

Finance
Professional Indemnity Insurance

25. The Law Society has the power to provide and to require solicitors to have professional indemnity insurance and does so through the Solicitors (Scotland) Professional Indemnity Insurance Rules 1995 and a master policy scheme. The master policy provides cover in respect of negligence claims as well as indemnifying solicitors in respect of claims arising out of any alleged dishonest, fraudulent, criminal or malicious act or omission. Claims under the master policy are investigated by the insurers (Marsh UK). The Committee is aware that lengthy delays in receiving settlements from the master policy have caused distress to a number of individuals. The Committee recommends that the Scottish Executive should examine ways in which the operation of the guarantee fund and the master policy could be made subject to external regulation and report back to the Committee on its findings.

Faculty of Advocates

26. The Ombudsman told the Committee that the Faculty's handling of complaints allows no consumer redress and is based entirely on an internal disciplinary code. If the client is in pursuit of compensation, this must be pursued by a negligence action through the courts. The Committee believes that there should be redress where complaints have been upheld. The Committee recommends that the Faculty of Advocates should offer compensation of up to £5,000 for upheld complaints which relate to IPS, and for complaints about an individual advocate’s conduct where it is established that loss has been suffered as a direct result of the advocate’s conduct.

27. The Committee recommends that the Faculty should prepare an information sheet to be sent to all complainers providing a brief outline of the way the Faculty deals with complaints.

Complaints involving solicitors and advocates

28. The Committee recommends that the Law Society and the Faculty of Advocates should produce a procedure for dealing with complaints which involve both solicitors and advocates, in consultation with the Ombudsman.

Legislation

29. The Committee acknowledges that legislation will be required to implement many of its recommendations and invites the Executive to report back to the Committee on these proposals.
LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL: COMPLAINTS ABOUT THE LEGAL PROFESSION

SARAH HARVIE-CLARK

The Legal Profession and Legal Aid (Scotland) Bill, introduced in the Scottish Parliament on 1 March 2006, stems from two distinct strands of Scottish Executive policy development. This briefing considers the parts of the Bill concerned with reform of the handling of complaints against legal practitioners in Scotland. A separate SPICe briefing considers the proposals in the Bill relating to legal aid.


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KEY POINTS OF THIS BRIEFING

- the Legal Profession and Legal Aid (Scotland) Bill (‘the Bill’), introduced in the Scottish Parliament on 1 March 2006, contains proposals intended to improve the system for the handling of complaints against legal practitioners in Scotland

- originally the regulation of the legal profession in Scotland lay in the hands of courts which controlled the right of lawyers to practice. They have long since delegated this and other aspects of regulation to the legal profession itself (referred to as ‘self-regulation’)

- criticism of self-regulation has led to a move to ‘co-regulation’ – a broad multi-layered regulatory framework involving bodies including the ordinary courts, the professional bodies (the Law Society of Scotland and the Faculty of Advocates), the Scottish Solicitors Discipline Tribunal and the Scottish Legal Services Ombudsman

- the Bill provides for further change in the form of a new Scottish Legal Complaints Commission to investigate complaints relating to the services provided by a practitioner (where ‘inadequate professional services’ is alleged) (ss 1 and 7). At present this type of complaint is considered by the professional bodies themselves

- complaints relating to the conduct of a practitioner (ie where ‘professional misconduct’ or ‘unsatisfactory professional conduct’ are alleged) will continue to be considered by the professional bodies themselves, subject to the new Commission overseeing how the complaint was handled by the bodies (ss 5, 15–16 and 35)

- the new complaints handling system will be funded by a general levy on the legal profession and also by a levy on individual practitioners who have been the subject of a complaint which is eligible to be considered by the Commission (ss 18 and 19)

- the Bill also provides that the new Commission will have an oversight function in relation to the Master Policy (professional indemnity insurance required by and provided by the Law Society in relation to its members) and the Guarantee Fund (operated by the Law Society to provide protection for those who have lost money through their solicitor acting dishonestly) (s 29)

- key issues associated with the Bill include the following:
  - the distinction between complaints about services and complaints about conduct and the consequences of this distinction (including its effect on the maximum compensation levels that can be awarded to a complainant)
  - the lack of an external right of appeal from the Commission in relation to complaints about service and whether this is compatible with the ECHR
  - the funding of the Commission including the fact that there is a levy on individual practitioners who have been the subject of a complaint which is eligible to be considered, whether or not the complaint is ultimately upheld
  - whether the new Commission should have an oversight role in relation to the Master Policy and the Guarantee Fund
INTRODUCTION

The Legal Profession and Legal Aid (Scotland) Bill, introduced to the Scottish Parliament on 1 March 2006, stems from two distinct strands of Scottish Executive policy development. Firstly, the Bill contains proposals intended to improve the system for the handling of complaints against legal practitioners in Scotland. Secondly, it contains proposals relating to legal aid which represent the first stage of a programme to improve the delivery of all forms of publicly funded legal assistance, provided by both lawyers and non-lawyers. This briefing considers the complaints handling aspect of the Bill. A separate SPICe briefing considers the proposals in the Bill relating to legal aid.

THE LEGAL PROFESSION IN SCOTLAND

HISTORICAL BACKGROUND TO REGULATION OF THE LEGAL PROFESSION

Historically, the regulation of the legal profession in Scotland, as in most other jurisdictions, lay in the hands of courts which controlled the right of lawyers to practice. They have long since delegated large aspects of regulation to the legal profession itself. Between the 1930s and the 1980s the era of ‘traditional’ self-regulation of the legal profession reached its height.

Since then criticism of self-regulation has led to a move to ‘co-regulation’ – a broad multi-layered regulatory framework involving bodies including the ordinary courts, the professional bodies (the Law Society of Scotland and the Faculty of Advocates), the Scottish Solicitors Discipline Tribunal, the Scottish Legal Services Ombudsman, the Scottish Legal Aid Board (in relation to legal aid work), the Financial Services Authority (in relation to investment business), the Department of Trade and Industry (in relation to insolvency practice) the Office of Fair Trading (in relation to consumer credit and debt advice) and the Immigration Services Commissioner (in relation to immigration and asylum advice) (Paterson 2005, para 1.01). The functions of the main regulators will be returned to in more detail below.

Despite the shift towards co-regulation public criticisms of the system have remained. Many consumers view the complaints process as too long and complicated, requiring undue persistence to reach a conclusion, and there is also concern that the overall process might be weighted in favour of the lawyer (Scottish Executive 2005a, para 1.2).

During the first session of the Scottish Parliament (1999–2003), the former Justice 1 Committee undertook an inquiry into Regulation of the Legal Profession (see Volume 1: Report and Evidence). It concluded that the best option for the people of Scotland was to retain the current system of co-regulation but reform it to make it more acceptable and more representative of the public interest. A number of its recommendations have now been implemented by the professional bodies (Scottish Executive 2005a, para 1.1, appendices A and B).

In 2005, the Scottish Executive consulted (Scottish Executive 2005a) on a range of options for further change to the structure of the complaints handling system. The Bill’s proposals are largely based on this consultation.

CATEGORIES OF LEGAL PRACTITIONER IN SCOTLAND

There are four (soon to be five) main categories of legal practitioner in Scotland:

- **solicitors**: solicitors are the most numerous of the legal professionals in Scotland. At the time of writing, there are just over 11,500 of them, with just under 10,000 holding current practising certificates (the remainder are on the Roll of Solicitors which entitles them to
apply for a practising certificate). Practising solicitors can give advice on all legal matters and represent clients in the lower Scottish courts, ie the district and sheriff courts and tribunals where legal representation is allowed. All solicitors are members of the Law Society of Scotland and are primarily regulated by this body.

- **advocates**: advocates are the next largest category of legal professionals. At the time of writing, there are around 740 of them, with 470 currently practising. They are lawyers who have a right to appear in all Scottish courts, though in practice most of their work involves giving specialist opinions on legal matters and appearing in the higher courts (mainly the Court of Session and the House of Lords in civil cases and the High Court of Justiciary in criminal cases). All advocates are members of the Faculty of Advocates and are primarily regulated by this body.

- **solicitor-advocates**: solicitor-advocates have been in existence since 1993 and there are currently around 180 of them in Scotland. They are solicitors who have ‘extended rights of audience’ ie they can appear in one or both of the higher Scottish courts, as well as the lower courts. They are primarily regulated by the Law Society of Scotland.

- **conveyancing and executry practitioners**: unlike the categories of practitioner described above, these practitioners do not have a general legal qualification but are qualified to work in a specific area of legal practice only (ie either conveyancing or executry work). There are currently around 20 of them in Scotland and since 2003 they have been regulated by the Law Society of Scotland.¹

- **members of professional or other bodies**: ss 25-29 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c 40), which have not yet been commenced, set out arrangements by which rights to conduct litigation and rights of audience in the Scottish courts can be granted to members of a professional or other body (other than the Law Society of Scotland or the Faculty of Advocates) where this is approved by Scottish Ministers and the Lord President of the Court of Session. When the Bill was introduced the Scottish Executive announced that these provisions are to be commenced at a future date (see Scottish Executive news release and Policy Memorandum to the Bill, para 46).

### THE CURRENT STRUCTURE OF THE COMPLAINTS HANDLING SYSTEM

There are two main types of regulation in Scotland that affect the everyday lives of most legal practitioners:

- **regulation by the professional bodies**: regulation by the professional bodies (ie the Law Society of Scotland and the Faculty of Advocates), with the Scottish Legal Services Ombudsman overseeing how these bodies handle complaints and, for all practitioners apart from advocates, the Scottish Solicitors Discipline Tribunal (and thereafter the Court of Session) providing the possibility of external appeal in relation to the substance of these bodies’ decisions.

- **regulation by the ordinary courts**: regulation by the ordinary courts when considering actions brought by aggrieved individuals (for more information on the Scottish courts system see the website of the Scottish Courts Service). The courts use standards derived from the laws of professional negligence, contract law and the law of agency.

¹ The Law Society took over this responsibility from the Scottish Conveyancing and Executive Services Board (SCESB) which was abolished in 2003.
These two systems do overlap to a certain extent in that in the system of regulation by the professional bodies there is an ultimate right of appeal for practitioners to the Court of Session. Furthermore, the standard applicable to professional negligence actions that can be brought in the ordinary courts overlaps with the standards relating to conduct and service set by the professional bodies (see further ‘Key Issues’ below). Lastly, the Law Society provides and requires practitioners to have professional indemnity insurance (known as ‘the Master Policy’) which provides cover to practitioners in relation to claims including professional negligence claims.\(^2\)

The following section of the briefing provides more detail about the current system for handling complaints against legal practitioners in Scotland.

**Solicitors, Solicitor-Advocates and Conveyancing and Executry Practitioners**

As mentioned above, solicitors, solicitor-advocates and conveyancing and executry practitioners are regulated in the first instance by the Law Society of Scotland.

**Law Society of Scotland**

The Law Society of Scotland is a statutory body whose main powers are set out in the Solicitors (Scotland) Act 1980 (c 46) (‘the 1980 Act’). The Society has a dual role under the 1980 Act to promote both the interests of the solicitors’ profession in Scotland and the interests of the public in relation to that profession (the 1980 Act, s 1). One of its functions is to deal with complaints about practitioners through its Client Relations Office (Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c 40), s 33).

*Encouraging early resolution*

In the first place, complainants will be encouraged to resolve their complaint directly with their practitioner or law firm but where this has not been possible the Law Society will pass the complaint to a Case Manager who will carry out an investigation which includes instructing a Reporter to prepare a report containing recommendations.

*Distinction between services complaints and complaints about conduct*

From them on, the internal procedure of the Law Society for handling complaints and the remedies it has available to it differs depending on whether the complaint is just about the service provided by the practitioner (‘a services complaint’) or about the conduct of the practitioner. This distinction will be returned to in more detail below but at present it is sufficient to note the following consequences.

*Procedure in relation to a services complaint where parties in agreement*

In relation to a services complaint, if both parties accept the Reporter’s recommendations then that will be the end of the matter.

*Procedure in other circumstances*

If, in relation to a services complaint, the Reporter’s recommendations are not accepted, or, there is a conduct complaint, the report will go to one of the Society’s Client Relations Committees (which has a membership of 50% solicitors and 50% non-solicitors) which then has various options open to it.

\(^2\) It also indemnifies practitioners in respect of claims arising out of any alleged dishonest, fraudulent, criminal or malicious act or omission (Scottish Executive 2005a, chapter 10, footnote 30).
Remedies available in relation to a services complaint

In relation to a complaint about service the Committee can decide whether to uphold or reject the complaint. If it upholds the complaint it can do the following (1980 Act, s 42A):

- order the solicitor to charge no fees/outlays
- order the solicitor to refund or reduce fees/outlays
- order the solicitor to rectify mistakes at the solicitor’s expense
- direct the solicitor to take, at his or her own expense, such other action in the interests of the client as it may specify
- compensate the client up to a maximum of £5,000 (where the service complained of occurred after April 2005)

The solicitor can appeal a finding of the Law Society about service to the Scottish Solicitors Discipline Tribunal (SSDT) (see below).

Procedure in relation to a complaint about conduct

Should a complaint include possible professional misconduct it will be referred from the Client Relations Committee initially considering the complaint to the Society’s Professional Conduct Committee (also composed in equal proportion of solicitors and non-solicitors) who can dismiss the complaint or decide to prosecute it before the Scottish Solicitors’ Discipline Tribunal (SSDT) (see below). The Law Society has no powers to make a finding of professional misconduct itself.

No right of appeal for complainants but oversight function performed by SLSO

Complainants cannot appeal the decision of the Law Society to dismiss their complaint, whatever stage it occurs at. However, should complainants be dissatisfied with the way in which the Law Society has handled their complaint in relation to either type of complaint, they can refer the matter to the Scottish Legal Services Ombudsman (SLSO) (see below).

Scottish Solicitors' Discipline Tribunal

The Scottish Solicitors’ Discipline Tribunal (SSDT) is an independent body that generally sits with three solicitor members and two non-solicitor members. The solicitor members are appointed by the Lord President of the Court of Session on the recommendation of the Council of the Law Society, and the non-solicitor members by the Lord President after consultation with the Scottish Ministers. The members hold office for five years but are eligible for reappointment.

It is not only the Law Society that can make a complaint to the SSDT but the Lord Advocate, any judge, the Dean of the Faculty of Advocates, the Auditors of the Court of Session or of any sheriff court, the Scottish Legal Aid Board and the Scottish Legal Services Ombudsman.

If the SSDT makes a finding of professional misconduct it has a wide range of powers including:

- **striking off**: ordering the name of the solicitor to be struck off the Roll of Solicitors – this effectively removes the individual’s right to apply for a practising certificate to practice as a solicitor in Scotland

- **suspension**: ordering that the solicitor be suspended from practice for such period as it sees fit

- **fine**: imposing a fine up to £10,000

- **censure**: censuring the solicitor
Currently, it is not possible for the SSDT to award compensation to an aggrieved client in relation to professional misconduct.

In relation to a finding of professional misconduct, a solicitor has a right of appeal from a decision of the SSDT to the Court of Session. The Court of Session has the same remedies available to it as the SSDT except that it can also suspend or revoke any right of audience before the courts that a practitioner has.

As mentioned above, a solicitor, though not a complainant, can also appeal a decision of the Law Society to the SSDT in relation to a services complaint. If the SSDT upholds a service complaint it has all the remedies open to the Law Society when dealing with a service complaint.

Scottish Legal Services Ombudsman

As mentioned above, should complainants be dissatisfied with the way in which the Law Society has handled their complaint, they can refer the matter to the Scottish Legal Services Ombudsman (SLSO). (This is also the case in relation to the Faculty of Advocates – see below).

The SLSO is appointed by Scottish Ministers. From 26 April 2006 the post-holder will be Mrs Jane Irvine. Her duties are set out in the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c 40). She is independent of the legal profession and is not a lawyer. When she receives a complaint she will investigate how it was handled and will then put her findings together in a written Opinion. In compiling her Opinion the Ombudsman is concerned whether the initial investigation was fair and thorough, whether all the relevant heads of complaint were properly addressed and whether appropriate action was taken. There is no appeal against the SLSO’s findings in an Opinion.

In her Opinion, the SLSO can make various recommendations including that the professional body: provides more information to the complainant, investigates the complaint further; reconsiders the complaint or pays compensation for loss, inconvenience or distress caused by the way the body investigated the complaint. However, the SLSO has no power to enforce her recommendations and it is up to the professional body whether to accept or reject them. The SLSO can, however, publicise her findings in a case and the fact that they have not been accepted by the professional body. The SLSO may also take a case to the SSDT where it appears that a solicitor may have been guilty of professional misconduct.

ADVOCATES

The Faculty of Advocates is a body of independent lawyers who have been admitted to practice as advocates before the Scottish courts. It is led by its Dean who is elected by the whole membership and is assisted by four other office bearers. The Faculty is self-regulating and controls its own admissions and discipline.

The Faculty is statutorily responsible for investigating complaints against advocates (Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c 40), s 33). Complaints made to the Faculty of Advocates about advocates are considered by the Dean who can deal with the complaint himself, or delegate it to an office bearer or refer it to the Faculty’s Complaints Committee. The Complaints Committee is composed of professional and lay members in equal proportion.
The **Faculty of Advocates** in practice also distinguishes between conduct and services complaints although it is of course not bound by Solicitors (Scotland) Act 1980 (Scottish Executive 2005a, para 7.5, footnote 21).

If a complaint about services or conduct is upheld after consideration of representations from both parties, a range of penalties may be imposed including a fine or an award of compensation up to £5,000.

Alternatively, more serious complaints may be referred to the Faculty of Advocates Disciplinary Tribunal, an internal tribunal which is also composed in equal proportions of professional and lay members. The range of penalties available then extends to a number of additional remedies including suspension or expulsion from membership of the **Faculty**.

As mentioned above, should complainants be dissatisfied with the way in which the **Faculty** has handled their complaint, they can take their complaint to the **Scottish Legal Services Ombudsman**. The **SLSO** has the same powers as in relation to the **Faculty** as she has in relation to a complaint against the **Law Society**.

**THE CURRENT SYSTEM: STANDARDS APPLIED WHEN CONSIDERING COMPLAINTS**

The main standards applicable to legal practitioners are considered below. The first three relate to the system of regulation by the professional bodies and the last standard – professional negligence – is applied by the ordinary courts. It has been argued that the distinction between the different standards is not clear cut and there is overlap between them. This issue is explored in greater detail at ‘Key Issues’ below.

**PROFESSIONAL MISCONDUCT**

In terms of the standards applied by the professions and their disciplinary bodies, a finding of professional misconduct currently attracts the most serious consequences for legal practitioners.

**The Sharp test: the basic definition**

Unlike a number of Commonwealth jurisdictions (eg Ontario in Canada and New South Wales and Victoria in Australia) the definition of ‘professional misconduct’ is currently not enshrined in statute (Paterson 2005, para 1.05). What is regarded as the key description of the concept is contained in the Court of Session case of *Sharp v Council of the Law Society* (1984 SC 129 at 129) where Lord President Emslie observed:

“There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct”

He also described it as a “grave charge” and made it clear that the whole circumstances and the degree of culpability of the individual practitioner must be considered (1984 SC 129 at 129).³

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³ It has been established that the following factors will not affect a solicitor’s culpability (although they may serve to mitigate the penalty imposed for the misconduct): illness (eg depression or ME); substance abuse (eg alcoholism or drug abuse); stress and overwork and inexperience or junior status (Paterson 2005, paras 1.13–1.17).
The Sharp test: other sources of guidance

On its own, the test in Sharp actually tells the practitioner and potential complainant very little so other sources are typically relied upon for further guidance. Webster (2004), in her textbook on professional ethics, tries to summarise the essence of good conduct for the benefit of Scottish solicitors:

“The essential and absolute qualities of good conduct are honesty, truthfulness and integrity, and as a solicitor you should remember that you owe duties to four classes of people (…): 1) your client; 2) the court; 3) your fellow professionals; 4) the public”

(Webster 2004, para 1.11)

Webster (above) is paraphrasing from the general Code of Conduct (2002) for solicitors provided by the Law Society. Indeed, the Law Society makes a significant contribution to the provision of further guidance on the Sharp test for practitioners:

- **Codes of Conduct**: the general Code of Conduct (2002) for solicitors and also a Code of Conduct for Criminal Work. These Codes are intended as a statement of basic values and principles which form the foundation of the legal profession, as opposed to an exhaustive list of rules and detailed obligations. Adherence to the Codes are not mandatory but breach of them may be relevant to a finding of professional misconduct (Paterson 2005, para 1.09)

- **Practice Rules**: the 1980 Act (s 34) gives the Law Society the power to make rules relating to the conduct and discipline of solicitors (which must be approved by the Lord President of the Court of Session). It has been established by statute and case law that breach of a Practice Rule may amount to misconduct (Paterson 2005, para 1.09)

- **Practice Guidelines**: these come from the Law Society’s Professional Practice Committee and are often quite detailed in nature. Although they are little more than guides to good practice their breach may also be taken into account in a conduct complaint (Paterson 2005, para 1.09)

For more information on the above see the Members’ Information section of the Law Society’s website.

Advocates’ conduct

In relation to advocates, in 1988 the Faculty of Advocates produced a Guide to the Professional Conduct of Advocates. However, the Guide states that it should be:

“read as a whole and interpreted according to its spirit rather than its letter. For the same reason, it must not be assumed that it is enough for the advocate to keep within the letter of a ‘rule’ as stated in the Guide” (p iv)

The Guide states that the ultimate test of an advocate’s conduct is whether it is such as to impair the trust and confidence which others place in him [or her] and his [or her] profession (at p iv).
Examples of professional misconduct

Examples of conduct of legal practitioners which has amounted to professional misconduct in the past include embezzlement of client funds, misleading the Law Society and/or other parties and failure to renew a practising certificate (such a certificate is required for all solicitors to practice in Scotland and therefore to have insurance cover from the Master Policy) (Paterson 2005, para 1.05).

Perhaps understandably, there will always be a certain degree of overlap between behaviour which merits discipline on conduct grounds and that which leads to a criminal conviction. However, not every criminal conviction will give rise to a finding of professional misconduct. Professor Paterson states that one factor that is likely to influence the SSDT in considering whether a conviction should also be misconduct is whether it involves an abuse of a position of trust (Paterson 2005, para 1.23). Furthermore, the SSDT is entitled under the 1980 Act (s 53(1)(b)) to treat any conviction “by any court of any act involving dishonesty” or which led to a sentence of “imprisonment of not less than 2 years” as misconduct warranting sanction. Offences which have lead to a finding of professional misconduct in the past include firearms offences, assault, domestic violence and repeated motoring offences (Paterson 2005, para 1.23).

UNSATISFACTORY CONDUCT (SOMETIMES KNOWN AS ‘UNPROFESSIONAL CONDUCT’)

Neither this standard nor its definition is to be found in any legislation which governs Scottish legal practitioners. However, it is recognised by the Law Society and the SSDT. Unsatisfactory conduct is behaviour which, while falling just short of professional misconduct, is nonetheless unacceptable and worthy of public condemnation. Unlike professional misconduct, the test for it is only on the balance of probabilities. Indeed the clearest examples of unsatisfactory conduct are cases where there is insufficient evidence to establish the behaviour beyond reasonable doubt but enough to establish it on the balance of probabilities. The other most common form of unsatisfactory conduct is failing to send an appropriate letter to both clients where the solicitor is acting for both sides in a conveyancing transaction (Paterson 2005, para 1.28).

When considering complaints about a practitioner’s conduct, both the Law Society’s Client Relations Committees and its Professional Conduct Committee will make a finding of unsatisfactory conduct where they consider the circumstances justify it. The Council of the Law Society will then issue a letter ‘deploring’ or ‘regretting’ the conduct. This is noted on the solicitor’s record (Webster 2004, paras 1.07 and 7.02) for up to five years. It is thought that repeated findings of unsatisfactory conduct might give grounds for a finding of professional misconduct.

INADEQUATE PROFESSIONAL SERVICES

In relation to solicitors, ‘inadequate professional services’(IPS) consists of:

“Professional services which are not in any respect of the quality which could reasonably be expected of a competent solicitor” (1980 Act, s 65)

As with professional misconduct, the standard requires to be supplemented by further guidance from other sources. Article 5 of the Code of Conduct (2002) for solicitors provides that:

“Solicitors must provide adequate professional services. Solicitors are under a professional obligation to provide adequate professional services to their clients. An adequate professional service requires the legal knowledge, skill, thoroughness and preparation necessary to the matter in hand. Solicitors should not accept instructions
unless they can adequately discharge these. This means that as well as being liable for damages assessable by a court of law for any act of negligence in dealing with a client’s affairs, a solicitor may face disciplinary action by the Law Society in respect of a service to a client which is held to be an inadequate professional service.”

The Law Society has issued guidelines relating to consideration of complaints where IPS is alleged. The guidelines provide that one should have regard to whether the solicitor (Webster 2004, para 7.06):

- has dealt with the business with due expedition
- has displayed the adequate knowledge of the relevant area of law
- has exercised the appropriate level of skill
- maintains appropriate systems
- has communicated effectively with his [or her] clients and others

Scrutiny of the recent Annual Reports of the Law Society reveals that consistently the most frequent forms of IPS in relation to solicitors relate to delay, failure to communicate, failure to advise adequately, failure to follow instructions and failure to prepare adequately (Paterson 2005, para 1.35). Behaviour which gives rise to a finding of professional misconduct or unsatisfactory conduct may well also give rise to a finding of IPS. However, only a minority of IPS cases will raise conduct issues.

PROFESSIONAL NEGLIGENCE

As mentioned above, it is always open to an aggrieved individual, in addition to or instead of, pursuing a complaint with the practitioner’s professional body, to bring an action for negligence in the ordinary courts.

If IPS relates to a general lack of capacity to perform certain tasks adequately, negligence refers to a want of due care in performing a specific task which results in loss to a client (Paterson 2005, para 1.36; Webster 2004, para 7.08). The modern test for professional negligence in Scotland was established in the case of Hunter v Hanley (1955 SC 200). Essentially, negligence by a professional is only established if the course taken by the profession is one “which no professional man of ordinary skill would have taken if he had been acting with ordinary care”.

PROPOSALS IN BILL RELATING TO REGULATION OF THE LEGAL PROFESSION

REFORM OF THE COMPLAINTS HANDLING SYSTEM

The Bill makes important changes to the current structure of the complaints handling system for the legal profession. Section 1 creates a new body, the Scottish Legal Complaints Commission (‘the Commission’), headed up a board appointed by Scottish Ministers and composed of a non-lawyer chair and non-lawyer majority.

Single gateway

The Commission will act as a single gateway for the receipt of all complaints about legal practitioners that cannot be resolved at source (ie at a local level between the practitioner and complainant).
Classification of the complaint

Section 4(1) of the Bill provides that after it takes certain preliminary steps in relation to the complaint to determine whether it is eligible to be considered,⁴ the Commission must determine whether the complaint is a ‘services complaint’ or a ‘conduct complaint’ as defined in the Bill (at sections 2(1) and 34 – see further below). This classification is very important as it determines the powers the Commission has in relation to the complaint.

Where the Commission thinks that the complaint may constitute both a services complaint and a conduct complaint it must:

“consult, co-operate and liaise with the relevant professional organisation [ie the Law Society of Scotland or the Faculty of Advocates] and have regard to any views expressed by the organisation on the matter” (s 4(2))

Services complaints

The role of the new Commission

Under the Bill, “services complaints” are essentially complaints about ‘inadequate professional services’ (IPS), as recognised by the current law (ss 2(1)(b) and 34). The Bill provides that the new Commission will take over from the Law Society and the Faculty of Advocates in investigating and determining services complaints (s 7).

Remedies available to Commission

The remedies available to the new Commission in relation to services complaints are the same as those available to the Law Society at present in relation to services complaints (under the 1980 Act, s 42A), ie no fees or reduced fees, correction of mistakes, compensation or such other action the Law Society sees fit of benefit to the client (s 8(2)). However, the maximum level of compensation payable to the complainant is increased from £5,000 to £20,000 under the Bill (s 8(2)(d)).

The compensation aspect of the Bill in relation to services complaints was the subject of some media attention when the Bill was introduced (see eg BBC news release 2 March 2006) and has also attracted comment (positive and negative comment respectively) from the Law Society of Scotland and the Scottish Legal Services Ombudsman (see The Journal Online 6 March 2006).

Appeal mechanism and oversight function

As mentioned above, at present a decision of the Law Society in relation to IPS can be appealed by the practitioner (although not the complainant) to the SSDT (an external body).⁵ The Bill does not make provision for a comparable right of appeal from the Commission to a further external body. However, the Commission will have an internal appeals committee, to

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⁴The Commission must determine whether the complaint being made has been passed to the Commission within the time limits for considering complaints set by the Commission and also that the complaint is not being made prematurely (ie prior to a reasonable attempt to resolve the complaint at source) (s 3). It must also determine that the complaint is not frivolous or vexatious (s 2(1) and (2)).

⁵However, there is no comparable body for appeals from decisions of the Faculty of Advocates, as its discipline tribunal is an internal body.
which appeals may be made against the initial decision (schedule 1, paragraph 11). Thereafter an action can be raised in the Court of Session for 'judicial review' of the decision (Policy Memorandum to the Bill, para 5). This is a review on certain limited grounds only and does not involve reconsideration of the decision under review.

The Scottish Legal Services Ombudsman is to be abolished (s 17) so there will be no other body specifically charged with overseeing how the complaint has been handled by the new Commission (a separate, although related, issue from that of the possibility of an appeal relating to the substance of the decision).

Conduct complaints

The standards to be applied

“Conduct complaints” are defined in the Bill as ‘professional misconduct’ or ‘unsatisfactory professional conduct’ (ss 2(2)(a) and 34). ‘Professional misconduct’ is not defined any further by the legislation and it must be assumed that the current definition created by the case of Sharp (see above) is still applicable. ‘Unsatisfactory professional conduct’ is further defined in relation to solicitors (and similarly for other practitioners) as:

“professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional services” (s 34(e))

So, broadly speaking, the ‘unofficial’ standard of ‘unsatisfactory conduct’ recognised in current practice (and discussed above) has been given formal statutory recognition.

Consideration of the complaint by the professional body with Commission oversight

Under the new system conduct complaints are to continue to be considered by the relevant professional body, ie the Law Society or the Faculty of Advocates (ss 5 and 35). Indeed, the Bill imposes a duty on the professional bodies to deal with them (s 35).

How the complaint was handled but not the substance of the complaint will be overseen by the new Commission (ss 15 and 16) – as the Scottish Legal Services Ombudsman currently does in relation to all types of complaint. Unlike the current Ombudsman, however, the Commission will be able to enforce its recommendations (s 16(6)).

The Law Society and unsatisfactory professional conduct complaints

In relation to the Law Society, a distinction needs to be made between its powers in relation to ‘unsatisfactory professional conduct’ and ‘professional misconduct’. In relation to unsatisfactory professional misconduct, the Law Society will have the power to determine the complaint itself and (s 36(2) of the Bill inserting s 42ZA into the 1980 Act):

- **censure**: censure the practitioner

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6 This is the first time IPS has been explicitly placed on a continuum with the conduct standards (recognition of the potential overlaps between them not withstanding). However, the fact that unsatisfactory conduct is less serious than professional misconduct is well-established in practice. See eg Paterson 2005 at para 1.05: "In regulatory terms conduct ranges along a continuum from aspirational conduct at one end through good practice, acceptable conduct, unsatisfactory conduct and finally professional misconduct at the other. However, disciplinary measures are restricted to the last two.”
• **education or training**: where it does not consider the practitioner has sufficient competence in relation to any aspect of law or legal practice, direct him or her to undertake appropriate education or training

• **fine**: direct the practitioner to pay a fine not exceeding £2,000

• **compensation**: direct the practitioner to pay compensation to the complainant not exceeding £5,000

This gives the Law Society a much greater range of sanctions than they have at present in relation to a breach of the equivalent standard in current practice, where they can only note the finding on the solicitor’s record (Webster 2004, para 1.07 and 7.02).

A practitioner can appeal to the SSDT against a finding of unsatisfactory professional conduct by the Law Society or against the sanction imposed by the Law Society (s 36(2) of the Bill inserting s 42ZA(8) into the 1980 Act).

**The Law Society, the SSDT and professional misconduct complaints**

In relation to complaints where professional misconduct is alleged, there are no proposals in the Bill to alter the present law which provides that the Law Society has no power to make a finding of professional misconduct itself. Instead, the Law Society will have to decide whether to bring a prosecution before the SSDT or dismiss the complaint.

If the matter is prosecuted before the SSDT and the Tribunal makes a finding of professional misconduct, the Bill provides for a new remedy to be available to it (in addition to the ones available under the current law) of compensating the complainant up to a maximum amount of £5,000 (s 38(2)).

In its consultation document, the Scottish Executive did consider giving the Law Society power to determine complaints of professional misconduct itself and impose sanctions (Scottish Executive 2005a, paras 11.3 and 11.5). However, this did not find majority support on consultation. Of the 37% of respondents to the consultation who provided clear views on the issue, 63% recommended that such powers should remain a matter for the Tribunal (Scottish Executive 2005b, para 12.2).

**The Faculty of Advocates and conduct complaints**

As mentioned above, in relation to conduct complaints, the Faculty of Advocates are under the same duty in the Bill as the Law Society to investigate and report on complaints (s 35) and, like the Law Society, they are also subject to the oversight of the new Commission in relation to how they handle such complaints (ss 15 and 16).

However, the Faculty are not given statutory powers to impose sanctions in relation to professional unsatisfactory misconduct equivalent to those given to the Law Society in the Bill. For, unlike the Law Society, the Faculty’s power to consider certain types of conduct complaint has never been removed by statute and given to an external body (as was the case with the Law Society and the SSDT). The Faculty of Advocates have always considered all types of conduct complaint internally and on an administrative non-statutory basis and the Explanatory

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7 This practice does not have statutory backing.

8 However, the researchers analysing the responses cautioned in relation to these figures that amongst some respondents there appeared to be confusion as to whether they were answering a question relating to the disciplinary powers of the Law Society in general or specifically related to its proposed powers in relation to professional misconduct (Scottish Executive 2005, para 12.2).
Notes to the Bill (para 13) state that they will continue to do so, subject to the duty to investigate and the Commission’s oversight function relating to complaints handling described above.

**Funding of the new complaints handling system**

At present, the complaints handling function of the professional bodies is funded by their members through subscriptions, whilst the office of the SLSO is funded by the Scottish Executive (Policy Memorandum to the Bill, para 34).

Under the new system the Executive intends that the profession should continue to fund complaints handling with the Executive funding the start-up costs of the new Commission. Normal running costs for the new body will be obtained by two levies – one will be an annual general levy on all practitioners which the professional bodies will collect and pass to the Commission. The other will be a complaints levy which would be payable by an individual practitioner if an eligible complaint is made against him or her, i.e. a complaint which is not excluded by the Commission for being frivolous or vexatious or otherwise ineligible in terms of various procedural rules (ss 2 and 3) (Policy Memorandum, para 35). The complaints levy is payable by the individual practitioner whether or not the complaint is ultimately upheld as the Executive views the levy as:

“a charge for the dispute resolution service being provided by the Commission”

(Policy Memorandum, para 35)

**THE MASTER POLICY AND THE GUARANTEE FUND**

As mentioned above, the Law Society provides and requires practitioners to have professional indemnity insurance (known as ‘the Master Policy’) which provides cover to practitioners in relation to claims including professional negligence claims. The insurance provides cover of up to £1.5 million for any one claim.

The Law Society also operates a Guarantee Fund which is for the protection of those who have lost money through their solicitor acting dishonestly. To make a successful claim there must be no other way of recovering the money, for example by suing the solicitor directly.

The Bill provides that the new Commission will monitor the effectiveness of the Guarantee Fund and the operation of the Master Policy (s 29). On consultation, the Executive noted that the Legal Services Commissioner in New South Wales has similar functions (Scottish Executive 2005a, para 10.2).

**KEY ISSUES**

**THE BALANCE BETWEEN INDEPENDENCE AND SELF-REGULATION**

One of the key issues associated with the Bill is whether the new system of complaints handling strikes the correct balance between being independent of the legal profession and keeping the legal profession involved in the system of complaints handling.

One of the main complaints in relation to the current system is that it seems unfairly weighted in favour of the practitioner. The main policy advantage of a complaints handling system that is

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9 It also indemnifies practitioners in respect of claims arising out of any alleged dishonest, fraudulent, criminal or malicious act or omission (Scottish Executive 2005a, chapter 10, footnote 30).
independent of practitioners is that it would be, and would be perceived by the public to be, as more balanced between the interests of practitioner and complainer and so public confidence in the system would be restored (Scottish Executive 2005b, para 5.7.1). The main policy advantage of a system that keeps the legal profession involved to some degree in the system of complaints handling is that it arguably alerts the profession to the problems arising within the profession and helps members address problems at the earliest opportunity (Scottish Executive 2005b, para 5.7.3).

On consultation, the Executive presented four options for reforming the structure of the complaints handling system (referred to as options A–D). All struck different balances between independence and self-regulation (Scottish Executive 2005a, chapter 5). The proposal which received the most support on consultation (and which appears in the Bill) is the one that has the greatest degree of independence in the system, with an external complaints handling body (with a lay chair and a lay majority) handling services complaints, and the professional bodies dealing with conduct complaints, subject to a strengthened oversight function performed by the new body. (This is referred to as option D in the consultation paper – see Scottish Executive 2005a, paras 5.16 – 5.17; Scottish Executive 2005b, paras 5.7–5.9.2).

Although the consultation paper did not explicitly ask respondents to comment specifically on perceived disadvantages of option D (see Scottish Executive 2005a, para 5.17) a number did. Quite a few of these related to the issue of balance between independence and self-regulation. For instance some consultees saw the continuing involvement of professional bodies in handling complaints about conduct as detrimental to the independence of this option. Others considered option D to go too far in distancing the professional bodies from complaints handling. A recurring comment was that the proposed involvement of lay members on the Commission’s board may leave the system vulnerable due to the lack of expertise, experience and professional knowledge of the board (Scottish Executive 2005b, para 5.7.3). However, the inclusion of lay membership was a popular feature of the proposal for many consultees (Scottish Executive 2005b, para 5.7.1).

THE DISTINCTION BETWEEN SERVICES COMPLAINTS AND CONDUCT COMPLAINTS

Another key aspect of the Bill is the distinction between services complaints and conduct complaints. This classification determines whether the complaint is considered by the new Commission or remains with the relevant professional body (section 4). The classification also determines the remedies which will be available to the complainant (ss 8, 36 and 38).

Academic commentary

Leading experts in the field of professional ethics have highlighted the fact that the same behaviour can fall foul of more than one standard. Professor Paterson writes:

“After much soul searching the [Law] Society, the Tribunal and the Court each reached the conclusion that provided the failure was egregious enough negligence, delay, carelessness or incompetence could each amount to misconduct. Of course, each of them could also be unsatisfactory conduct, inadequate professional service or negligence. Indeed the very same careless or negligent act or period of delay (...) can at one and the same time constitute misconduct/unsatisfactory conduct, IPS and negligence” (Paterson 2005, para 1.26)\(^\text{10}\)

Similarly in relation to the issue of delay by practitioners Webster writes:

\(^{10}\) See also Paterson 2005 at para 1.04.
“Delay may amount to inadequate professional services, unprofessional conduct or professional misconduct. In one case involving a delay of two months to reply to a letter from the Law Society, the Discipline Tribunal said this was misconduct, but delay could even be negligence if it were gross” (Webster 2004, para 7.01)

Initial comments by regulators

Initial comments on the distinction and its consequences by existing regulators have not been entirely favourable. The current SLSO, Mrs Linda Costelloe Baker, was recently quoted by the Law Society in their online journal as having said that the bill contains a “recipe for confusion” in that conduct complaints will continue to be referred to the professional bodies. She estimates that 30% of all complaints she sees contain elements of both conduct and service (The Journal Online 6 March 2006). Furthermore, the Law Society in their recent Q & A briefing on the Bill commented:

“There needs to be a robust and fair system for deciding how complaints involving both service and conduct are to be dealt with. Again, the Bill does not address this issue. If a complaint comprises both service and conduct there will be an inbuilt delay in the early stages of the complaint whilst a consultation takes place about who should deal with which part and in which order.” (Law Society of Scotland: Legal Profession and Legal Aid (Scotland) Bill – Q & A)

Other recent comments

The Scottish Consumer Council in its submission to the Justice 2 Committee on the Bill observed:

“It is sometimes very difficult to draw the line between inadequate professional services (IPS) and professional misconduct. The distinction may sometimes boil down to a matter of degree: if a solicitor fails to reply to one letter or telephone call from his or her client, depending on the circumstances the service the client received might be inadequate. If, however, s/he fails to reply to any communication from the client, this (…) would be professional misconduct.

(…) we now consider that, on balance, conduct complaints should also be dealt with by the Commission. We are persuaded by arguments made by the current ombudsman and others that many complaints have elements of both service and conduct, and that these are very difficult to separate. The distinction between the various types of complaint is not always clear, even to solicitors and members of the public cannot be expected to distinguish between them.” (Scottish Consumer Council 2006b)

At the time of writing, only some of the responses to the current Justice 2 Committee’s call for evidence on the Bill are available. The views expressed above should not therefore be treated as representative of the views of all those who may respond to Justice 2’s consultation.

The consultation

The distinction between different categories of complaint

As the former Justice 1 Committee had recommended in their report (2002, para 84) into the regulation of the legal profession that the distinction between conduct and IPS complaints should be removed, the Executive explored the consequences of implementing this recommendation in its consultation paper, noting that:
“(...) statute would not continue to specify different procedures, redress and disciplinary sanctions for IPS and conduct complaints. It would instead have to set out a unified set of procedures (...) to follow, together with (...) a menu of disciplinary sanctions and redress (...) to apply in cases where appropriate”

(Scottish Executive 2005a, para 7.6)

The Executive asked those responding to the consultation whether they envisaged any difficulties with dropping the distinction (Scottish Executive 2005a, para 7.6). Sixty one respondents (12% of the total respondents) addressed the question. Respondents were fairly evenly divided between those who saw no difficulties with dropping the distinction (46%) and those who did (54%).

Of consultees in favour of retaining the distinction a common response from those representing several different sectors was that distinction was very important, particularly as conduct complaints could relate to very serious situations with significant consequences for any guilty party (eg striking off the Roll of Solicitors). It was also pointed out that different categories of complaint were presently handled using different levels of proof and different procedures and standards. One view was that an amalgamated system would be unfair to solicitors who could be faced with the full range of sanctions instead of the defined limits of the current system. The contrasting view was a concern that merging categories of complaint might result in the dilution of penalties and seriousness of charges against solicitors. On a more pragmatic note, a few consultees argued that of the four options for the new structure of the complaints handling system presented in the consultation paper, two of them (including the one ultimately adopted in the Bill) required the distinctions to continue to operate as they did at present (Scottish Executive 2005b, para 7.5.1).

From the consultees in favour of dropping the distinction a recurring comment was that the distinction between categories of complaint was artificial with much overlap existing. One respondent argued for a change from thinking in terms of the type of complaint to thinking in terms of redress for complainant and protecting the public. It was also said that a complaint is a complaint and that the public would find it less confusing if the distinction was removed (Scottish Executive 2005b, para 7.5.2).

The discretion in option C

Another interesting aspect of the consultation in relation to the distinction between services and conduct complaints relates to a difference between option C and option D. The main difference between option C and option D that the Executive highlighted is that option C was to have been led by a single officeholder, whereas the new Commission in the Bill is under the management of a board (Scottish Executive 2005a, paras 5.12–5.17). However, another potentially interesting difference is that option C appeared to leave the external regulating body with a discretion in relation to handling the substance of conduct complaints, whereas there was no discretion proposed for option D (and there is none in the Bill). Option C is described as follows in the consultation paper:

“It [the external regulating body] would deal mainly [emphasis added] with complaints of alleged inadequate professional service (IPS) in-house, and refer most [emphasis added] complaints about conduct to the legal professional bodies. This option would be broadly similar to the gateway in New South Wales, Australia, where in 2003-2004 the Legal Services Commissioner’s office dealt with 77% of the complaints it received and referred
the remaining 23% to the legal professional bodies" (Scottish Executive 2005a, para 5.12)

On the other hand, in relation to option D:

"the [external] body would deal with complaints about service received from all legal practitioners in Scotland and the professional bodies would continue to handle cases or alleged professional misconduct" (Scottish Executive 2005a, para 5.16)

This difference between option C and option D was not picked up by consultees particularly on consultation. However, if the new Commission retained a discretionary power to deal with conduct complaints in some circumstances this might be another possible way of addressing the concerns discussed above about the potential overlap between services and conduct complaints.

MAXIMUM COMPENSATION LEVELS AND SMALL NEGLIGENCE CLAIMS

One notable consequence of the distinction between types of complaint described above is the variation in the maximum permitted level of compensation that can be awarded to a complainant in relation to each.

In respect of professional misconduct, section 38 of the Bill provides that the SSDT can award compensation to a complainant up to a maximum level of £5,000. For unsatisfactory professional conduct (i.e. “conduct not amounting to professional misconduct” (s 34)) the maximum award is also £5,000 (s 36). On the other hand, although the definition of unsatisfactory professional conduct in section 34 of the Bill suggests that this standard sits between professional misconduct and IPS in terms of severity (with professional misconduct the most serious type of breach of what is required of a practitioner and IPS the least serious) the maximum permitted compensation level for IPS is now £20,000 (the Bill, s 8(2)(d)).

The consultation process

The Executive did not consult specifically on the issue of raising the compensation level for IPS complaints. It consulted on the possibility of compensation for the complainant for professional misconduct (Scottish Executive 2005a, chapter 8), in respect of which strong support was expressed (Scottish Executive 2005b, para 9.1) and on appropriate sanctions for unsatisfactory professional conduct (Scottish Executive 2005a, para 11.4), in respect of which consultees appeared to be in favour of stronger sanctions than those initially suggested (Scottish Executive 2005b, para 12.3).

Most significantly, the Executive consulted on the former Justice 1 Committee’s recommendation (2002, para 94) that the Executive should examine the merits of allowing professional bodies to investigate small negligence claims up to a certain financial limit. In this regard the Executive commented:

11 At least in relation to the SSDT having the power to award compensation. See Scottish Executive 2005a, para 11.3 for the Scottish Executive’s proposal that the Law Society should be able to award compensation in relation to professional misconduct and Scottish Executive 2005b, para 12.2 for the consultees’ responses. This proposal was ultimately not included in the Bill.

12 It is difficult to determine the position conclusively as those responding were asked to comment on the proposed sanctions for professional misconduct and unsatisfactory professional conduct in the same question (question 31) and the analysis of the responses (Scottish Executive 2005b) does not distinguish between sanctions being proposed in relation to each type of conduct complaint.

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“The maximum level of compensation for inadequate professional service rose from £1,000 to £5,000 with effect from 1 April 2005. Though these increased levels of compensation might attract people with potential negligence claims at the lower end of the spectrum to pursue them as a complaint, complainants with more substantial claims might prefer court action with its potential for a higher level of settlement.

In recent years, the Law Society of Scotland has asked its reporters and Client Relations Committees to consider both the quality of advice received by the client and the judgement exercised by the solicitor in giving that advice, on the understanding that such consideration relates to reasonableness.

The Executive proposes that the law should authorise professional bodies to investigate claims of negligence so that statutory backing is given to what is increasingly happening in practice” (Scottish Executive 2005a, paras 7.9–7.11)

This proposal met with a mixed response on consultation. Fifty three per cent of those who expressed a clear view on the question thought the professional bodies should be able to investigate small negligence claims and 47% were against the proposal. There were stark differences between members of the public of whom 70% were in favour, and those of other categories of respondent of whom only 32% favoured this proposal. For some respondents their support came with the qualification that complainants should still be able to raise a court action if desired. Some consultees were unclear about the wording and precise meaning of the proposal. Questions were asked about the meaning of the word ‘small’, with some remarking that ‘small’ may not necessarily equate with ‘simple’ (Scottish Executive 2005b, para 8.1).

While those in favour of the proposal did not tend to expand on their response many of those opposing the proposition provided more detail. The main arguments were that (Scottish Executive 2005b, para 8.1):

- the proposal was seen to create conflicts of interest with professional bodies investigating ‘their own’
- this could breach human rights legislation particularly article 6 (right to a fair trial) and article 1 of Protocol 1 (right to peaceful enjoyment of possessions)
- professional bodies are not equipped to investigate small negligence claims and may require specific training for this task
- a perfectly good system already exists for small claims and complainants already have the option of pursuing their case through the courts

Recent comments
In a recent briefing, the Law Society commented as follows:

“The increase in compensation for Inadequate Professional Service from £5,000 (…) to £20,000 is excessive and no explanation for such a large rise is given. The English white paper on complaints handling introduced the £20,000 figure – it appears that an English solution is being imported to resolve a perceived Scottish problem, despite the promise of Scottish solutions for Scottish issues.

(…)

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The Commission will take on the functions of the courts in negligence matters where the claim is less than £20,000, even though there is no consultation mandate to do so. Again this is likely to raise issues in relation to ECHR compliance. The Society believes negligence should remain a matter for the courts." (Law Society of Scotland 2006c)

The view of the Law Society can be contrasted with that of the Scottish Consumer Council:

“We welcome the powers of the Commission under s 8, where it upholds a service complaint. The proposed increase in the limit up to which compensation can be awarded, from £5,000 to £20,000, is particularly significant for those who have cause to complain about their legal practitioner. Increasing the limit to this level should have a significant deterrent effect in ensuring that firms do not fail to provide an adequate service”

(Scottish Consumer Council 2006b, p 4)

In relation to the issue of the Commission considering small negligence claims, the Scottish Consumer Council writes:

“It is significant that the bill explicitly states that ‘inadequate professional service’ includes negligence; this will allow the Commission to deal with the majority of negligence claims against solicitors. Previously, the problem in situations where negligence is alleged has been that the Law Society has refused to deal with the matter, requiring the complainer to pursue it through the Society’s Master Policy or, if necessary, the courts. This is a costly and slow process, and it is likely that many complainers do not pursue the matter for that reason. We also have anecdotal evidence that where complainers do pursue a negligence claims, some have great difficulty in finding a solicitor who is willing to pursue a fellow legal professional. The ombudsman is also concerned about this issue, and has recommended that Scottish Ministers should look into the matter.

We therefore welcome this provision, which will mean that a considerable proportion of complainers with negligence claims will no longer have to face the risk, expense and uncertainty of taking their claims to court” (Scottish Consumer Council 2006b, p 4)

Again it must be stressed that the views expressed above should not be treated as representative of the views of all those who may respond to Justice 2’s call for evidence (and whose responses are not yet available).

RIGHTS OF APPEAL AND THE OVERSIGHT FUNCTION

Right of appeal in relation to a services complaint

At present, in relation to a services complaint the practitioner, though not the complainant, has a right of appeal from a finding of the Law Society to the SSDT (and thereafter to the Court of Session). However, from a decision of the new Commission in relation to a services complaint there is only the possibility of a review by an internal committee of the Commission and thereafter the possibility of bringing an action for judicial review.

The consultation

The Executive consulted on changing the structure of the complaints handling system, and whilst it received strong support for the model which appears in the Bill (option D), it did not consult specifically on what appeal mechanisms (if any) would be available in relation the option (Scottish Executive 2005a paras 5.16–5.17; Scottish Executive 2005b, paras 5.7–5.10).
Some consultees interpreted the proposal to mean that the new Commission would be largely a 'one stop shop', eg a member of the public who responded said that it was:

“(…) pointless to have layer upon layer of regulatory bodies when one properly organised, impartial, neutral and objective body can do the whole job”

(Scottish Executive 2005b, para 5.7.1)

Others were not sure of the precise structure being proposed. For example, a few respondents expressed their confusion about where the **SLSO** would fit within the proposed structure for complaints handling (although section 17 of the Bill abolishes this office) (Scottish Executive 2005b, para 5.7.3). This is important as in a number of places in the consultation paper it was proposed to give the **SLSO** substantive complaint handling functions in some circumstances (see Scottish Executive 2005a, paras 5.1–5.2 and 6.2–6.4).

**Views of the Law Society and Lord Lester on ECHR compatibility**

The **Law Society** has made public the **Opinion** it has obtained from Lord Lester of Herne Hill QC (2006) which stated that the lack of an external right of appeal in relation to service complaints is not fully compatible with Article 6(1) of the ECHR. This protects the right to have an independent and impartial tribunal determine one’s civil rights and obligations (see **Law Society news release** and **Legal Profession and Legal Aid (Scotland) Bill - Background**). A bill is not considered to be within the legislative competence of the Scottish Parliament if it is incompatible with the Convention Rights (Scotland Act 1998 (c 46), s 29(2)(d)). The Minister for Justice and the Deputy Presiding Officer have both made statements as part of the normal parliamentary legislative process that the Bill is within the legislative competence of the Scottish Parliament (see **Executive Statement on Legislative Competence and Presiding Officer’s Statement on Legislative Competence** made on 1 March 2006 and 28 February 2006 respectively).

Again it must be stressed that the views expressed above should not be treated as representative of the views of all those who may respond to Justice 2’s consultation (and whose responses are not yet available).

**Oversight function in relation to conduct complaints**

In the Bill the professional bodies will continue to handle conduct complaints, subject to the new Commission performing an oversight function in relation to how the complaint is handled (ss 15 and 16). This is what the **SLSO** currently does in relation to all types of complaint – that office is abolished under s 17 of the Bill.

As the new Commission is to take over from the established **SLSO** a key issue is arguably how effective it will be at performing its oversight function. It has already been pointed out that the new Commission will be able to enforce its recommendations, whereas the **SLSO** cannot (s 16(6)). However, it is not entirely clear from the Bill what the scope of the enforcement power is, eg will the Commission be able to prosecute a complaint before the **SSDT** as the **SLSO** currently can do? Other relevant issues to be considered are set out below.

**The consultation paper**

Three out of the four options proposed by the Executive to reform the structure of complaints handling involved retaining the **SLSO** to perform the oversight function (along with various other functions). Accordingly, much of the discussion in the consultation paper relating to strengthening the oversight function referred to the **SLSO**. However, there seems no reason
why the proposals for strengthening the oversight function of the [SLSO](#) are not also relevant for assessing the oversight function of the new Commission in relation to conduct complaints.

Other than being able to enforce its recommendations, as discussed, the Executive consulted on giving the [SLSO](#) power to (Scottish Executive 2005a, paras 6.1 – 6.10):

- **substance of decision**: investigate the substance of the original decision in certain circumstances (eg where the [SLSO](#) believes that the professional body may have failed to investigate a complaint effectively and considers that investigation by his or her own office would be preferable to directing the body to re-investigate)

- **general audit**: to conduct general audits of the complaint files of the professional bodies

- **target timescales**: to set appropriate target timescales for the processing of complaints by professional bodies and monitor adherence to them

- **power of direction**: to direct professional bodies to re-investigate a complaint

These proposals mirrored the recommendations of the [former Justice 1 Committee](#) (2002, paras 38, 45, 49 and 51).

All but the first proposal described above – allowing the external body to investigate the substance of a conduct complaint in certain circumstances – have been addressed in the Bill (ss 16(2)(b) – (d), 16(6), 27(1), (3) and (5)).

On consultation, 88% of those who provided a view considered that the [SLSO](#) should have its powers increased, whilst 66% of those who responded thought its remit should be extended to cover all of the powers recommended by the [former Justice 1 Committee](#). Three of the powers were identified most frequently as inappropriate were 1) investigating the substance of the original decision; 2) conducting general audits; and 3) setting appropriate target timescales (Scottish Executive 2005b, paras 6.1 and 6.3).

**FUNDING OF THE COMPLAINTS HANDLING SYSTEM**

As mentioned above, funds for the new Commission will be obtained by two levies – one will be an annual general levy on all practitioners and the complaints levy which will be payable by an individual practitioner if a complaint is made against him or her which is eligible for the Commission to consider (the Bill, ss 2 and 3; Policy Memorandum, para 35).

*The consultation paper*

In the consultation paper the complaints levy was presented not as a levy on practitioners against whom a complaint was made but as a levy on “law firms against which a complaint has been *upheld*” [emphasis added]. It was therefore said to be equivalent to the ‘polluter pays’ principle found in environment law, which places the costs of remedying pollution on those responsible for it (Scottish Executive 2005a, para 5.13).

In the consultation, the Executive did not ask a specific question on the funding arrangements of the model of complaints handling ultimately adopted in the Bill (option D) – although some respondents appear to have commented in any event (see Scottish Executive 2005b, para 5.7.4). Instead the Executive stated that these funding arrangements would have the same basic structure as a similar model also consulted on (option C) and asked a specific question
about the funding arrangements for option C. As stated above, the main difference between option C and options D is that option C was to have been led by a single officeholder, whereas the new Commission in the Bill is under the management of a board (Scottish Executive 2005a, paras 5.12–5.17). In the consultation paper the Executive acknowledged that “remuneration of the board would be slightly more expensive” (Scottish Executive 2005a, para 5.17).

**Views expressed during the consultation**

Overall, a clear majority (70%) of those who provided a view were in favour of the proposed funding arrangements for Option C. However, whereas 89% of the members of the public who responded supported these arrangements, only 42% of the other respondents were in favour. The notion of ‘polluter pays’ attracted much supportive commentary, almost all from members of the public. However, several respondents, all from the legal profession, argued that the profession should not be required to foot the bill for a system which they could not control or for which they were not accountable. There were mixed views from those few respondents who expressed a view in relation to the funding arrangements for Option D (the model found in the Bill). Some welcomed the option whilst others recommended that the taxpayer should be the main funder (Scottish Executive 2005b, paras 5.7.4 and 5.10).

**Views expressed on the Bill’s proposals**

A recent briefing by the [Law Society](#) commented as follows:

> “the system would be more accurately described as one based on the principle of ‘solicitor pays’ as the practitioner will be expected to pay case fees whether or not a complaint is upheld”

*(Law Society of Scotland 2006c)*

In contrast, the [Scottish Consumer Council](#) commented:

> “In line with the policy intentions of the bill, we believe that the legal profession, individually and collectively, should be encouraged to try and resolve complaints without complainers having to resort to the formal complaints system. (…) we therefore support the bill’s approach: a general levy on all members of the profession, and a complaints levy on firms against whom a complaint is made”

*(Scottish Consumer Council 2006b)*

Lord Lester (2006, p 2), in his recent [Opinion](#) on the Bill’s ECHR compatibility, has expressed the view that the provision on the levies are not in themselves incompatible with the ECHR rights (although he obviously was not commenting on the proposal as a matter of policy).

The views expressed above should not be treated as representative of the views of all those who may respond to Justice 2’s consultation (and whose responses are not available at the time of writing).

**OVERSIGHT OF THE MASTER POLICY AND THE GUARANTEE FUND**

The Bill provides that the new Commission will monitor the effectiveness of the [Guarantee Fund](#) and the operation of the [Master Policy](#) (s 29).

The Executive (2005a, chapter 10) consulted on a similar proposal, ie that the existing [SLSO](#) should have this oversight function. (The [SLSO](#) is of course now to be abolished under s 17 of...
the Bill.) In the consultation the Executive referred to the evidence heard by the former Justice 1 Committee that lengthy delays in receiving settlements had caused distress to a number of individuals (Scottish Parliament Justice 1 Committee 2002, para 142; Scottish Executive 2005a, para 10). However, the Executive (2005a, para 10) also noted that it had no specific information on the turnaround times for the settlement of claims.

The consultation

Quantification of views expressed

Overall, 61 respondents (12%) to the consultation chose to address the issue of giving an oversight function to the SLSO. Of these 58 provided a clear view on whether they agreed with the proposed oversight role for the SLSO. Responses were evenly split between those in favour of the SLSO adopting the oversight role proposed and those against this proposal. However, a difference emerged between the views of the public who were largely (76%) in favour of the proposal, and those of other respondents who were largely against (84%) (Scottish Executive 2005b, para 11.1).

Views in favour of an oversight role

Amongst the many responses indicating support for the proposed oversight role, few substantive arguments were documented to underpin this view (Scottish Executive 2005b, para 11.1). One consumer body did express their view thus:

“delighted that this is included [in the consultation] (...) the current procedure lacks transparency (...) we have been contacted by a number of complainants who have had difficulty in pursuing their claim under the Master Policy”

(Scottish Executive 2005b, para 11.1)

An MSP responding took the view that the status quo represented a conflict of interests. It was argued that the members of the Law Society who pay the Master Policy insurance premium regularly take part in proceedings that may result in a financial burden being placed on the Master Policy, so it may not be in their interests to take decisions that might damage their financial interest with the Master Policy (Scottish Executive 2005b, para 11.1).

Views against an oversight role

Commonly expressed views were that the consultation document did not provide evidence of the limitations of the current system and that the system, as currently operating, presented significant benefits to the public. Another recurring theme was that the SLSO did not have the necessary expertise for the role proposed, although one respondent argued that extra resources should be given to the SLSO for the recruitment of the required expertise. One respondent considered that although they saw no place for the SLSO in relation to the Master Policy, on account of it being commercially obtained insurance, the SLSO could be involved in setting appropriate targets for handling claims under the Guarantee Fund. Another view was that monitoring turnaround times was difficult in practice due to the many different factors influencing the time taken to complete cases, eg claims being dependent on the outcome of other litigation, delays in the court system and lack of co-operation by a third party (Scottish Executive 2005b, para 11.2).

Recent views expressed

The Scottish Consumer Council, in its submission to the Justice 2 Committee, commented as follows:
“We warmly welcome the provision in section 29 that the Commission may monitor the effectiveness of the Scottish Solicitor’s Guarantee Fund and the Law Society of Scotland’s Master Policy for indemnity insurance. The New South Wales ombudsman has power to oversee the equivalent mechanisms in that jurisdiction, and we have previously argued that that would be appropriate for Scotland. We have been contacted in recent years by a number of complainers who have had difficulties in pursuing claims under the Master Policy. We consider that the current procedure appears to lack transparency, and gives some complainers the impression that the insurers are in league with solicitors and the Society. This new provision should help to increase public confidence in the operation of the policy.” (Scottish Consumer Council 2006b)

In contrast the Law Society has commented in relation to the new powers:

“The justification for such powers is not clear and there was no mandate for their introduction in the Scottish Executive’s consultation. The administration of the Master Policy and claims made under that policy are not decided by the Society. These are unique and robust public protections” (Law Society of Scotland 2006c)
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The Legal Profession and Legal Aid (Scotland) Bill, introduced in the Scottish Parliament on 1 March 2006, stems from two distinct strands of Scottish Executive policy development. This briefing considers the main provisions of the Bill relating to legal aid (sections 44 and 45). A separate SPICe briefing looks at the sections of the Bill concerned with reform of the handling of complaints against legal practitioners in Scotland.
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- REFORM OF CIVIL A & A
- ‘ADVICE FOR ALL’ CONSULTATION
- LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

**SOURCES**
KEY POINTS OF THIS BRIEFING

- the **Legal Profession and Legal Aid (Scotland) Bill** makes provision for changes to the system of legal aid in Scotland and represents the first stage of a programme to improve the delivery of all forms of publicly funded legal assistance, provided by both lawyers and non-lawyers.

- the operation of the legal aid system in Scotland is governed by the Legal Aid (Scotland) Act 1986 (c 47) (‘the 1986 Act’) and is administered by the Scottish Legal Aid Board (‘SLAB’). There are three main types of legal aid in Scotland:

  - **Advice and Assistance** (‘A & A’): this makes it possible to obtain initial legal advice from a solicitor, (or where appropriate, from counsel) on any matter of Scots law (civil or criminal).

  - **Civil Legal Aid**: a form of legal aid that provides for representation by a solicitor or counsel in civil proceedings before designated Scottish courts and tribunals, including proceedings in the House of Lords on appeal from the Court of Session.

  - **Criminal Legal Aid**: this pays for legal representation of the accused person by a solicitor or counsel in criminal proceedings in courts including the High Court, sheriff courts and the district courts. It can be further divided into summary Criminal Legal Aid and solemn Criminal Legal Aid, depending on whether the accused is being prosecuted under summary or solemn procedure (which, in turn, depends on the seriousness of the offence).

- the Bill was preceded by the **Strategic Review of the Delivery of Legal Aid, Advice and Information** (‘the Strategic Review’), published by the Scottish Executive in 2003, followed in 2005 by a consultation paper entitled ‘**Advice for All: Publicly Funded Legal Assistance in Scotland – the Way Forward**’ (‘Advice for All’).

- two of the five short to medium term proposals identified in **Advice for All** (which were to be brought in by regulatory or administrative change or a bill in this parliamentary session) appear in the Bill as introduced (at section 44 and section 45 respectively).

- section 44 of the Bill repeals the provisions of the 1986 Act which provide that applications for Criminal Legal Aid in solemn proceedings are made to the court, and transfers the power to grant Criminal Legal Aid in such proceedings to SLAB. This proposal received majority support on consultation (58%). However, a related proposal to reform the financial eligibility criteria to qualify for Criminal Legal Aid also received majority support on consultation (69%) but does not appear in the Bill.

- section 45 of the Bill amends the 1986 Act enabling SLAB for the first time to make payments out of the legal aid fund to non-legally qualified individuals and bodies in certain categories of A & A. The general principle of funding non-lawyers received the support of the vast majority on consultation (81%). However, the **Strategic Review** did not support this as the main method of funding advice provision by non-lawyers, preferring grant funding. The Executive is committed to looking again at this issue “in the second stage of the programme of improvements” (Policy Memorandum, para 59).
INTRODUCTION

The Legal Profession and Legal Aid (Scotland) Bill, introduced in the Scottish Parliament on 1 March 2006, stems from two distinct strands of Scottish Executive policy development. Firstly, the Bill contains proposals intended to improve the system for the handling of complaints against legal practitioners in Scotland. Secondly, it contains proposals relating to legal aid which represent the first stage of a programme to improve the delivery of all forms of publicly funded legal assistance, provided by both lawyers and non-lawyers. This briefing considers the main proposals relating to legal aid in the Bill (contained in sections 44 and 45 respectively). A separate SPICe briefing considers the proposals in the Bill relating to complaints handling.

A SYSTEM OF PUBLICLY FUNDED LEGAL ADVICE AND INFORMATION

The Bill contains proposals relating to civil and criminal legal aid. However, this section of the briefing attempts to place the Bill’s proposals in the wider context of the current system in Scotland of publicly funded legal advice and assistance (which includes legal aid).

CRIMINAL MATTERS

Where people get assistance from a solicitor in relation to criminal matters and this is supported through public funding in the vast majority of cases this will be provided by solicitors in private practice and funded by the criminal legal aid system administered by the Scottish Legal Aid Board (SLAB) (outlined in more detail below).

However, the introduction of the Public Defence Solicitor’s Office (PDSO) has created the beginnings of an alternative method for the delivery of criminal legal assistance. Solicitors employed by the PDSO are salaried employees of SLAB.

CIVIL MATTERS

In relation to legal advice and information on civil matters for the less well off members of the community, the picture is somewhat different. As well as advice from solicitors in private practice funded by the civil legal aid system administered by SLAB (see further below), there is a great variety of other types of legal advice provider, including the police, trade unions, local authority departments, housing associations, insurance companies, advice agencies, welfare rights and trading standards officers, law centres, voluntary organisations and interest groups, social workers and court staff. Research tells us that the most common sources of advice are solicitors and Citizens Advice Bureaux (Genn and Paterson 2001; Scottish Executive 2004h, paras 6–7, 10–11).

FUNDING ARRANGEMENTS

Major funding bodies of publicly funded legal advice and information are local authorities, SLAB and central government. Of those, local authorities are the principal funders of the voluntary advice sector, as well as being significant providers of advice services themselves. SLAB almost exclusively funds advice provision through private practice solicitors.

Central government funding (of voluntary sector provision or for specific initiatives in local authorities) is less prominent, but does involve a number of UK Government Departments (such as DTI, who provide funding for, for example, Citizens Advice Scotland). The Scottish Executive also provides funding for advice provision, through several Departments (Scottish Executive 2004h, paras 102–104).
RECENT POLICY DEVELOPMENTS

The Scottish Executive has been considering the provision of publicly funded legal advice and information (in relation to both civil and criminal matters) for a number of years and has published a number of lengthy policy documents and research findings in the area. For a full summary of its work in this area (and the work of SLAB) see the attached Annex to this paper.

Most recently, in 2003, a Strategic Review of the Delivery of Legal Aid, Advice and Information (‘the Strategic Review’) was undertaken by a team comprising representatives of the Scottish Executive Justice Department and SLAB. The report (Scottish Executive 2004i) (and summary (Scottish Executive 2004j)) of the Review, making recommendations to Scottish Ministers and SLAB, was published in October 2004.

Key findings of the Strategic Review were (Scottish Executive 2004j):

- **a strategic and coordinated approach**: there needs to be a more strategic and coordinated approach to planning and delivery of overall provision of publicly funded legal assistance

- **coordination of legal advice services**: there is a need to take forward the better integration and coordination of legal advice services by solicitors (funded through legal aid) on the one hand and non-legal qualified advisers (funded from other public sources) on the other

- **planned changes to justice system**: the development of publicly funded legal assistance needs to be taken forward in conjunction with the planned changes in the justice system, rather than in isolation, given the influence and impact of each upon the other

- **enhanced role for SLAB**: there needs to be an enhanced role for SLAB to help deliver a better coordinated and more flexible and responsive system

The specific findings of the Strategic Review in relation to legal aid are outlined later in this briefing.

In June 2005, the Scottish Executive (2005a) published a consultation paper, ‘Advice for All: Publicly Funded Legal Assistance in Scotland? The Way Forward – a Consultation’ (‘Advice for All’). It divided its proposals into:

- **short and medium term proposals**: requiring administrative or regulatory change, or amendment to existing primary legislation (with a bill intended for introduction in the Scottish Parliament in the current parliamentary session)

- **longer term proposals**: requiring a new and fundamentally different legislative framework, which would need to be considered in the next parliamentary session. The main long term proposal is for the creation of a national body to co-ordinate publicly funded legal advice and information provision (Scottish Executive 2005a, p 3 and Table 1)

Two of the five short to medium term proposals in Advice for All (Scottish Executive 2005a) appear in the Bill (at sections 44 and 45).
THE SYSTEM OF LEGAL AID IN SCOTLAND

The operation of the legal aid system in Scotland is governed by the Legal Aid (Scotland) Act 1986 (c 47) (‘the 1986 Act’). There are currently five types of legal aid in Scotland:

- Advice and Assistance (including in certain circumstances ‘Assistance by Way of Representation’ or ‘ABWOR’)
- Civil Legal Aid
- Criminal Legal Aid
- Children’s Legal Aid
- Legal aid for proceedings for contempt of court

The first three listed are the most relevant for the purposes of the Bill and further details in relation to them are provided below.

ADVICE AND ASSISTANCE

Advice and Assistance (‘A & A’) makes it possible to obtain initial legal advice from a solicitor, or where appropriate, from counsel, “on any matter of Scots law” (Scottish Executive 2004h, para 19) (see the 1986 Act, section 6(1) for the full definition of A & A).

A & A is therefore available on a wide range of civil matters to include marriage, debt, employment and injury, as well as for criminal matters. A & A does not cover a solicitor representing his or her client in court or at a tribunal (Scottish Executive 2004h, para 19).

A & A is provided directly by solicitors, who carry out a simple financial eligibility assessment of the person’s weekly disposable income and disposable capital. The financial eligibility thresholds are prescribed and revised annually by regulations. For further details information on financial eligibility in relation to A & A see paras 21 – 28 of the Background Paper to the Strategic Review (Scottish Executive 2004h).

ABWOR

ABWOR is a form of A & A which allows a solicitor or counsel to represent a client in specified civil and criminal proceedings in certain courts and tribunals (Scottish Executive 2004h, para 29).

The basic definition of ABWOR is found in the relevant primary legislation (1986 Act, section 6(1)) is wide enough to cover all types of proceedings in any court or tribunal at any level whether at first instance or on appeal. However, regulations currently limit the types of proceedings in which ABWOR is available (Advice and Assistance (ABWOR)(Scotland) Regulations 2003 (SSI 2003/179), regulations 3, 4 and 5) (Scottish Executive 2004h, para 30).

Financial eligibility for ABWOR is generally the same as for A & A, and solicitors can directly provide ABWOR if they are satisfied that their client is eligible financially. Clients who are financially eligible for A & A are generally also financially eligible for ABWOR. For further details information on financial eligibility in relation to ABWOR see paras 33–37 of the Background Paper to the Strategic Review (Scottish Executive 2004h).
CIVIL LEGAL AID

Scope

Civil Legal Aid is essentially a form of legal aid that provides for representation by a solicitor or counsel in civil proceedings before designated Scottish courts and tribunals. This includes proceedings in the House of Lords on appeal from the Court of Session, proceedings before any person to whom a case is referred by one of the designated courts and appeals to the Social Security Commissioners (1986 Act, section 13(2) and schedule 2, Part I; Scottish Executive 2004h, para 38).

Civil Legal Aid is available for a wide range of proceedings subject to a small number of exclusions: it is not available for proceedings wholly or partly concerned with defamation, election petitions, simplified divorce applications in the Court of Session or sheriff court; small claims processes at first instance and petitions by a debtor for sequestration of his or her estate (1986 Act, schedule 2, Part II; Scottish Executive 2004h, para 39). Civil Legal Aid also does not cover representation before most tribunals although ABWOR has been extended to cover some tribunals (1986 Act, schedule 2, Part I; Advice and Assistance (ABWOR)(Scotland) Regulations 2003 (SSI 2003/179), regulations 3, 4 and 5). Furthermore, it cannot be used easily to fund actions by groups of individuals or ‘test case’ litigation.

Procedure

Unlike A & A where the solicitor determines eligibility, Civil Legal Aid is only available on application to SLAB, which must assess each application against a number of tests (see below). To ensure that a solicitor can act to protect the client’s best interests in urgent situations, provision exists for a solicitor to act in certain circumstances before an application is determined by SLAB (Scottish Executive 2004h, para 40).

Eligibility

SLAB must consider whether applicants satisfy the following three tests (Scottish Executive 2004h, para 42):

- they must be financially eligible
- they must have proven cause
- it must be reasonable that they should receive legal aid

The financial eligibility criteria for Civil Legal Aid are not the same as those for A & A. This assessment is more complex than that carried out done by solicitors for A & A, and may take several weeks, and sometimes longer, if the client’s financial affairs are particularly complicated or there is difficulty in obtaining all necessary information.

A grant of civil legal aid may be subject to the payment of a contribution towards the costs of the case, depending on the client’s capital and disposable income (unlike A & A, where eligibility is assessed on the basis of weekly disposable income for the week immediately prior to the application being made). The financial eligibility thresholds are fixed and revised annually by regulations which must be approved by the Scottish Parliament.

For more information on the tests for eligibility for Civil Legal Aid, including the tests for financial eligibility, see Background Paper to the Strategic Review (Scottish Executive 2004h), paras 42 – 49.
Liability of a legally aided person at the end of the case

Unsuccessful legally aided person

If the legally aided person is unsuccessful in relation to his or her case, SLAB will pay the costs of the solicitor and other expenses related to the case. The client has to pay their contribution as previously determined by SLAB (see above) (Scottish Executive 2004h, para 53).

As with a privately paying client, the court may order an unsuccessful legally aided person to pay his or her opponent’s expenses (costs). However, a legally aided person has a significant benefit which is not available to the privately paying client. The legally aided person may ask the court to reduce the sum due. This can result in costs being reduced to nil. This process is known as ‘modification’ of expenses. The court may only reduce the amount due after consideration of the legally aided person’s current financial circumstances (which might have changed since the time legal aid was granted) and his or her conduct in the case.

Where there is modification of expenses, a successful non-legally aided opponent is left to meet some or all of their own costs. Where however this would cause severe financial hardship and the successful opponent was defending an action, they may be able to recover their costs from the Legal Aid Fund under section 19 of the 1986 Act (the test of ‘severe financial hardship’).

If the court refuses to reduce the sum due the unsuccessful legally aided person is personally responsible for payment of the opponent’s expenses and cannot ask SLAB to pay those expenses for him or her (Scottish Executive 2004h, para 54).

Successful legally aided person

If Civil Legal Aid is granted and the assisted person wins the case SLAB will also pay the costs of the solicitor and other expenses related to the case such as court fees and expert opinions. However, and the implications of this are not always sufficiently understood, SLAB has a responsibility to recover the monies paid out for legal aid. To cover the costs of the case SLAB will use (Scottish Executive 2004h, para 55):

- any costs paid by the opponent(s)
- any contribution the legally aided person has to pay
- if these first two methods are not enough to cover the costs, all or part of any money or property the applicant has won or managed to keep as a result of the case (around a third of the annual gross expenditure on Civil Legal Aid is recovered in this way) This is sometimes described as the ‘statutory charge’ or ‘statutory clawback’

Criminal Legal Aid

Criminal Legal Aid pays for legal representation of the accused person by a solicitor or counsel in criminal proceedings in the High Court, sheriff courts, district courts and before the Judicial Committee of the Privy Council.

Criminal proceedings are classified as summary or solemn. Summary proceedings are used for less serious crimes and are dealt with by a district court or sheriff sitting without a jury. Solemn proceedings are used for more serious crimes and are dealt with in the sheriff court or High Court. They may involve a jury trial. Criminal Legal Aid is not available in summary proceedings.
until the conclusion of the first diet at which the accused has tendered a plea of ‘not guilty’ (1986 Act, section 21(1); Scottish Executive 2004h, para 57).

Secondary legislation provides a list of proceedings in which Criminal Legal Aid is not available (Criminal Legal Aid (Scotland)(Prescribed Proceedings) Regulations 1997 (SI 1997/3069)). These proceedings are covered by ABWOR (see above).

**Eligibility for Criminal Legal Aid in summary proceedings**

In order to qualify for summary Criminal Legal Aid, SLAB must be satisfied that the accused or his or her family would suffer “undue hardship” (1986 Act, section 24(1)(a)) if the accused had to pay for his or her own defence and that it is in the “interests of justice” that the accused should receive Criminal Legal Aid (1986 Act, section 24(1)(b)).

Although no fixed financial limits for Criminal Legal Aid are set down in the legislation, and no guidance has been issued, in practice SLAB refers to the Civil Legal Aid eligibility limits as an indicator of the ability of the accused to pay for their own defence (Scottish Executive 2004h, para 65).

There are no contributions to be paid for Criminal Legal Aid. Therefore, once Criminal Legal Aid has been granted there is no cost to be paid by the accused. However, contributions are payable for A & A on criminal matters (as the same regime applies to civil and criminal A & A) (Scottish Executive 2004h, para 65).

In determining whether it is in the “interests of justice” that legal aid be made available, SLAB must weigh a number of factors, as set out in section 24(3) of the 1986 Act. These factors include, for example:

- the offence is such that if proved it is likely that the court would impose a sentence which would deprive the accused of his liberty or lead to loss of livelihood

- the determination of the case may involve consideration of a substantial question of law, or of evidence of a complex or difficult nature

These statutory factors do not exclude other factors being taken into account by SLAB. SLAB is required to look at the whole circumstances of the case, including the circumstances of the individual concerned and must make a balanced decision (Scottish Executive 2004h, para 67).

**Accused person charged under solemn procedure**

An accused person charged and brought before the sheriff or judge in a solemn case is automatically entitled to Criminal Legal Aid until a) his or her application for legal aid is determined by the court or b) she or he is given bail or placed in custody (1986 Act, section 22(1)(b)(i)).

Automatic legal aid, however, only covers the first stage of the case, so it is necessary for the accused person to apply for solemn Criminal Legal Aid straight away. It is important to note that the application has to be made to the court, not to SLAB. The court must be satisfied, after consideration of the accused person’s financial circumstances, that the expenses of the case cannot be met without “undue hardship” to him or her or his or her dependants (1986 Act, section 23(1)(b)).
The fact that the accused is charged under solemn procedure means that the seriousness of the charge and the impact of a possible conviction are assumed, and a separate interests of justice test is not applied by the court.

**THE STRATEGIC REVIEW AND LEGAL AID**

In relation to legal aid the [Strategic Review](Scottish Executive 2004j) identified the following as key issues for reform:

- **supply of solicitors**: uncertainty over whether there are sufficient solicitors in the private sector willing to take on legal aid work (see chapter 8 of the [Strategic Review](Scottish Executive 2004j))

- **financial support of agencies staffed by non-lawyers**: how to financially support these agencies to ensure they can make an important contribution to the delivery of publicly funded advice and information, in particular – should they have access to A & A on a case by case basis, or should they be grant funded? (see paras 5.36–5.39 and 5.112–5.121 of the [Strategic Review](Scottish Executive 2004j))

- **complexity of legal aid legislation**: see chapter 11 of the [Strategic Review](Scottish Executive 2004j)

- **financial eligibility tests in civil legal assistance**: in A & A for civil matters, ABWOR and Civil Legal Aid the concern is that the financial eligibility tests are too restrictive – access to justice is arguably only available for those either poor enough to quality for legal aid or rich enough to fund their own actions; the tests are also not consistent between the different types of legal aid (see paras 5.123 onwards in the [Strategic Review](Scottish Executive 2004j))

- **scope of civil legal assistance**: whether the scope of the type of proceedings qualifying for ABWOR and Civil Legal Aid should be broadened (see paras 4.60 onwards and para 5.193 onwards in the [Strategic Review](Scottish Executive 2004j))

- **several issues in A & A**: whether there is a disproportionate administrative burden for practitioners, whether controls on expenditure should be tightened and whether the purpose of A & A should be clarified (see paras 5.87 onwards in the [Strategic Review](Scottish Executive 2004j). Note also that a separate [Consultation on Reform of Civil Advice and Assistance](Scottish Executive 2004k) was carried out in 2004 – see the Appendix for more details)

**‘ADVICE FOR ALL’ CONSULTATION**

As mentioned above, in its consultation paper, [Advice for All](Scottish Executive 2005a), (Scottish Executive 2005a) that followed the [Strategic Review](Scottish Executive 2004j), the Executive divided its proposals into short and medium term and longer term. The short and medium term proposals either would require administrative or regulatory change or amendment to existing primary legislation (with a Bill intended for introduction in the Scottish Parliament in the current Parliamentary Session). The longer term proposals would require a new and fundamentally different legislative framework, which would need to be considered in the next Parliamentary Session (Scottish Executive 2005a, p 3).

The main proposals are summarised below:

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1 Not chapter 13 as referred to at several points in the text of the Strategic Review.
Table: Table summarising proposed changes to publicly funded legal assistance in Scotland (adapted from Scottish Executive 2005a, p 3 and Table 1)

<table>
<thead>
<tr>
<th>Civil publicly funded legal assistance ('civil PFLA')</th>
<th>Criminal publicly funded legal assistance ('criminal PFLA')</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Proposals for change – short to medium term:</strong></td>
<td><strong>Proposals for change – short to medium term:</strong></td>
</tr>
<tr>
<td>• improving provision: make specific provision to give SLAB additional powers to improve the delivery of civil PFLA and to secure provision by a range of methods including grant funding provision by non-lawyers (see further below under ‘Proposals in the Bill’)</td>
<td>• improving provision: give SLAB more flexible powers to secure and fund the provision of criminal PFLA, including the greater use of the PDSO (Public Defence Solicitors’ Office) where necessary and appropriate</td>
</tr>
<tr>
<td>• ‘severe hardship’ test: relax the ‘severe hardship’ test (1986 Act, section 19) relating to the concept of ‘modification of expenses’ which is possible for a legally aided but unsuccessful party in a court case (see above)</td>
<td>• solemn Criminal Legal Aid: transfer the granting of solemn Criminal Legal Aid from the courts to SLAB (see further below under ‘Proposals in the Bill’)</td>
</tr>
<tr>
<td></td>
<td>• new financial eligibility criteria: introduce clear and fixed financial eligibility criteria for all criminal legal aid (including criminal A &amp; A and ABWOR)</td>
</tr>
<tr>
<td><strong>Proposals for change – longer term:</strong></td>
<td><strong>Proposals for change – longer term:</strong></td>
</tr>
<tr>
<td>• national co-ordinating body: establish a national co-ordinating body for both civil and criminal PFLA</td>
<td>• national co-ordinating body: establish a national co-ordinating body for both civil and criminal PFLA</td>
</tr>
<tr>
<td>• extending financial eligibility: consider the introduction of extended, tapered financial eligibility for all civil legal aid (ie A &amp; A, ABWOR and Civil Legal Aid)</td>
<td>• means tested contributions: consider introduction of means tested contributions in criminal PFLA (ie the legally aided individual may have to make a contribution to the costs of the case, depending on his or her financial situation)</td>
</tr>
</tbody>
</table>

Two out of the five short to medium term proposals in Advice for All (Scottish Executive 2005a) appear in the Bill (at sections 44 and 45 respectively). These are considered in more detail below.
PROPOSALS IN THE BILL

GRANTING OF LEGAL AID IN SOLEMN CASES

Section 44 of the Bill

Section 44 of the Bill repeals the provisions of the 1986 Act which provide that applications for Criminal Legal Aid in solemn proceedings are made to the court and transfers the power to grant Criminal Legal Aid in such proceedings to SLAB.

Section 44 does not change the criteria currently used by the court for determining applications for solemn Criminal Legal Aid. It provides that SLAB can only make Criminal Legal Aid available to a person being prosecuted under solemn procedure if it is satisfied, after consideration of the person’s financial circumstances, that the expenses of the case cannot be met without undue hardship to the person or his or her dependants.

What the Strategic Review said

The Strategic Review considered the issue of the role of the court in granting solemn Criminal Legal Aid (Scottish Executive 2004j, paras 6.25–6.33; 7.43–7.46) and stated:

“The test of undue hardship applied by the courts in solemn legal aid is essentially the same as that applied by SLAB in summary cases. However, there does not appear to be any guidance available to sheriffs and judges as to how to apply the test, nor is it known how many applications are refused on the basis of means. This lack of information makes it difficult to assess how the test is applied. As such, there is inadequate evidence at present as to how the courts apply the test, how this might vary between courts or how it may differ from the approach taken by SLAB.

However, it is contrary to our general principles of consistency and transparency that there should be scope for the same test to be applied differently by SLAB on the one hand and the courts on the other. We are also concerned that the present arrangements commit the Board to making payment of fees and outlays in cases where there is no control over the assessment process. This is of particular concern in solemn cases where the cost of a case may be high. This concern is exacerbated by SLAB’s lack of power in the event of an applicant having been found to have made a false disclosure of income or capital. Any withdrawal of solemn legal aid is entirely in the hands of the court”

(Scottish Executive 2004j, paras 6.25–6.26)

The Strategic Review acknowledged SLAB’s experience of assessing financial eligibility for legal aid and recommended the transfer of power to grant solemn Criminal Legal Aid from the courts to SLAB (as provided for in section 44 of the Bill) (Scottish Executive 2004j, paras 6.27, 6.30 and 7.45). Furthermore, it recommended that, in order to deal effectively with fraud risk, SLAB should also have the power to terminate grants of solemn Criminal Legal Aid where appropriate and recover costs from the applicant where there has been a false disclosure of means (Scottish Executive 2004j, para 6.30). This recommendation does not appear in the Bill but the Executive states in the Policy Memorandum to the Bill that it intends that it will be implemented by secondary legislation (Policy Memorandum to the Bill, para 50).
**What Advice for All said**

*Advice for All* asked consultees whether they are agreed with the transfer of responsibility for granting solemn Criminal Legal Aid to *SLAB* (Scottish Executive 2005a, question 34(a)).

It also noted that if such a transfer of responsibility were to take place, further thought would need to be given to the basis on which *SLAB* would assess ‘undue hardship’. It commented:

“On one hand, there are arguments in favour of a degree of equity between those applying for civil and criminal legal assistance. On the other, it could be argued that the seriousness of the position of a person facing solemn criminal charges would justify a more inclusive approach. On balance, we consider that specific financial eligibility criteria should be introduced for solemn criminal legal aid. It would follow that such criteria should also be introduced for summary criminal legal aid”

(Scottish Executive 2005a, para 2.36)

*Advice for All* sought consultees’ views on this recommendation (Scottish Executive 2005a, question 36(a)).

**Responses to the Advice for All consultation**

**Whether there should be a transfer of power from the courts to SLAB**

The majority (58%) view was opposed to the transfer of responsibility for granting criminal legal aid in solemn cases from the courts to *SLAB*. However, this overall picture masked a difference between respondent sectors, with a clear majority (77%) of legal bodies opposing the proposal compared with a slight majority (55%) of other respondents favouring this transfer of responsibility.

A common argument in favour of transferring responsibility for granting legal aid in solemn cases from courts to *SLAB* was that this would promote a consistency of approach. The likelihood of delays in proceedings was disputed with others recommending that a fast-track process be established by *SLAB* to deal with applications speedily. One view was that, under *SLAB*’s control, the detection and prevention of fraudulent applications would be easier. However, the expertise of courts in assessing financial circumstances and eligibility was strongly defended by many of those opposing the proposed transfer of responsibility with the view that the ability of sheriffs and judges could surely not be called into question on this issue.

Another recurring theme was that the proposal would result in delays in solemn proceedings which would be unacceptable in the context of serious cases. One respondent considered that what they foresaw as inevitable delays would undermine the Scottish Executive’s reforms of the solemn criminal justice system and potentially compromise the preparation of the defence, possibly leading to miscarriages of justice. Others considered that the current system worked well and there did not appear to be any compelling evidence to suggest change was necessary. A few consultees disagreed that the transfer of responsibility would lead to greater consistency in decision-making, or that it would lead to greater openness, as it would result in decisions on eligibility being taken in private rather than in public as at present (Scottish Executive 2006c, para 12.4 and Table 32).

**Whether there should be specific financial eligibility criteria for all Criminal Legal Aid**

The majority (69%) view was in favour of specific financial eligibility criteria applying across all Criminal Legal Aid. Further interpretation of the responses to this question was hampered,
however, by uncertainty over whether those who indicated their opposition to the proposal were basing this view on their lack of support of the idea of uniform criteria across criminal legal aid, or indeed, lack of consistency of approach across civil and criminal procedures (Scottish Executive 2006c, para 12.8).

FUNDING OF NON-LEGALLY QUALIFIED ADVISERS

Section 45 of the Bill

Currently A & A may only be provided by a solicitor or, where appropriate, by counsel. Section 45 of the Bill amends the 1986 Act enabling SLAB to make payments out of the legal aid fund to non-legally qualified individuals and bodies in certain categories of A & A.

Section 45(6) provides for a register of advisers to be established and maintained by SLAB. This will consist of non-legally qualified persons and organisations who are approved by SLAB to provide A & A. Section 45(6) also enables regulations to be made which specify the category of circumstances in which a registered adviser may provide A & A. The regulations may be made for different categories of cases and for different purposes.

What the Strategic Review said

The Strategic Review, after “detailed analysis” came out in favour of legal aid funding being extended to non-lawyers but not, generally, through the same case-by-case funding regime (ie A & A) as solicitors (Scottish Executive 2004j, paras 5.115 – 5.116).

It stated:

“Our primary reason for reaching this conclusion relates to our recommendation above (…) that local authorities should retain primary responsibility for the planning, funding and/or provision of local non-lawyer services. It appears to us that the grant funding mechanisms in place in this regard are the most appropriate way of funding generalist advice provision (…) We would observe (…) that most non-lawyer agencies are not used to working on a case-by-case funding basis and that to do so would require a major change in practice, as well as policy for some (particularly in relation to means testing)”

(Scottish Executive 2004j, paras 5.116 and 5.121)

Thus the Strategic Review was in favour of legal aid funds being used to support the provision of specialist services (ie services in one particular area of law, such as social welfare law) by non-lawyers, just not through the case by case funding approach. The Review’s favoured approach was that the specialists would be grant-funded, or based on contracts or employed directly by SLAB.

The Strategic Review did however see some “limited” scope for some specialist services (where the non-lawyer may be the best placed adviser in a given subject area) to be funded on a case-by-case basis, particularly where, for example, demand is unlikely to be sufficient to make grant funding feasible (Scottish Executive 2004j, paras 5.117 and 5.120). The Policy Memorandum to Bill states that it is this recommendation to which section 45 of the Bill gives effect (para 60).

The Policy Memorandum to the Bill states that the issue of grant funding for agencies staffed by non-lawyers “will be considered for implementation in the second stage of the programme of improvements” (para 59).
What Advice for All said

Advice for All addressed the question of funding provision for non-legally qualified advisers (Scottish Executive 2005a, paras 1.55–1.57). In its main section on the issue it did not specify the method by which funding should be delivered referring only to the need for funding to strengthen the supply of advice provision and asking consultees whether, in the short to medium term, SLAB should have the power to fund non-lawyers (question 11). However, in the summary of the main proposals in the consultation document, the Scottish Executive did refer specifically to grant funding provision by non-lawyers in the short to medium term (Scottish Executive 2005a, Table 1). This ambiguity about what specifically was being proposed (ie grant funding or case-by-case funding) may limit the usefulness of the consultation responses.

Responses to Advice for All consultation

Quantification of views

Overall, the vast majority (81%) of those who provided a view was in favour of SLAB being able to fund provision by non-legally qualified advisers as well as solicitors and advocates. However, this overwhelming support masked differences between respondent sectors, with the strength of support from non-legal bodies and individuals far greater (93%) than that expressed by legal bodies (57%) (Scottish Executive 2006c, para 7.1).

Views in Favour of SLAB Funding Provision by Non-Legally Qualified Providers

A recurring comment was that non-legally qualified practitioners were already making a significant contribution to the delivery of legal advice and would continue to have much to offer. Others considered that the proposal would give consumers more choice of providers, and could better serve the needs of specific groups such as asylum seekers and refugees. It was argued that there seemed to be no justification not to go down this route and that the proposal should be implemented sooner rather than later. One consultee specifically proposed that SLAB be given powers to enter into contracts or grant funding arrangements with non-legal agencies.

Some consultees stressed that the key issue should be the quality of provision and not necessarily the source of advice. Many respondents agreed that the scheme should be underpinned by a robust system of quality assurance and accreditation of the non-legal advisers involved.

One beneficial by-product of the proposal was identified as helping voluntary organisations to employ dedicated staff to deliver advice. Another consultee suggested that the scheme be piloted to establish best practice and helpful benchmarking.

Several respondents expressed cautious support for the proposal provided that certain features were in place. These included the provision of additional funds to pay for the scheme; clear definitions of what is meant by ‘non-legally qualified’ to help to make the scheme transparent; clear categorisation of the type of advice which will be covered under the proposals eg money advice, neighbour disputes; and clear attribution of roles and responsibilities of the parties concerned.

Another view was that the scheme should not be aimed at promoting a cheaper alternative to using a solicitor. One consultee argued that any non-legally qualified advice provider should work under the wing of a qualified practitioner (Scottish Executive 2006c, 7.1.1).
Views against SLAB Funding Provision by Non-Legally Qualified Providers

Of the few respondents who opposed the proposal, two argued that non-legally qualified providers were not equipped to provide legal advice. One expressed their view thus:

“Legal advice should be provided by lawyers who are qualified, insured and vigorously regulated”

One respondent who was unsure about whether or not to support the proposal, raised the question of what recourse service users would have under the proposals to complain about the advice they had received (Scottish Executive 2006c, para 7.1.2).

Responses to Justice 2’s call for evidence

The Scottish Consumer Council in their response to the Justice 2 Committee’s call for evidence on the Bill expressed their disappointment that the scope of section 45 is limited to extending A & A to non-lawyers as opposed to giving SLAB power to award grant funding to agencies staffed by non-lawyers. It commented:

“(…) as currently drafted, section 45 will have only minimal impact on the provision of publicly funded legal assistance. While it may be utilised by law centres and private practice solicitors who employ paralegals or non-solicitor advisers, we do not believe that most advice agencies will take advantage of the provisions. Firstly, they would introduce considerable bureaucracy, as a form would need to be filled in for every client. Most advice agencies are not geared up to operate on a case-by-case basis, as they are largely grant funded at present.

Secondly, the provisions would require agencies to means test clients. Many advice agencies, most notably citizens' advice bureaux, offer their services free at the point of delivery. Some agencies are opposed to means testing as a matter of principle” (Scottish Consumer Council 2006, p 7)

The views expressed above should not be treated as representative of the views of all those who may respond to Justice 2’s consultation (and whose responses are not available at the time of writing).
ANNEX: SUMMARY OF RECENT POLICY DEVELOPMENTS IN SCOTLAND RELATING TO PUBLICLY FUNDED ADVICE AND INFORMATION

WORKING GROUP REPORT 2001

In October 2001 a Working Group set up by the Scottish Executive (2001) published its report, ‘Review of Legal Information and Advice Provision in Scotland’, on the development of a community legal service (‘CLS’) in Scotland. It is intended that the CLS should be a joined-up quality assured network of legal advice and information. The Working Group’s recommended that there should be:

- a quality assurance scheme in place to protect the advice users
- a co-ordinating body overseeing the work of the CLS
- a phase of development work by the Scottish Executive

DEVELOPMENT WORK BY THE SCOTTISH EXECUTIVE

The Scottish Executive’s subsequent programme of development work comprised the following elements:

A Programme of Research

A report (Scottish Executive 2003a) (see also the summary research findings (Scottish Executive 2003b)) was published in October 2003 following a review of:

- outreach services and remote delivery: the available evidence on the use of internet accessible services, telephone helplines and outreach and remote delivery of services generally
- contracting: the use of ‘contracting’ in England and Wales, ie the system where advice providers (including both solicitors and advice centres) can enter into contracts with the Legal Services Commission (which replaced the Legal Aid Board in England and Wales) to provide a service in relation to a specified number of legal cases

Pilot Partnerships

Four pilot partnerships, run between May 2003 and April 2004, aimed to bring together funders, service providers (eg advice centres and solicitors) and the users of legal services in particular areas. It was intended that these should ensure better co-ordination and better referral mechanisms, whilst working within existing staffing and funding arrangements.

Three of these pilots were geographical (based in Fife, Edinburgh and Argyll & Bute). The remaining pilot was ‘thematic’, considering the legal advice needs of people with a disability, and was established in co-operation with the Disability Rights Commission.

The Executive carried out a review of the prevalence of legal problems in the pilot partnership areas (see above) and one further area (Glasgow West), as well as a review of the current availability of legal services in these areas. Its findings were published in May 2004 (Scottish Executive 2004a; Scottish Executive 2004b; Scottish Executive 2004c; Scottish Executive 2004d; Scottish Executive 2004f; Scottish Executive 2004g) along with research findings.
(Scottish Executive 2004e) on the views of those participating in the pilot partnerships as to the structure, appropriateness and potential contribution of the pilot partnerships.

**Other Relevant Projects**

Two other groups of projects have fed into the Scottish Executive’s current policy on legal advice and information. An outline of each is provided below:

**Part V Projects**

Part V of the Legal Aid (Scotland) Act 1986 (c 47) empowers SLAB to employ solicitors to work in partnership with local advice giving organisations. Using additional funding from the Scottish Executive, SLAB set up four pilot projects under Part V of the 1986 Act. These came into operation between January and April 2002. Their purpose is to evaluate different methods of improving access to justice.

The partnerships are with Citizen’s Advice Bureaux in Inverness and Moray; with advice providers in West Lothian; with ‘Streetwork’ (supporting rough sleepers and young people) in Edinburgh; and with the Ethnic Minorities Law Centre and Castlemilk Law Centre in Glasgow.

An evaluation of phase one of the pilots showed positive results and indicated that the pilots were successful on the whole. Ministers have agreed to continue the funding for a further three years from April 2005. Arrangements are currently underway to set up the second phase of pilots.

**In-court Advice**

In-court advice services are funded by the Scottish Executive at the sheriff courts in the following locations: (a) Edinburgh; (b) Airdrie; (c) Aberdeen; (d) Hamilton; (e) Dundee; and (f) Kilmarnock. In addition to these pilots, the Executive also funds the Homelessness Advice Desk in Paisley Sheriff Court, which is run by Paisley Law Centre.

These services enable unassisted litigants and other court users to access free and independent legal and other advice in certain types of court case (including rent arrears and eviction cases).

An evaluation of the first phase of the pilots has shown that the pilots are meeting their aims and that demand for the service is high. Ministers have decided that funding should be continued for a further three years until March 2009.

**THE PUBLIC DEFENCE SOLICITORS’ OFFICE (PDSO)**

The Public Defence Solicitors’ Office (PDSO) in Edinburgh opened in October 1998 after a five year pilot scheme to compare the provision of criminal legal assistance by private solicitors with solicitors employed by SLAB. Two further offices are now operational in Glasgow and Inverness.

The PDSO provides criminal legal assistance on the same basis as solicitors in private practice. If the person is financially eligible, the PDSO solicitor will be able to offer A & A, and/or prepare an application for summary Criminal Legal Aid and submit this to SLAB. If SLAB grants legal aid, the PDSO solicitor will act for the client under the normal rules of professional conduct. However, SLAB will not pay the PDSO’s solicitors on a case by case basis as these solicitors already receive a salary directly from SLAB.
The pilot scheme was independently evaluated and a report was made to the Scottish Parliament in October 2001 (three years into the pilot). New research on the effectiveness of the scheme is planned for reporting in 2008.

STRATEGIC REVIEW OF LEGAL AID, ADVICE AND INFORMATION

In October 2003 the Scottish Executive announced a Strategic Review of Legal Aid, Advice and Information, which linked future policy development on legal advice and information with the modernisation of legal aid. This Review was carried out by a team from the Scottish Executive Justice Department and SLAB.

The report (Scottish Executive 2004i) and summary (Scottish Executive 2004j) of the Review, making recommendations to Scottish Ministers and SLAB, was published in October 2004.

Key findings of the Strategic Review were:

- **a strategic and coordinated approach**: there needs to be a more strategic and coordinated approach to planning and delivery of overall provision of publicly funded legal assistance

- **coordination of legal advice services**: there is a need to take forward the better integration and coordination of legal advice services by solicitors (funded through legal aid) on the one hand and non-legally qualified advisers (funded from other public sources) on the other

- **planned changes to justice system**: the development of publicly funded legal assistance needs to be taken forward in conjunction with the planned changes in the justice system, rather than in isolation, given the influence and impact of each upon the other

- **enhanced role for SLAB**: there needs to be an enhanced role for SLAB to help deliver a better coordinated and more flexible and responsive system

REVIEW OF SUMMARY CRIMINAL LEGAL ASSISTANCE

In March 2005 SLAB (2005) published its Proposals for the Review of Summary Legal Assistance. The key proposal is that there should be a single integrated system for publicly funded legal assistance in summary cases which provides advice, assistance and representation.

REFORM OF CIVIL A & A

In December 2004 the Scottish Executive published a consultation paper (Scottish Executive 2004k) on the reform of civil A & A which was developed by the Tripartite Consultation Group of SLAB, the Law Society of Scotland and the Scottish Executive.

The proposals represent the first step in creating a separation between civil and criminal A & A which the Executive views as: “crucial in the longer term for enabling the development of consistent, coherent and co-ordinated systems for civil PFLA [ie publicly funded legal assistance] on the one hand and criminal PFLA on the other” (Scottish Executive 2005a, para 1.53). In particular, the proposals aim to reduce the inconsistencies that exist between Civil Legal Aid and A & A in, for example, the financial assessment of the eligibility of an individual for legal aid and the contributions to costs that a legally aided individual might have to make under each system. Other proposed changes include the introduction of a tiered system of
remuneration for the adviser, including an increased rate for all substantive A & A work (Scottish Executive 2005a, para 1.53). In June 2005, the Executive stated: “Work is now underway to implement the changes over the coming months, in the light of the responses to the consultation” (Scottish Executive 2005a, para 1.53).

‘ADVICE FOR ALL’ CONSULTATION

In June 2005, the Scottish Executive (2005a) published a consultation paper, ‘Advice for All: Publicly Funded Legal Assistance in Scotland? The Way Forward – a Consultation’, the responses to which (Scottish Executive 2005b) and various associated documents (Scottish Executive 2006c; Scottish Executive 2006d and Scottish Executive 2006e) are now available.

The Executive divided its proposals into:

- **short and medium term proposals**: requiring administrative or regulatory change, or amendment to existing primary legislation (with a Bill intended for introduction in the Scottish Parliament in the current Parliamentary Session)

- **longer term proposals**: requiring a new and fundamentally different legislative framework, which would need to be considered in the next Parliamentary Session. The main long term proposal is for the creation of a national body to co-ordinate publicly funded legal advice and information provision (Scottish Executive 2005a, p 3 and Table 1)

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

The Legal Profession and Legal Aid (Scotland) Bill was introduced to the Scottish Parliament on 1 March 2006. Two of the five short to medium term proposals in Advice for All (Scottish Executive 2005a) appear in the Bill. These are:

- the transfer of power from the court to SLAB to consider applications for Criminal Legal Aid in solemn proceedings (section 44)

- the creation of a new power for SLAB to make payments out of the legal aid fund to non-legally qualified individuals and bodies in certain categories of A & A (section 45)
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Dear David

I refer to correspondence that I have received from Alan Swift, Director of Personnel and Development at the Scottish Court Service, in relation to the transparency of legal fees.

In light of your Committee’s forthcoming consideration of the Legal Profession and Legal Aid (Scotland) Bill, I thought it would be appropriate to refer this correspondence to you for your consideration.

Yours sincerely

Pauline McNeill MSP
Convener, Justice 1 Committee
Callum Thomson
Clerk
Justice 1 Committee
Scottish Parliament
Tower 1 T3.60
Committee Office
EDINBURGH, EH99 1SP

Your Reference: 

Our Reference: 

Date: 20 March 2006

Dear Mr Thomson

TRANSPARENCY OF LEGAL FEES

I wrote to you on 15 December updating the Committee with progress on the Agency’s consultation about the appropriateness of Scottish Court Service (SCS) staff undertaking work related to extra judicial audits, also known as fee assessment work.

The Agency’s Management Board has now advised Sheriffs Principal and SCS staff that it has been decided that the undertaking of extra-judicial audits should no longer be permitted. Copy letters attached.

Staff are to be given 18 months notice of the change with the notice period beginning from the date on which our colleagues in the Scottish Executive Justice Department, which is responsible for policy in this area, announce what future arrangements are to be put in place for this type of auditing/fee assessment work.

I hope this is helpful.

If you require any further information, please telephone me on 0131 221 6831.

Yours sincerely

Alan Swift
Director of Personnel and Development
Dear,

SCOTTISH COURT SERVICE STAFF AS AUDITORS OF COURT: EXTRA-JUDICIAL AUDITS.

I am writing to you because, according to our records, you currently hold a commission to act as an auditor of court. This letter advises you of a decision that will in future restrict the role of auditor of court to work that is classed as a "judicial auditing" or taxation, with any fee income generated being payable to the Scottish Court Service.

As you know the Agency has carried out a consultation about the current extra judicial auditing arrangements. The consultation closed at the end of February 2005 and since that time there have been discussions with the main respondents. The Management Board of the Scottish Court Service noted that the majority of respondents appreciated the concerns of the Agency about the current arrangements and were not against a change if appropriate steps are taken to ensure that new and acceptable procedures are put in place.

As a result of this the Management Board has now formally decided to bring to an end the arrangements whereby staff of the Agency can carry out extra-judicial audits or independent fee assessments as part of their role as an auditor of court. The Chief Executive has formally advised the Minister of Justice of this decision.

From a date to be announced the Agency will give staff 18 months notice of the change to the arrangements for the carrying out of extra-judicial audits.

Our preferred option would have been to give you notice and, at the same time, indicate when new arrangements will come into being. Unfortunately, that is not
possible. Policy in this area is the responsibility of the Scottish Executive Justice Department (SEJD) and colleagues there are considering future options. The arrangements for court auditing generally were considered by the Research Working Group on competition in the legal services market in Scotland, whose report is expected to be published shortly. I understand from colleagues in SEJD that they currently expect to be seeking views this summer. Until we are clear on the new arrangements and the timescale all that the Agency can do is to advise you of the decision we have taken and give you the reassurance that we will give a minimum of 18 months notice once the future arrangements are agreed. Once a decision is made I will write to you again with formal notification of the 18 months notice period.

I hope this is helpful. If you wish to discuss this matter with me please contact me on 0131 221 6831.

Yours sincerely

Alan Swift
Director of Personnel and Development
Sheriff Principal Edward F Bowen QC  
Sheriff Principal’s Chambers  
Sheriff Court House  
27 Chambers Street  
EDINBURGH  
DX NO ED  550308

17 March 2006

Dear Sheriff Principal Bowen

CONSULTATION: ARRANGEMENTS FOR EXTRA-JUDICIAL AUDITS

You are no doubt aware that, following your letter to me of 6 September 2004, the Agency initiated a wider consultation on the proposal that the Scottish Court Service staff should no longer be permitted to undertake extra-judicial audits.

The consultation ended in February 2005 and since that time we have been in discussion with the main respondents. The Management Board recently reviewed the position in the light of these discussions. It noted that the majority of respondents appreciate the concerns of the Agency about the current arrangements and are not against a change if appropriate steps are taken to ensure that new and acceptable procedures are put in place. As a result of this the Management Board has now formally decided to bring to an end the arrangements whereby staff of the Agency can carry out extra-judicial audits for private profit. I have advised the Minister for Justice of this decision.

It has always been our intention to give staff a fair amount of notice of this change and we have now agreed that a period of 18 months is appropriate. This will allow auditors to cope with any financial implications but it also responds to the points raised by some respondents to the consultation about giving sufficient time for new arrangements to be put in place.

Our preferred approach would have been to announce the new arrangements for extra-judicial audits now and give staff a definite date on which the current arrangements will end. Unfortunately, that is not possible. Policy in this area is the responsibility of the Scottish Executive Justice Department and colleagues there are considering future options. The arrangements for court auditing generally were considered by the Research Working

From The Chief Executive
Group on competition in the legal services market in Scotland, whose report is expected to be published shortly. I understand from colleagues that they currently expect to be seeking views this summer. Until we are clear on the new arrangements and the timescale, at this stage all I can do is advise SCS staff and others of the decision we have taken, and assure them that they will have a minimum of 18 months notice once the future arrangements are agreed.

This is a major change and I do know that the concerns expressed in your letter of 6 September 2004 will still exist. However, I hope you are reassured that we have taken time to consult in some detail on the issue and that we are continuing to work with Justice Department colleagues on future arrangements before removing the service currently provided by Sheriff Clerks.

I am copying this letter to your fellow Sheriffs Principal, and I am providing a copy to the Lord President for information. I hope that this update on the position is helpful. Please let me know if you wish to discuss this further as I would be happy to do so.

Yours sincerely

Eleanor A. Emerson

ELEANOR EMBERSON

Copy to: Lord President
Sheriffs Principal

From The Chief Executive

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