JUSTICE 2 COMMITTEE

AGENDA

13th Meeting, 2006 (Session 2)

Tuesday 9 May 2006

The Committee will meet at 2.00 pm in Committee Room 6.

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

   Panel 1
   Kaliani Lyle, Chief Executive Officer, and Eileen McKenna, Manager, Airdrie Citizens Advice Bureau, Citizens Advice Scotland;

   Panel 2
   Professor Alan Paterson, Law School, Strathclyde University; and

   Professor Mary Seneviratne, Centre for Legal Research, Nottingham Law School;

   Panel 3
   Stuart Usher and William Burns, Scotland Against Crooked Lawyers.


3. Legal Profession and Legal Aid (Scotland) Bill – consideration of written evidence (in private): The Committee will consider the written evidence received in relation to the Bill.

4. Legal Profession and Legal Aid (Scotland) Bill (in private): The Committee will consider the main themes arising from the evidence session, to inform the drafting of its Stage 1 report.

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/S2/06/13/1
Submission from Citizens Advice Scotland J2/S2/06/13/2
Submission from Professor Alan Paterson J2/S2/06/13/3
Submission from Scotland Against Crooked Lawyers J2/S2/06/13/4
Letter from Subordinate Legislation Committee to the Scottish Executive on the Legal Profession and Legal Aid (Scotland) Bill, 18 April 2006 J2/S2/06/13/5
Scottish Executive response to the Subordinate Legislation Committee on the Legal Profession and Legal Aid (Scotland) Bill, 28 April 2006 J2/S2/06/13/6

Agenda Item 2

Draft report J2/S2/06/13/7

Agenda Item 3

Paper by Clerk (PRIVATE PAPER) J2/S2/06/13/8

Documents circulated for information only—

Letter from Deputy Minister for Health and Community Care to Convener, Justice 2 Committee on Alcohol Test Purchasing, 2 May 2006

Letter from Minister for Justice to Convener, Justice 2 Committee on Redevelopment of Parliament House, 28 April 2006

Forthcoming meetings—
• Tuesday 16 May 2006, 2pm, Committee Room 6
• Tuesday 23 May, 2pm, Committee Room 1
Legal Profession and Legal Aid (Scotland) Bill

Evidence to the Justice 2 committee from Citizens Advice Scotland

based on the evidence of Citizens Advice Bureaux clients across Scotland

by Kaliani Lyle
Chief Executive Officer

April 2006
Legal Profession and Legal Aid (Scotland) Bill

Evidence to the Justice 2 committee from Citizens Advice Scotland

By Kaliani Lyle, Chief Executive Officer

Citizens Advice Scotland and its 76 CABx offices form Scotland's largest independent advice network. CAB advice services are delivered through 214 service points throughout Scotland, from the islands to city centres.

The CAB service aims:

to ensure that individuals do not suffer through lack of knowledge of their rights and responsibilities, or of the services available to them, or through an inability to express their need effectively

and equally

to exercise a responsible influence on the development of social policies and services, both locally and nationally.

The CAB service is independent and provides free, confidential and impartial advice to everybody regardless of race, sex, disability or sexuality.
Executive summary

1. Our response is limited to the second policy strand, on Legal Aid and Assistance.

2. We endorsed the general principles of the Strategic Review and broadly welcomed the proposals for reform of legal aid in the Advice for All consultation. We are therefore disappointed that the limited powers in the bill will not increase access to civil justice to any significant extent.

3. Case-by-case funding for non-solicitors, as proposed in the Bill, presents:
   • a problem of principle for the CAB service, since one of our 12 principles is that the service is free regardless of means
   • a practical problem since it is a bureaucratic, inefficient and complex means of funding legal advice.

4. Issues previously recognised by the Executive but not addressed by the current legislation include:
   • the precarious nature of funding for legal advice by non-solicitors
   • the large unmet need for legal advice
   • the role of legal advice in tackling social exclusion
   • the need for preventative measures as well as crisis intervention.

5. Grant funding for non-solicitors, as proposed in Advice for All, would allow these issues to begin to be addressed and existing quality assurance standards could be used whilst a national framework is developed.

6. Strategic overview is also required and could be provided by a reference group of key organisations that could ensure an open and inclusive grant funding process that meets existing gaps in provision.

7. Given the scale of the contribution to legal advice by non-solicitors, the large unmet need and the fact that those most in need of advice are least served by the current system, it is difficult to see how the pace of reform that is required will be delivered without the inclusion of grant funding at this stage.

8. Accordingly, CAS recommends that the Scottish Legal Aid Board be given the power to provide grant funding for the provision of legal advice by non-legal advisors.
Introduction

1. Whilst the bill contains two policy strands - regulating the legal profession and reforming legal aid - Citizens Advice Scotland (CAS) has confined its response to the second strand, since this is where the bulk of our evidence and previous work has been. Our comments therefore solely concern improvements in the co-ordination and delivery of publicly funded legal assistance (PFLA) and, in particular, the funding of non-legal qualified advisers.

2. Over a period of ten years CAS, in responses to consultation documents¹, has commented on the inadequacies of the legal aid scheme in relation to civil matters and argued for the need to develop new ways of delivering legal services that are accessible and meet the needs of all. Accordingly, we welcomed the process of reforming and modernising legal aid in Scotland started in 2001, endorsed the general principles laid out in the Strategic Review on the Delivery of Legal Aid, Advice and Information in 03-04 and last year broadly welcomed the proposals for the strategic reforms of legal aid outlined in the Advice for All consultation.

3. We are therefore disappointed that the limited powers contained in the Bill on this matter will not increase access to justice for people in Scotland to any significant extent.

Part 4 - Legal Aid

4. Citizens Advice Scotland (CAS), in association with other legal advice networks in Scotland (ASLAN), produced a manifesto in June 2000\(^2\). It argued that a vital aspect of a just society is the opportunity to access the legal process to ‘right a wrong’, for example to stop an eviction, negotiate a debt or defend unfair dismissal, and that there are many vulnerable people who are excluded from exercising this right. CAS has also long maintained that the concept of access to justice should be widened to include preventative advice and early intervention and that the free independent advice sector has a significant role to play in publicly funded legal assistance.

5. We therefore welcomed the proposals in both the strategic review and the consultation to extend PFLA and the commitment in the Bill to the mixed model provision of legal assistance.

6. However, whilst we understand that Part 4 of the Bill is the first stage of a planned programme of measures in the delivery of PFLA in Scotland, the initial changes proposed, which include provision for case-by-case funding for non-legal advisors and a register of advisers, will only marginally increase the availability of quality assured legal advice. This modest measure will make a minimal impact on the provision of publicly funded legal advice.

7. If the delivery of civil PFLA is to be improved, then in line with the Advice for All consultation, the Scottish Legal Aid Board (SLAB) should be given additional powers to grant fund non-solicitors at this stage. This would enable SLAB to fund delivery methods that would work towards achieving the Scottish Executive policy objective of ensuring that people receive advice from an adviser with the most appropriate skills, knowledge and experience irrespective of whether this was a solicitor or a non-legally qualified adviser.

Case-by-case funding

8. Section 45 of the Bill extends the current legal aid scheme in certain categories of advice and assistance to non-solicitors approved and registered by SLAB. To access the fund the registered adviser or organisation would have to means test clients and complete an individual application form in every case.

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\(^2\) ASLAN Manifesto for Community Legal Services, June 2000
9. Having given serious consideration to the scheme we have concluded that it would not be possible to recommend that the CAB service participate in it for the following reasons:

- One of the twelve principles that underpin the CAB service is that any service provided through a CAB is free regardless of means. The difficulty that means testing presents for many voluntary sector advice agencies was acknowledged by the Scottish Executive Working group on the Review of Legal Information and Advice Provision in Scotland which concluded that the conditions for funding would have to take into account this opposition to means testing and charging. Means testing is opposed by many voluntary sector advice agencies because it creates a two tier system in which some clients are able to access legal aid and some are not. Bureaux have examples of clients on very low income, for whom paying for a solicitor is impossible – yet they do not meet the financial eligibility criteria for legal aid. Passporting would only partially overcome this problem.

- The proposed system is not practical. It is highly inefficient and bureaucratic, and it is for this reason that community legal services in England and Wales opted for grant funding. It is simply not feasible for the vast majority of non-legal advice providers, including the CAB service, to develop the administrative resources required to make these applications. It is clearly indicated in the Strategic Review that the preferred method of funding specialist services provided by non-solicitors is by grants rather than case-by-case. The Strategic Review recommended that specialist non-lawyers should not have to access funding for provision of legal advice on a case-by-case basis. The Review observed 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)”\(^3\). In addition, there was nothing in Advice for All to indicate that the Executive was not going to implement grant funding, nor did the consultation responses draw that inference.

- There would also be additional administrative complexities to any scheme that requires registration of individual advisers, rather than individual agencies. All bureaux run a competence based training scheme and are responsible for the

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3 Strategic Review on the Delivery of Legal Aid, Advice and Information, Scottish Executive, October 2004, paragraphs 5.118 - 5.121
advice given by individual advisers. It is therefore more efficient for the agency, rather than the adviser, to be registered, especially given the turnover of volunteers.

- The deficiencies in the current legal aid scheme, which are outlined below, risk being compounded by the current proposals, since registered agencies could prioritise cases eligible for funding above other clients, or even seek out more lucrative cases, irrespective of need.

**Deficiencies in the Civil Justice system**

10. It is our view that for the reasons stated above very few advice agencies, most of whom are grant funded, would make use of the provisions in the Bill. Without an increase in Publicly Funded Legal Assistance, the present deficiencies in civil justice system would continue as detailed below;

**The current service**

11. The current service provides assistance in the traditional areas of law such as family/matrimonial and reparation to the detriment of social welfare law. Our statistics show that, in 2004/2005¹, for every case given advice and assistance under the current scheme, the CAB service saw:

- over four times as many housing issues
- over four times as many hire purchase / debt issues
- nearly seventeen times as many employment issues
- over seventeen times as many state benefit issues

12. With regard to tribunals, legal aid funded representation for 118 employment tribunals in 2004/2005. In the same year, the CAB service represented clients in 650 employment tribunals, 404 of which were settled in advance of the hearing². Legal Aid funding is only available for the complex employment tribunal cases; meaning that for many CAB clients with a genuine need for representation access to legal aid is simply not possible. The CAB service provides a wider range of options for clients; CAS provides specialist second tier support to CAB advisers and is able to request an opinion from an Advocate through the Faculty of Advocates Free Representation Unit.

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² 43 withdrew, 404 settled in advance (financial gain £846,043.59), 58 lost, 145 won (financial gain £355,923.22)
13. Legal aid does not fund representation at unified appeals tribunals, which hear benefit appeals. In 2004-2005, the CAB service provided advice on 139,210 benefits issues and represented clients in 3,601 tribunals (680 of which were settled in advance of a hearing)\(^6\). A further three cases were taken to the Social Security Commissioner. All three were won.

14. In addition, a study of the use of specialist resources by solicitors in Scotland found that 21% of respondents contacted the CAB for information and advice\(^7\).

15. Despite this extensive contribution to the provision of legal advice and assistance, and an acknowledgement by solicitors that the CAB service is an expert provider of information and advice, no funding is available from the Scottish Legal Aid Board to bureaux and the funding position of most bureaux is precarious. The same is true for all advice agencies in the voluntary sector. The Advice for All consultation recognised that ‘vulnerability of provision in the voluntary sector is a strategic issue which needs to be addressed since stability and security of funding are essential in maintaining and developing quality provision’\(^8\). However, long term, secure funding for Scotland’s independent advice sector will not be provided for by the case-by-case funding proposed in the bill. Without grant funding, the ability of citizens to access the appropriate advice and assistance they need remains seriously diminished.

**Unmet need for advice**

16. The main non profit legal services providers in Scotland stated in the ASLAN manifesto that, although they work with thousands of people every year, they knew that many more do not have the legal information, advice and representation they require to influence the major decisions which will impact on their lives.

17. The Paths to Justice Scotland research\(^9\), and the research that has succeeded it, indicate that there is significant need for legal advice which is currently not being met. There are geographical areas where there are few or no legal aid solicitors available. In 1999, a study found that only 25% of Scottish solicitors would advise on welfare benefits and social

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6 128 withdrew, 680 settled in advance (financial gain £2,464,527.80), 876 lost, 1917 won (financial gain £7,543,921.23)

7 Legal Studies Research Findings No. 2 - Specialism in Private Legal Practice: The provision and use of specialist resources by solicitors in Scotland; Kerner, Karen; 1999

8 Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward, Scottish Executive, June 2005; paragraph 1.47

security benefits\textsuperscript{10}. In addition, there are emerging needs such as the problems faced by migrant workers who are largely excluded from the civil justice system.

18. The Paths to Justice Scotland study into the prevalence of significant justiciable problems has shown that around a quarter of people in Scotland experienced such a justiciable problem in the preceding five years. The problems most commonly experienced were related to money, faulty goods and services, housing, employment problems, relationships and family matters and injuries or health problems relating to accidents or poor working conditions\textsuperscript{11}. Of this number, only a fraction approached an adviser (legally qualified or not) for help, suggesting that there is a profound need for individuals to have knowledge about their rights and where they can get advice and support to enforce them. This is confirmed by separate research undertaken by Scottish Consumer Council\textsuperscript{12} and the Scottish Executive\textsuperscript{13}.

19. In a survey undertaken by Mori for Citizens Advice in England and Wales\textsuperscript{14}, it was found that for every person who receives advice from a bureau there is another person who cannot get an appointment.

20. CAS, along with other advice providers, have long argued that only a strategic approach and a radical restructuring of PFLA would address this need. The scope of case-by-case funding as a preliminary step is too narrow to begin this process.

The opportunity gap in civil justice

21. It is our view, and one that is shared by the Strategic Review, that inequality and disadvantage are frequently compounded by lack of access to effective legal advice, information and representation. This lack of access is exacerbated by the fact that those who are disadvantaged have the greatest need for advice.

22. In the experience of the CAB service, people in Scotland seek advice when they are experiencing, or are threatened by, acute or chronic hardship. This hardship is most commonly caused by problems resulting from a major life event and avoidable external factors. These factors include maladministration, lack of awareness of entitlements to a benefit, right or service, and difficulty in accessing decision makers.

\textsuperscript{10} Legal Studies Research Findings No. 2; op. cit.
\textsuperscript{11} Paths to Justice Chapter 2, pg 34 op. cit.
\textsuperscript{12} Knowledge of Consumer Rights In Scotland, SCC, February 2003
\textsuperscript{13} Public Perspective on Accessing Legal Advice and Information, Scottish Executive Research Unit, 2001
\textsuperscript{14} Unmet Demand for Citizens Advice Bureaux, MORI, 2004
23. Additionally, research has identified that there is a far higher need for advice among groups experiencing social disadvantage and that those with multiple problems tended to be in vulnerable groups.\textsuperscript{15} People with justiciable problems are more likely to be living in rented accommodation, in receipt of housing benefits, have children at home, be unemployed, or have a physical or mental impairment.\textsuperscript{16}

24. Informed intervention at an early stage could make a real and long lasting difference to the lives of the most vulnerable in society, whose life circumstances could be improved by utilising the law. The Strategic Review, drawing on the Paths to Justice research, identified that one of the key purposes of PFLA was to promote the early resolution of legal problems and to promote social inclusion in relation to resolving a problem which may, if unresolved, trigger additional related problems.

25. Strategic investment in legal advice can therefore not only resolve legal problems, but also prevent further problems developing. Research has shown that, when a person has a problem, they are likely to experience additional problems in clusters, and that this pattern can be prevented by early intervention\textsuperscript{17}. For example, where conditions of employment change, the loss of earnings can lead to other problems such as debt, ill health, relationship difficulties and even homelessness.

\textit{An East of Scotland CAB reports of a male client who lost his job. He is dyslexic and has difficulty completing forms. He has weekend care of his ten year old daughter and lives in a Homes for Life property. He applied for council tax benefit and housing benefit but was denied it for three weeks as the paperwork was not provided in time and they refused to backdate it. He is therefore having to pay off a month’s rent himself to avoid eviction. He has not been able to see his daughter for two weeks as he has no money at all and his parents are feeding him. He has tried for a crisis loan but cannot get through on the telephone application line. He owes money to utility companies who are threatening disconnection and to the council for council tax. The CAB negotiated a repayment plan with both the council and the utility companies and he eventually succeeded in applying for a crisis loan, which enabled him to travel for a job interview that afternoon.}

\textsuperscript{15} Unmet Demand for Citizens Advice Bureaux op. cit; P. Pleasance et al, Causes for Action (2nd edn ) (LSC, 2006)


\textsuperscript{17} Paths to Justice Scotland Chapter 2 pg 44-48 op. cit.
26. The most pressing need for investment is in the provision of services tailored to those who are most vulnerable. Rather than preserving disadvantage through lack of access, there is the opportunity to tackle disadvantage through early ease of access.

**Advice beyond crisis**

27. Research also suggests that there is currently an emphasis in advice provision geared towards disaster management. Case-by-case funding merely perpetuates this focus on crisis points. Preventative advice, education, and innovative ways of delivering advice are not possible without grant funding advice agencies in the voluntary sector. Two successful examples of grant funded projects are the In-court Advice projects piloted in six courts around Scotland and the Highland Part V Legal Advice Project.

28. The concept of In-court Advice was originally piloted in Edinburgh Sheriff Court by Edinburgh Central CAB. This project is highly successful and five additional projects, three managed by local citizens advice bureaux, one by a partnership between Dundee CAB and Shelter and one by a local authority, were funded to explore the model further. The projects were evaluated in 2005 and all six projects were awarded a further three years funding. The evaluation report found that the In-court Advice projects were, “uniquely placed within the court house, particularly able to address unmet legal need for people involved in court proceedings” and, “demand for the services is high, and current workloads are becoming more difficult to manage across the pilots. However, potentially unmet needs for the service remain.”

29. The introduction of grant funding would extend the power that is currently held by SLAB to employ a salaried solicitor. This would enable an advice agency to employ a solicitor to provide second tier advice and support, similar to the Part V model, or another specialist adviser (but not restricted to a solicitor) in fields such as employment, debt, welfare benefits, housing and immigration to cover issues relevant to a specific area, for example, migrant workers in the Highlands and Perthshire. Grant funding would allow agencies on the ground to use their knowledge of changing circumstances to respond to needs as they arise and hence to supply a more flexible and responsive service.

30. These pilots have been successful, but the bill is so restrictive in its powers that it prevents SLAB from expanding on this kind of success. A grant funding scheme should allow sustainable funding for this type of specialist advice.

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18 Uniquely placed: evaluation of the in-court advice pilots (phase 1) Sue Morris, Patsy Richards & Eddie Richards: MorrisRichards Ltd. And Claire Lightowler. SESR – Scottish Executive Social Research 2005
Grant funding

31. Grant funding is not a panacea for the current failings of the civil justice system. However, given the scale of the contribution to legal advice by non-solicitors, the large unmet need and the fact that those most in need of advice are least served by the current system, it is difficult to see how the pace of reform that is required will be delivered without the inclusion of grant funding for the provision of legal advice by non-legally qualified solicitors at this stage.

32. A clear advantage of a grant funding scheme is that funding would be attached to the outcomes of a service rather than the method in which the service is delivered. This would allow funding of a range of advice providers who would provide a corresponding range of services. Outcomes should consider both the quantifiable results of the service and the client’s experience of the service. The evaluation of the In-court Advice projects found that 97% of respondents would recommend the service to someone else.19

33. Grant funding would also:

- as in England, prevent the withdrawal of local authority funds by insisting on match funding from local authorities. This would also provide a strategic view of the delivery of advice services locally
- allow for early intervention and replicate good practice
- be cost effective, because it would reduce the need for more expensive legal aid services from solicitors
- be holistic – for example, if a client approaches a CAB with a money problem, grant funding would allow advice to be offered about related issues, such as employment, housing or relationship breakdown without having to consider whether each issue fits within the legal aid criteria
- allow advice agencies to provide specialist advisers and second tier support for complex issues.

19 Uniquely placed: evaluation of the in-court advice pilots (phase 1) op. cit. paragraph 3.39
Interim quality assurance standards for a grant funding scheme

34. We accept that PFLA needs to be quality assured and that a national quality assurance framework is in the process of being developed. However, in the interim there are already existing national standards for advice in a number of subject areas: housing; money; immigration and consumer matters.  

35. The CAB service also operates a membership scheme which requires bureau to undergo a quality of advice audit every three years. The scheme is committed to continuous improvement and is currently being developed to align with the subject based national standards.

36. In addition to using the established quality assurance schemes, the register proposed in section 45 could be amended to apply to approved agencies or a designated individual in an agency could provide the mechanism for quality assuring PFLA grant funded by SLAB.

37. The Strategic Review stated that there was “a need for a national body with a responsibility to plan, co-ordinate, support and develop civil PFLA in Scotland”. CAS believes that there is an immediate need for a strategic overview of the planning and delivery of PFLA. In the absence of a national strategic body it is imperative that organisations involved in the delivery of PFLA on the ground are involved in determining how the grant scheme would operate based on their extensive experience.


21 Strategic Review of Legal Aid: op. cit. paragraph 5.27, see also 5.26 – 5.31
Conclusion

38. The case for radical restructuring of advice services, with a mixed model of provision and better co-ordination, has been accepted by the Executive and welcomed by advice providers. That the proposed changes will be phased through a programme of measures is in itself uncontroversial. The problem is that the initial changes proposed in this Bill do little to start the restructuring process and leave largely unaffected the current problems with the civil justice system.

39. Given the scale of the contribution to legal advice by non-solicitors, the large unmet need and the fact that those most in need of advice are least served by the current system, it is difficult to see how the pace of reform that is required will be delivered without the inclusion of grant funding at this stage.

40. Accordingly, CAS recommends that SLAB be given the power to provide grant funding for the provision of legal advice by non-legal advisors.
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Legal Profession and Legal Aid (Scotland) Bill

Evidence from Professor Alan Paterson

1.01 Introduction
The stated purposes of the Bill are to establish the Scottish Legal Complaints Commission; to make provision as regards complaints against members of the legal profession in Scotland and other matters concerning the regulation of the profession; to make provision in connection with the administration of the Scottish Legal Aid Fund, including a register of advisers in connection with advice and assistance; and for connected purposes. In my opinion legislation to effect these purposes is to be welcomed, unfortunately I am remain unconvinced that some of its key features are likely to be successful. In relation to the regulation of the profession it is, I believe, important to uphold the rule of law, to satisfy the public and the profession and to achieve political peace. Regrettably, I consider that the Bill may encounter problems with several of these objectives. Similarly, I am unconvinced that the Bill’s proposals in relation to the not for profit sector and publicly funded legal assistance, are likely to greatly enhance access to justice in Scotland.

1.02 Background to regulation: The shift from self-regulation to independent regulation. The regulation of the legal profession extends on a spectrum from self-regulation to co-regulation to independent regulation. In the last twenty five years in the UK the trend in this field has been to move from self-regulation towards independent regulation. The issue posed by the first three parts of this Bill is how far to take this process.

In the last twenty-five years the traditional concept of professionalism amongst lawyers in the UK and the regulatory bargain by which the profession provided access, expertise, integrity and public protection in return for status, restraint on competition and self-regulation, has been steadily re-negotiated. Self-regulation in particular has come under increasing scrutiny. Twenty-five years ago self-regulation was largely unquestioned. The profession’s right to regulate itself was seen as a vital part of being a profession, and was argued to be in the public interest since (1) only peers were in a position to judge their fellows (2) peers were more likely to be tough on errant lawyers than outsiders and thus standards in the profession would be higher (3) it was cheaper than the alternatives and (4) it was quicker and more effective than the alternatives. In the past decade the criticisms of self-regulation have been much more to the fore: that it has become a cloak for rent-seeking, for regulatory capture,

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ineffective disciplinary procedures and anti-competitive practices.\(^3\) Moreover, more active consumer movements and a global movement in favour of freer trade have led governments of all political hues to embrace deregulation of the profession to a greater or lesser degree. However, the problems of information asymmetry between lawyers and clients which justified regulation in the first place have led to re-regulation and co-regulation in the shape of public protection measures – ethical codes, legal services ombudsmen, penalties for “shoddy work” and financial services regulation. This process of de-regulation and re-regulation has had a number of consequences – a growth in co-regulation, an exceptionally fragmented market for legal services, a greatly enhanced tension between commercial pressures and professional integrity, and continuing debates as to whether regulation is standing in the way of new business structures and external investment. These consequences are forcing the state, the profession and society to re-consider the regulatory framework for the profession and other providers of legal services in a wide range of jurisdictions.\(^4\)

The various jurisdictions have differed as to scope of their regulatory reviews. Sir David Clementi’s review of the regulatory framework for legal services in England and Wales covered entry standards, training, complaints, and alternative business structures. In New South Wales external regulators have an input into the articulation and setting of professional responsibility standards, the education, admission and certification of professionals, as well as the advertisement of their services. The current Bill is markedly narrower in focus, concentrating as it does on complaints against the profession.

1.03 My preferred model for regulating complaints handling

The Better Regulation Task Force in 2000 argued that the principles of good regulation are fivefold: Transparency, Accountability, Proportionality, Consistency and Targeting. My own view is that a complaints framework for providers of legal services should:

a) Balance appropriately the interest of the profession / providers and the public interest;

b) Have clearly articulated goals and written procedures;

c) Involve the application of clear and consistent standards in order to ensure consistent outcomes;

d) Cope appropriately with overlapping standards eg IPS, negligence and conduct;

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\(^3\) Such arguments can be found in many modern writings including Ogus, *op.cit.* at p.108, Seneviratne, *op.cit.* at pp.28-9 and D.Rhode, “Policing the Professional Monopoly” (1981) 34 *Stanford Law Review* 1.

e) Be clear as to the favoured truth-finding mechanism i.e. inquisitorial or adversarial, at each stage in the process;

f) Involve appropriate dispute resolution mechanisms at each stage: the job descriptions and remit of personnel should be clear and they should receive appropriate training and support;

g) Be fair to each side: e.g. adhere to the principles of natural justice, permit equal opportunity to each side to make representations at appropriate junctures, and should encourage an equality of arms where an adversarial procedure is being used;

h) Be relatively speedy;

i) Be adequately monitored (including review);

j) Be affordable to the profession, the complainer and the respondent;

k) Involve sanctions that are proportionate in the eyes of the profession and the public (adequate, meaningful and commercially significant);

l) Satisfy the reasonable complainer

m) Uphold the rule of law

n) Bring political peace to the area.

The Justice 1 Committee responded to public disquiet over the independence and integrity of the complaints processes operated by the legal profession in Scotland by proposing enhanced powers for the Ombudsman and a single gateway for complaints. In my view the Justice 1 Committee got it pretty much right. I believe that the regulator (whether an individual or a Board) should be enabled to perform an effective co-regulatory role with the profession. The single gateway regulator with oversight and review functions is, I believe, the best way to achieve this. Moreover, it represents a win : win solution for the public and the profession. The public wants an independent regulator, which is seen to be independent and in which they can have confidence. The profession wants a system of regulation in which they also can have confidence, which is cost effective and in which they continue to have a stake. The single gateway regulator provides such a model. In it, with the exception of complaints that are conciliated or disposed of at source, all other complaints are referred to the regulator acting as the sole conduit or gateway for complaints. The regulator would first sift the complaints to weed out frivolous or irrelevant complaints in a way that is publicly seen to be independent. Thereafter the regulator would retain a small minority of complaints (which might be either IPS or conduct complaints or both) but pass the great bulk of the complaints on to the professional bodies to be handled by them subject to the regulator’s powers of direction, scrutiny and review. The regulator’s function would therefore extend far beyond the gateway function. Thus the regulator would have an input into standard setting, the duty to monitor the complaints procedures of the profession, and the right to provide guidelines to the profession as to the handling of complaints. In addition the regulator would be able to give directions as to how a particular complaint should be handled e.g setting special sanctions.

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5 The use of the word “gateway” is perhaps misleading. Under this model the regulator is responsible for the whole complaints process, whilst largely delegating the function to the professional bodies.

6 Typically these would be complaints which (1) were sensitive e.g. because they related to a member of the governing bodies of either branch of the profession, or (2) raised issues of policy or principle e.g. where the regulator envisages that there will be a series of a particular type of complaint, such as the alleged mis-selling of endowment policies, and wishes to facilitate a common approach to such complaints.

7 As in New South Wales, see Legal Practice Act 1996 s. 147; Legal Profession Act 1987 s. 149
time limits or lines for investigation, track the handling of individual complaints and ask to see a range of random files. Finally, the regulator would be able to review any complaints’ decision of the professional bodies, whether or not he/she has been requested to do so by the complainer. In doing so, the regulator would be able to order a re-investigation, or conduct that re-investigation or substitute his or her own decision for that of the professional body without further investigation. However, where the regulator forms the view that the behaviour complained about is misconduct, a prosecution before the Discipline Tribunal would still be required, unless the respondent agrees to be reprimanded. This model has key strengths only some of which are shared by the Bill. Thus the complaints process would be perceived by the public as independent of the profession. The regulator would receive the brickbats and worse which currently are directed at those handling complaints within the professional bodies. The two branches of the profession would retain the great bulk of their regulatory functions in relation to complaints, albeit in an explicit form of co-regulation. The regulator would be able to achieve greater consistency in standard setting across providers and services, to encourage greater consistency in complaints decision-making and to facilitate lay/consumer input into the decision-making processes. The regulator also could foster the establishment of disciplinary and complaints processes amongst new and unregulated providers of legal services. However, since the bulk of complaints would be passed on to the providers this model would be cheaper and less bureaucratic than the model contained in the Bill. Moreover it would not undermine the public orientation of the professions nor be so likely to impose alien standards on the profession as a completely independent regulator handling conduct and service complaints. The providers would be left in a co-regulatory position without the imperative to move to a split between regulatory and representative functions. Under this model, therefore, it would not be necessary to draw a distinction between regulatory and representative functions and the professional bodies would continue to be required to consider the wider public interest in relation to all their functions. Finally, it would enable the regulator of the legal profession to look at wider functions including standard setting.

1.04 Part 1 of the Bill

Clause 1 As indicated above I am happy to welcome the establishment of an independent Scottish Legal Complaints Commission and its role as a single gateway for all complaints. It is its other functions that concern me.

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8 As in New South Wales, see Legal Practice Act 1996 s. 148; Legal Profession Act 1987 s. 150 This power is rarely exercised.

9 As in New South Wales, see Legal Practice Act 1996 s. 154; Legal Profession Act 1987 s. 159

10 A single gateway model akin to this exists in New South Wales in the shape of the Legal Services Commissioner and has been recommended by independent regulatory reviews in Victoria and Queensland. While Sir David Clementi expressly rejects the single gateway model, by this he meant the postbox model of the gateway, and I am proposing far more than this. Moreover, Clementi was very unclear on the link up between service and conduct complaints in the future. The current plans for implementing Clementi in England and Wales envisage that all complaints (whether of service or conduct) will go to one regulator, although the conduct ones would then go to the professional bodies under some form of monitoring. This is in effect a single gateway model.

11 In NSW the Commissioner’s remit extends to monitoring the operation of the mutual indemnity fund and the fidelity fund. The Commissioner also has the power to scrutinise any proposed rule change by the Bar or the Law Society from the perspective of the public interest and competition policy.
**Clause 2** As set out above I strongly support the establishment of an independent single gateway such as that contained in this clause. I am happy for the Commission to have the power (which the Law Society currently lacks) to weed out frivolous and vexatious complaints. While I welcome the definition of “any person having an interest” in IPS complaints which is in the clause, it is not clear why a similar definition does not exist for conduct complaints. **Clause 24** rightly requires that conduct and services complaints which go direct to the professional organisations must be re-directed to the Commission. However, it should be competent for the professional organisations to raise conduct complaints themselves (which would be subject to oversight, review and monitoring by the Commission).

**Clause 3** I am happy with a time limit being imposed for complaints provided it is a reasonable one. On premature complaints see my comments on **clause 6** below.

**Clause 4** This is one of the problematic areas of the Bill. The current complaints procedures of the legal profession allow conduct, service (and de facto some lower level negligence issues) to be dealt with in the one forum. So too would the Justice 1 model. However, the Bill model splits the handling of conduct and service matters and requires them to be decided in different fora, according to different timescales and with different evidence. Complainers are unlikely to consider this to be a helpful outcome. **Clause 4** seems to have been drafted as though overlaps between conduct and IPS are unusual occurrences. They are not. Most conduct offences in my experience will also raise issues of IPS (the opposite is not true). It follows that such overlaps are not that unusual and that requiring the Commission to consult with the professional body every time an overlap may occur will build in delay and bureaucracy. Moreover, it might create an undesirable tendency to try to categorise a complaint according to its predominant nature (and dropping the rest) rather than investigating all aspects of the problem.

**Clause 5** This follows from the decision to split the handling of conduct and services complaints. I am happy for the Commission to remit the great bulk of conduct complaints to the professional organisations, however, as with the Justice 1 model I would prefer the Commission to have greater oversight, review and monitoring functions over conduct complaints than the Bill provides.

**Clause 6** I am happy to support local investigation and possible mediation of services complaints in appropriate situations. That said, I do not favour compulsory talks aimed at settlement or mediation. Thus, if a client has lost faith in a law firm I see little point in insisting that they meet with the original solicitor or the firm’s client relations partner (if any) before the matter will be investigated by the Commission. Similarly, my support for mediation in certain solicitor/client disputes, would be conditional on the service being free to the client and voluntary as opposed to compulsory.

**Clause 7** I would prefer the Commission to refer the bulk of services complaints to the professional body as Justice 1 proposed, subject to oversight, review and monitoring by the Commission. This would be quicker, cheaper and more easily

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12 Experience in Victoria, Australia, indicates that a parallel jurisdiction for complaints between the regulator and the professional bodies is highly undesirable.
understood by the complainant than the Bill’s proposals. It would guarantee a decision by a committee consisting of equal numbers of relevant professionals and laypersons. It would allow complaints which raise services and conduct complaints to be heard together whilst requiring the professional bodies to continue to focus on the public interest as well as the profession’s interest. If the Commission had appropriate powers of oversight, review and monitoring I would argue for all complaints which raise services and conduct issues to be remitted to the professional organisations for determination (except those complaints which raised significant policy issues).

Clause 8 This largely replicates the powers of the Law Society at present. There are one or two areas of concern, however. The clause does not allow compensation to be paid to complainers who are not clients, even if the complaint is upheld, and subclauses 2(b) and (c) do not rectify this. This can deny redress in some cases e.g. to beneficiaries or those entitled to claim legal rights in an executry. Secondly the level of compensation mentioned for IPS has been put at £20,000. This is a very substantial rise from the newly introduced £5,000 and I am concerned that it may have an inhibiting effect on practices in rural areas or those doing civil legal aid work. Much will depend on the stance taken by the Master Policy insurers as to the standard excess per partner. If this is raised to beyond £20,000, then some practices may cease to undertake certain types of work which commonly give rise to IPS complaints. The issue is likely to be exacerbated by the requirement that practices pay a significant case fee, whether or not the complaint is upheld.

Clauses 9 & 10. These seem acceptable to me. Clause 10 largely replicates the existing legislation. However, it would seem fair to make it clear that whether a complainant raises a negligence action first and then an IPS complaint or the IPS complaint first and an negligence action second, the body taking the second decision should be required to take account of any compensation awarded in first case.

Clause 11 This provision stems from the problem of splitting services and conduct complaints. This seems to raise problems of cost, delay and bureaucracy. My preferred model of not splitting such complaints would avoid such problems.

Clauses 12-14 No comment

Clauses 15 & 16 This is my second major difficulty with the Bill. It retains the concept of a “handling complaint” as the sole vehicle for the Commission to look at how the professional organisations are dealing with conduct complaints. This replicates the position with the Ombudsman – a position which was rejected by Justice 1 because it left the regulator with insufficient powers. The Executive’s consultation paper “Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland” ("Reforming Complaints") explored several additional powers for the Ombudsman which had been recommended by Justice 1:

(a) "to investigate the substance of the original decision made by the professional body." (paragraph 38) ; (b) "to enforce recommendations." (paragraph 41)

(c) "to conduct general audits [of the complaints files of the professional bodies]." (paragraph 45)
The Commission should have all of these powers in relation to complaints dealt with by the professional bodies. In my opinion it is very difficult to reach a conclusion on a handling complaint without also reaching a conclusion as to the substance of the original decision by the professional body. It would make more sense (as Justice 1 argued) to give the Commission the power to do this. Despite the ambiguity in para 33 of the Explanatory Notes I do not believe that the Bill does give Commission the power to investigate the substance of a conduct complaint as opposed to a handling complaint. Furthermore, while the Bill allows the Commission to enforce its recommendations as to handling complaints it does not give it the power to enforce its other recommendations e.g. as to timescales or as to the methods or procedures for dealing with conduct complaints (Clause 27). While the Commission has powers under the Bill (Clause 27(5)) to carry out audits of conduct complaints files these would not include any files of conduct complaints raised by the professional body itself. More seriously, if my reading of the Bill is correct, even if the Commission formed the view that a practitioner’s conduct was unsatisfactory or misconduct the Commission would not be able to require the professional body to do anything other than re-investigate the matter. The Ombudsman at present has the power to prosecute a practitioner before the Discipline Tribunal as a final protection against a professional body’s refusal to act. The Bill as I read it, contains no such protection. In this respect the Commission has even fewer powers than the Ombudsman. This gap in the Bill may also be questionable since a dissatisfied complainer would have no effective right of review.

Clause 17 This provides for the abolition of the Ombudsman. I believe that the Commission should have at least all the powers of the Ombudsman. Moreover, in my view the Government’s funding of the Ombudsman’s office should be transferred to offset the costs of the Commission, and not simply its start up costs. (See Clause 21).

Clauses 18, 19 and 20. The Annual levy broadly equates to the current method for funding complaints handling by the professional bodies. The complaints levy is new. Whilst understanding a “polluter pays” system, I do not understand the justification for charging a levy against a professional who is vindicated by the Commission in the case of a services complaint. This may be challengeable. On the other hand if a “polluter pays” regime is introduced, the Commission will require to institute a form of proportionality so that the full cost of the complaints levy is not imposed on a professional who has been almost totally vindicated by the Commission.

Clause 29. This gives the Commission an oversight and monitoring role (but not a review role) in relation to the Guarantee Fund and aspects of the Master Policy. In the interests of enhancing effective co-regulation there would seem to be an argument that the operation of the Guarantee Fund and the Master Policy should be subject to independent scrutiny. Both of these are major commitments from the profession to the public interest, of which they are rightly proud. Objective evidence as to the effective operation of both schemes can only enhance public confidence in the regulation of the profession. The Bill (rightly) gives the Commission no powers that I can see to
interfere with any decision made by those operating the Guarantee Fund or the Master Policy in individual cases.

**Clause 34** The Interpretation Clause. The definition of IPS remains more or less as in the current legislation. As I have argued elsewhere there is a need for greater clarification of the application of the principle in practice. This should be easier for the Commission than for the Law Society which has twelve client relations committees and few mechanisms to achieve consistency between them. In one respect the definition of IPS in the Bill is new. This is the reference to IPS including “any element of negligence in respect of or in connection with the services”. Whilst this might be read as giving the Commission the power to handle all professional negligence cases worth below £20,000 against lawyers which involve IPS, in place of the courts, I suspect that is not what the Bill is intended to do. The more likely reading is probably that where a complaint relates to behavior by a solicitor which can be both IPS and negligence then the Commission should be able to investigate the service aspects of the behavior and to award compensation for them even if that selfsame behavior could give rise to a negligence suit. Any compensation award for loss in the IPS case would, rightly be taken into account if there was a subsequent negligence action. I am happy with the definition of unsatisfactory professional conduct contained in the clause, although this, too, is an area where a database, or a list of precedents would be very helpful.

**Omissions.** The Bill provides no mechanism for appeal (either for the lawyer or the complainer) from the decisions of the Commission on IPS, or (so far as I can see) for complainers from decisions / conclusions of the professional organisations in relation to conduct matters (if I am right as to the limitations on the Commission’s powers, see above). Some of these gaps may raise human rights considerations, and if so, they are unlikely to be rectified by the availability of judicial review. However, I would not favour allowing appeal to the Court of Session, or to the Discipline Tribunal because of the costs burden that this might impose on complainers (particularly those who have been successful at the first hearing) of being represented at either of these formal procedures. There is little point in providing complaints procedures which are free to the complainer at the first hearing if a successful complaint can be appealed to a Court or Tribunal with the threat of expenses running into thousands of pounds. An appeal mechanism is needed which would not threaten the complainer with crippling expenditure if the complainer has been successful at the first hearing.

**Part 2**

**Clause 36** I welcome this provision which puts unsatisfactory conduct on a statutory footing and for the first time provides some effective sanctions for such conduct. I am generally happy with the list of sanctions contained in the legislation, and that fact that they can be applied both to individual practitioners as well as firms. I think it unnecessarily restrictive however for the Bill only to permit compensation to be paid to the client, and not to a complainer who is successful but who is not a client.

**Clause 38** I am happy that the Tribunal should have the power to award compensation for professional misconduct. Interestingly, unlike the situation in cases of IPS and

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13 Professional Ethics, (W. Green, 2005) ch. 1 Standards.
Unsatisfactory conduct, the compensation is not restricted to the client, but can be paid to anyone who has suffered loss, inconvenience or distress as a direct result of the misconduct. This seems to me to be the preferable solution.

**Omissions.** Part 2 of the Bill does not give the Law Society the power to make findings of low level professional misconduct. This may be because the Executive considers that Unsatisfactory conduct will do the same job. I am afraid that I disagree. There are some forms of misconduct which are clearly misconduct and need to be labelled as such, rather than being downgraded to unsatisfactory services. Such cases, however, may still fall at the lower end of seriousness. To send them to the Tribunal will involve a cost burden on the solicitor of several thousand pounds even if the outcome is only a censure. This distorts the sanction imposed by the Tribunal for low level misconduct by adding a sizeable “fine” which the conduct may not merit. Such distortions will almost always accompany minor misconduct cases which go to the Tribunal. To avoid this, the Law Society should have the power to deal with minor misconduct cases without referring them to the Tribunal.

**Part 3**
No comment

**Part 4**
Clause 45 This extends the current legal aid scheme in certain categories of advice and assistance to non-solicitors approved and registered by the Scottish Legal Aid Board. Like others I am of the opinion that the research on “justiciable problems” in this area points to the need for early intervention. Generalist advice agencies with specialist advisers (both legally qualified and non-legal qualified) have a key role to play here, as the Strategic Review concluded. Unfortunately, I have severe reservations as to the value of Clause 45 for the not for profit sector and generalist advice agencies, in particular, in achieving the goal of employing specialist non-layyer advisers. The case by case method of funding is alien and impractical from their standpoint and may involve means testing which is unacceptable to some of them. The case by case method of funding is not what they had understood would be contained in the Bill and runs expressly contrary to the conclusion reached on this point in para 5.118 of the Strategic Review. I believe that in this area the approach of grant funding (or possibly contracts) is much to be preferred. I am strongly of the opinion that the Bill needs to be amended to give SLAB cash-limited grant giving powers to assist the not for profit sector in supplying specialist advisers who are not legally qualified.

**Professor Alan Paterson**
Director, Centre for Professional Legal Studies, Strathclyde University, Glasgow.

(Professor Paterson is providing evidence in his personal capacity, and not as a member of any organisation).

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14 See Genn and Paterson, *Paths to Justice Scotland* (Hart, 2001)
OPENING COMMENTS: The first paragraph in your letter to us dated 22 March 2006 contains the statement: “I write on behalf of the Justice 2 Committee to invite Scotland Against Crooked Lawyers to give evidence on the general principles of the Legal Profession and Legal Aid (Scotland) Bill at the Committee’s meeting on Tuesday 9 May 2006.”

Given that it was your Committee who invited SACL to attend the meeting to provide opinions and views on the content of the proposed Bill - which we welcome - we assume that the Committee will consider those opinions and views in good faith and make whatever amendments SACL feel are vital for the new Bill to function in a proper and equitable manner, towards the legal profession and the Consumers of Legal Services alike. We would contend that no other organisation, within or without the Legal Profession, possesses as much as SACL does the three necessary attributes to provide sincere submissions for consideration for the betterment of the Scottish Legal consumer, namely: the Competence, Experience and Logical Assessment based on impartiality. That said, we are bitterly disappointed that many individuals who fell victim to rogue lawyers were not invited to make oral presentations to the Justice 2 Committee. We would record that there is a huge imbalance with regard to the organisations your Committee invited to give Oral evidence. This imbalance is hugely biased in favour of the Law Society and other Legal Bodies. This is borne out by the fact that of the thirteen organisations/individuals invited no less than ten are these Legal Bodies and individuals who have strong connections with these Legal Bodies. All these parties have a vested interest in limiting the powers of the new Bill. SACL, regrettably, was the only organisation your Committee invited which is entirely independent of the Legal profession/system.

SACL shall therefore make a Submission to your Committee as follows:

SACL RESPONSE TO YOUR BULLET POINTS:

Your First Bullet Point: You state: “A new Scottish Legal Complaints Commission, led by a Board with a non-lawyer majority and a non-lawyer chair, acting as a gateway to receive complaints about lawyers which cannot be resolved at source (but with an emphasis on complaints being resolved at source where possible).”

SACL recommends that no lawyers sit on the Board of the Scottish Legal Complaints Commission because this would create a colossal “Conflict of Interest” situation which would cause impartiality to be seriously weakened. This would negate the ethical functioning of the Board of the Scottish Legal Complaints Commission, inter-alia. We are, however, agreeable to a lawyer being appointed to the Board to act in a legal advisory capacity only, but with no Voting Rights.

Your Second Bullet Point: You state: “The new Commission taking over responsibility for handling complaints about inadequate professional service from the legal professional bodies, the Scottish Legal Services Ombudsman and the Scottish Solicitors Discipline Tribunal.”

SACL agrees with the content of this passage, but with the proviso that “inadequate professional service from professional bodies” denotes exactly that. By this we mean that “inadequate professional service” covers all aspects of lawyers’ inadequate service to their clients. In practical terms, this means that “inadequate professional service” would cover the conduct of lawyers with regard to, inter-alia:
1) Failing to answer telephone calls;
2) Failing to return telephone calls timeously;
3) Failing to follow instructions;
4) Missing court and legal deadlines (whether by design or mistake);
5) Misleading clients;
6) Lying to clients;
7) Embezzling client’s funds and accounts held in Trust for clients;
8) Defrauding clients;
9) Altering documents;
10) Forging signatures.

After all, even the gravest transgression suffered by a client through a lawyer must be construed as “inadequate professional service”. If the service is not adequate, it is inadequate.

**Your Third Bullet Point:** You state: “Maximum amount of compensation for inadequate professional service complaints being raised to £20,000.”

On the basis of the above definition of “inadequate professional service”, it would be unrealistic in the extreme to limit compensation to £20,000. This is because lawyers often defraud their clients for sums far greater than £20,000. The practical effect of this proposal, as it presently stands, would be a positive encouragement for crooked lawyers to defraud their clients for amounts far greater than £20,000. We would therefore make the following recommendations:

- Where the “Inadequate Professional Service” was found to be a genuine *bona-fide* mistake by a lawyer, and this mistake resulted in serious loss to the client, the lawyer should be exonerated and the loss borne by his Indemnity Insurers who would be bound to compensate the client in full. The punishment for the lawyer and Law Firm responsible for the mistake would be market related; for example, they would pay higher Insurance Premiums and suffer Loss of Reputation.

- Where, however, the Scottish Legal Complaints Commission found that an Inadequate Professional Service had been rendered to the Client as a consequence of criminal activity on the lawyer’s part, the loss caused to the client should be borne solely by the lawyer involved in the criminal activity; to the full extent of his personal worth, if necessary. Were this amount still not enough to cover the loss caused, SACL suggests a percentage of the loss be levied on that Law Firm and its Partners, as required.

- Should this still not cover the full loss then the Indemnity Insurers should make up the balance to cover it in full.

This method of making good losses incurred by clients resulting from criminal activity by their lawyers is based on the very sound principle of “The Polluter Pays”. This method should deter all lawyers from enriching themselves at the expense of their clients.

**Your Fourth Bullet Point:** You state: “Responsibility for professional discipline remaining with the legal professional bodies and discipline tribunals but the way in which such complaints are handled being overseen by the Commission.”

SACL disagrees unequivocally with this proposition. Our recommendations in connection with the disciplining of lawyers are covered by our response in **Your Third Bullet Point** above.

**Your Fifth Bullet Point:** You state: “First Steps towards giving Rights of Audience and rights to conduct litigation to members of other professional or other bodies.”
Rights of audience and rights to conduct litigation in the Scottish Courts should have been accorded over ten years ago to other professional bodies and persons. We therefore suggest that you substitute “First” steps with “All” steps towards giving these Rights of Audience, as a matter of the greatest urgency.

Your Sixth Bullet Point: “Transfer of responsibility from the courts to the Scottish Legal Aid Board for granting and terminating legal aid in serious criminal cases.”
SACL reckons that the lesser of two evils is still evil, but would add that the Legal Aid Board ought to be financed directly by a body answerable to the Scottish Parliament, and not the Law Society as at present. This should go some way to lessening the enormous abuse of Public funds by unscrupulous lawyers. This should also make MSPs realise how much legal tender had been illegally squandered in the past.

Your Seventh Bullet Point: “Enabling the Scottish Legal Aid Board to fund certain advisers other than solicitors to provide advice and assistance.”
SACL agrees that professional bodies, persons and certain advisers other than solicitors should be funded to provide advice and assistance, but this responsibility should lie with the Scottish Parliament directly and not the Legal Aid Board, as mentioned at Your Sixth Bullet Point above. In cases where lawyers are funded to provide advice and assistance, SACL contends that any lawyer who has been found guilty of providing Inadequate Professional Service based on criminal activity at any time in the past should not be funded.

SUMMARY OF SACL POSITION ON THE HANDLING OF COMPLAINTS AGAINST LAWYERS:
We are, and always have been, very much in favour of “The Polluter Pays” principle. This was, to our pleasure, suggested in the 2005 Scottish Executive Consultation Paper. The only way to give full and proper effect to this principle is to give the Scottish Legal Complaints Commission the power to force the Polluter to pay, as outlined above. In practical terms, this means that all the powers and functions in connection with Complaints handling, would be transferred over to the new Legal Complaints Commission. This must include Complaints Determinations and Disciplinary Matters, which are presently held and exercised by the Law Society of Scotland, the Scottish Solicitors’ Disciplinary Tribunal, the Faculty of Advocates, the Sheriff’s Association, the Scottish Legal Services Ombudsman, the presently unaccountable Judiciary, and all other similar Representative Legal bodies and Associations of whatever nature,

All the above named existing bodies have for decades utterly failed the consumers of Scottish Legal Services in Complaints Handling, Complaints Determinations and Disciplinary matters. That is precisely the reason for the existence of this new Bill. An immediate beneficial effect would be the saving of large amounts of taxpayers’ money.

We have no objection to Legal Representative bodies continuing with their various other present activities, such as licensing lawyers (on a yearly basis), conducting audits, organising conferences, AGM’s and the like. But if the status quo is to remain SACL would suggest that the Law Society of Scotland be renamed the Law Mafia of Scotland. As it stands, it is an unethical work monopoly. The Bill should also contain a clause that any irregularities discovered by the “Law ‘Whatever’ of Scotland” must be reported immediately to the new Scottish Legal Complaints Commission, which, in turn, would be bound to act on the receipt of such information.

COMPOSITION OF THE NEW LEGAL COMPLAINTS COMMISSION:
We note that in Section 52 (Schedule 1) (101) of the Explanatory Notes to the proposed Bill it is stated that four of the nine members of the Commission are to be lawyers. As expressed hereinbefore, this is not acceptable to us on the grounds that these four lawyers would be in
a gross “Conflict of Interest” situation. This fact alone would have an immediate deleterious effect on the smooth functioning of the new Commission.

In the same Schedule, under 102, subheadings (1) and (2) the Report lays down guidelines for what Scottish Ministers are to have regard to in considering who to appoint to the Commission. These guidelines state the skills required from persons appointed to the Commission. These stated skills are:

“Persons who have experience of and have shown a capacity in (a) Consumer Affairs or Complaints Handling and (b) the monitoring of Legal Services and persons who have such other skills, knowledge or experience as the Scottish Ministers consider to be relevant in relation to the Commission’s functions.”

In this regard, we would state that we in SACL have enormous experience in Complaints Handling because so many people complain to us about the conduct of their Lawyers and Law Firms and Legal Bodies like the Law Society of Scotland, the Faculty of Advocates, et al. We also have vast experience in monitoring these lawyers, Law Firms and Legal Bodies. A quick visit to the SACL website: www.sacl.info will demonstrate our abilities in this regard very clearly. We are therefore of the opinion that it is vital that at least three SACL members are appointed to the Board of the new Commission.

CONCLUSION:

Our aim is to reform the present thoroughly corrupt Scottish Legal system into one of integrity where justice can be sought and quickly received by the aggrieved, at no cost to the aggrieved. All costs would be to the account of the Polluter. In brief, our aim is to ensure that a Legal Justice system is established in Scotland which meets the needs and expectations of the law abiding majority and one that is a credit to the country and one of which the country can be justifiably proud.

The best and only guarantee to achieve this aim is to give the new Commission the powers necessary, as outlined above, to deal with rogue lawyers in a manner that would make malfeasance a thing of the past very quickly. The savings to the public purse would be truly enormous; particularly in the Legal Aid field. We estimate that the Legal burden would fall by seventy per cent. On a UK-wide basis the annual Legal Aid bill at the present time is well over £2 billion. So let us say Scotland’s share of that is £300 million. Seventy per cent of that would be an annual saving of £210 million.

You will find that the only people who have personally experienced our court processes, but who do not share SACL’s view, are, not surprisingly, lawyers who profit from the present corrupt “gravy-train” structure, and, of course, the criminals themselves – some of whom are, needless to say, lawyers.

On Behalf of SCOTLAND AGAINST CROOKED LAWYERS

Stuart Usher (SACL Co-ordinator)

Date: 2/5/2006
PS: We note that your Committee allowed the Law Society of Scotland to bring at least six of its officials to the Oral Hearing before your Committee ydy (2/5/2006). You have allowed SACL only two of its officials to be present at the SACL Oral Hearing. We would record that this is another example of the bias shown by your Committee towards the Law Society of Scotland and your other Legal Invitees.
We further note that the Law Society President was caught out attempting to mislead your Committee at the beginning of the Oral Hearing by the EX-Leader of the Scottish National Party, the excellent Mr Swinney MSP. We would urge your Committee to take everything else that the Law Society and the other Legal Bodies and Parties appearing before your Committee say or write in the coming weeks with a very large pinch of salt indeed.

Please acknowledge receipt of this written Submission by e-mail. Hard copy will be posted to-day (3rd May 2006)

Stuart Usher (SACL Co-ordinator)

DATE: 3/5/2006
Legal Profession and Legal Aid (Scotland) Bill at Stage 1

1. The Subordinate Legislation Committee considered the above Bill on Tuesday 18 April and seeks an explanation of the following matters.

Section 15(4)(b) and 15(8) – Handling by relevant professional organisations of conduct complaints: investigation by Commission

2. The Committee considers that the expiry of a complaint is a matter of some importance and it might have expected the relevant period to have been specified in the Bill. The Executive is asked to explain why this is delegated to subordinate legislation.

3. The Committee considers that the power to amend the time limit to apply to complaints in section 15(8) sits oddly with the power in subsection (4), and seems unduly complicated. The Committee is not sure why the power in subsection (8) is needed given that it would be possible to achieve the objective under subsection (4). The Executive is asked to explain its drafting approach here, where a single power may have sufficed instead of two.

Section 16(8) – Investigation under section 15: final report and recommendations

4. The Committee notes from the DPM that “there is a requirement for consultation” with regard to amend the maximum level of compensation, but that this is not reflected in the Bill. The Committee considers that the power is significant enough to warrant consultation and notes that similar powers in sections 8 and 36(2) which, although limited, require prior consultation before
they are exercised. The Executive is asked to clarify the position with regard to consultation in this section.

Section 17(4) – Abolition of Scottish legal services ombudsman

5. The Committee is not clear on what is intended should be encompassed in an order under this power, and notes that there is nothing in the Bill which deals with the staff and property of the ombudsman. The Committee noted that it is normal practice for a Bill which abolishes a statutory office to contain some relevant provision in this respect. The Executive is asked for clarification of the power and whether this will cover such matters. If it does, the Committee considers that the power could be insufficient and that express provision might be necessary.

Section 23 (and schedule 3) – Duty of the Commission to make rules as to practice and procedure

6. The Committee notes that it would appear from the terms of Schedule 3 that the matters covered by the rules extend beyond matters of administration, and impose requirements on people submitting complaints to the Commission. If this is the case, then the Committee would take the view that some of the proposed rules should be embodied in a statutory instrument. This is an important provision and before offering detailed comment upon it, the Committee would require much more information (notwithstanding schedule 3) as to what is to be included in the rules. The Executive is asked to clarify what matters are intended to be included in the rules. The Executive is also asked whether it is proposed that the Commission should be listed in Schedule 1 to the Tribunals and Inquiries Act 1992.

Section 33(2)(a)(v) – Giving of notices etc. under Part 1

7. The Committee considers that as section 33 already contains detailed provisions as to the methods of giving notice, the Executive’s claim that subordinate legislation is more appropriate than primary legislation seems rather inconsistent. The Executive is asked to comment.

Section 36(4) – Unsatisfactory professional conduct: solicitors, firma of solicitor, incorporated practices or certain limited liability partnerships

Section 37(1) – Unsatisfactory professional conduct: conveyancing or executry practitioners etc.

Section 45(6) – Register of advisers: advice and assistance

8. The Committee notes that the exact nature of the provisions in these sections is still under consideration, however it is concerned that some of the powers taken by these regulations may be significant. It is not in a position without further information to decide whether it considers that subordinate legislation is appropriate. The Executive is asked to provide further details of the intended content of instruments under these powers.
9. Furthermore, although affirmative procedure is proposed (for sections 36(4) and 37(1)), the Committee wonders whether the power in section 36(4) should be subject to super-affirmative procedure. The Executive is asked to comment.

10. The Committee notes that there is no requirement to consult before exercising the powers in both sections 36(4) and 37(1). The Executive is asked to clarify the reasons why there is no such requirement.

11. The Committee notes that the power in section 45(6) which authorises the expenditure of public funds is currently subject to negative procedure. It is of the view that this is not adequate and is minded to recommend that at least the first set of regulations proposed should be subject to affirmative procedure, with subsequent regulations subject to negative procedure. The Executive is asked to comment.

Section 45(9) – new schedule 1A to the 1986 Act - further provisions in relation to the Register of advisers

12. It seems to the Committee that the “adviser code” will contain more than simple guidance and will have legislative effect. The Committee notes that compliance with the code is a prerequisite of registration and an adviser can be removed from the register for failure to comply with it. The Committee considers therefore that the code should be subject to Parliamentary procedure, perhaps in the form of a SSI made by Ministers approving the terms of the code. The Executive is asked to comment.

Paragraph 2(7) of schedule 1: The Scottish Legal Complaints Commission – Pre-application consultation

13. The Committee notes that this power confers a wide discretion on Ministers to alter the number of members on the Commission. It is concerned that the only constraint on the use of the power is contained in subparagraph (8) of paragraph 2. It is not clear for example whether the power in subparagraph (7)(4) might be used to remove all the lawyer members from the Commission so that it was made up of entirely lay members. The Executive is asked to provide further clarification of its intended use of the power; further explanation of the policy behind the proposed use of powers; and why it is considered that subordinate legislation is appropriate.

14. The Committee is concerned that there is no statutory provision requiring prior consultation before the draft order is laid. The Executive is asked to explain why there is no such provision.

Paragraph 17(1) of schedule 1: directions as to exercise of functions

15. The Committee notes that this paragraph confers powers on Ministers to issue directions to the Commission on how it should exercise its functions and that these are not subject to Parliamentary scrutiny. The Committee
would welcome further information on these powers to allow it to consider whether the directions should be subject to more formal scrutiny than is allowed for in the Bill. *The Executive is asked to provide further information.*

16. Please email your response to the shared e-mail address above by 5.00pm on Thursday 20 April 2006.

David McLaren  
Clerk to the Committee
Dear Sirs

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL AT STAGE 1

Your letter of 18 April 2006 to Gerald Byrne sets out the points which the Committee has raised about the provisions of the Legal Profession and Legal Aid (Scotland) Bill (“the Bill”). The Executive’s response to the issues raised is set out below.

Section 15(4)(b) & 15(8) – Handling by relevant professional organisations of conduct complaints: investigation by Commission

The Committee has asked the Executive to explain the reason for delegating to subordinate legislation the date from which the 6 month expiry period will run in relation to a handling complaint.

The Executive would explain that the date (from which the 6 month expiry period will run) will require to be referred to in different ways depending upon the professional organisation concerned and, in some cases, whether the conduct complaint about which a handling complaint is made is one which amounts to professional misconduct or whether it is one which amounts to unsatisfactory professional conduct. So, for example in relation to solicitors, the date in question would either be defined by reference to the date on which the Council of the Law Society of Scotland (“the Council”) made a determination under section 42ZA(1) (as inserted into the Solicitors (Scotland) Act 1980 by section 36 of the Bill) in relation to a complaint for unsatisfactory professional conduct or, where the complaint in question was one of professional misconduct, by reference to the date on which the Council referred, or decided not to refer, a case for prosecution at the Scottish Solicitors Discipline Tribunal. The power contained in subsection (4)(b) is of course also wide enough to recognise those same distinctions (i.e. between procedures for unsatisfactory professional conduct complaints and for professional misconduct complaints) to be made in relation to the Faculty of Advocates and the other professional organisations. In this context, the Executive further notes that as sections 25-27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 have not yet been commenced, there are as yet no bodies which have made a successful application under section 25 of that Act and it would therefore not in any event be possible to set out in the Bill precise definitions of the date on...
which the 6 month expiry period is to start to run in relation to such bodies. The Executive considers that the above level of detail is best set out in secondary legislation.

The Committee has asked the Executive to explain why the power in subsection (8) is needed given the Committee’s view that it would be possible to achieve the objective under subsection (4). The Executive considers that the power in subsection (4)(b) is to specify a date which will start the 6 month period running. The power in subsection (8) is to alter the 6 month period to a different period. So the powers are for 2 different purposes. The Executive therefore considers that the power in subsection (4)(b) could not achieve the purpose in subsection (8).

Section 16(8) – Investigation under Section 15: Final Report and Recommendations

The Committee notes from the delegated powers memorandum that “there is a requirement for consultation” with regard to amending the maximum level of compensation but that this is not reflected in the Bill. The Executive thanks the Committee for highlighting this discrepancy and confirms that the delegated powers memorandum reflects the policy intention rather than the Bill as introduced and that the Executive intends to bring forward an amendment at Stage 2 which will require consultation with regard to altering the maximum level of compensation.

Section 17(4) – Abolition of Scottish Legal Services Ombudsman

The Committee has asked the Executive for clarification on the scope of the power in section 17(4) and in particular whether it is intended for this power to deal with the staff and property of the Ombudsman. The Committee further notes that the power could be insufficient for dealing with the staff and property of the Scottish Legal Services Ombudsman (“the Ombudsman”) and that express provision might be necessary.

The Executive funds and provides all the Ombudsman’s facilities - including property - and therefore no special provision is necessary to deal with property which as taxpayers’ assets will revert to the Executive.

As regards staff, although incidental provisions may be required, it is not intended to make substantive provisions as regards transfer. In a letter to the Ombudsman of 7 March 2006, the Secretary to the Justice Department confirmed that, assuming a safe passage for the Bill, Scottish Ministers would act as if TUPE applied in respect of the transfer of her staff to the Commission and that the skills and experience of her staff would be valuable to the Commission.

The Executive would further explain that although the power in section 17(4) does not deal substantively with issues relating to staff or property, it is considered that the power may be required in case there are practical contingencies that may have to be dealt with.

Section 23 (and Schedule 3) – Duty of the Commission to Make Rules as to Practice and Procedure

The Committee has asked the Executive to clarify what matters are intended to be included in the rules and notes that it appears that the matters covered by the rules might extend beyond matters of administration and thus be more appropriately contained in Statutory Instruments. The Committee also asks whether it is proposed that the Commission should be listed in Schedule 1 of the Tribunals and Inquiries Act 1992.

The Executive agrees that the matters covered by the rules extend beyond pure matters of administration. The Executive considers it important, as part of the independence of the
Commission, for the rules of the Commission to be made by the Commission itself and the Executive would therefore not wish to pre-empt the Commission by imposing rules upon it. The Executive further explains, in this context, that the rules will be subject to full consultation (as set out in section 23(5) of the Bill) and will be informed by the expertise of the independent members of the Commission. However, given the importance and the sensitivity of the rules, the Executive is carefully considering possible stage 2 amendments which would make the rules subject to parliamentary procedure with a resolution of the Scottish Parliament required before the rules could come into force. The Executive is however bearing in mind that it will be good practice for the Commission to review its rules regularly in the light of experience and that a requirement for parliamentary scrutiny of any variation to its rules, in addition to the existing requirement to consult in section 23(5) of the Bill, might impose a constraint on the frequency of review. We should be grateful for the Committee’s views on this matter.

The Executive confirms that there is no present intention to list the Commission as a tribunal. Although the Commission has certain tribunal characteristics (bearing in mind ECHR considerations), the Executive expects the constitution and working of the Commission to be largely monitored and influenced through the consultation process in relation to its rules. There are also further provisions in the Bill giving the Commission accountability to the Scottish Ministers, the professional organisations and the Scottish Parliament which the Executive considers provide sufficient oversight of the Commission and obviate the need to place the Commission under the auspices of the Scottish Committee of the Council on Tribunals.

Section 33(2)(a)(v) – Giving of Notices etc under Part I

The Executive is asked to comment on why it is considered that subordinate legislation is more appropriate for setting out detailed provisions as to methods of giving notice when section 33 already contains such provisions.

The details set out in subsections (2)(a)(i)-(iv) apply generally to businesses, incorporated practices or limited liability partnerships, firms of solicitors and individuals (as appropriate). It is envisaged (please see subsection (3)) that any Regulations made under sub-paragraph (v) would identify individual bodies and/or organisations (as opposed to categories of person generally) and the Executive considers that although it is appropriate to set out details of notice to be given to broader categories of person on the face of the Bill, it is more appropriate for detailed provision relating to individual named bodies to be contained in subordinate legislation. The Executive also has in mind that there may be changing technologies or means of postal communication which may need to be provided for in future.

Section 36(4) – Unsatisfactory Professional Conduct: Solicitors, Firms of Solicitors, Incorporated Practices or Certain Limited Liability Partnerships

Section 37(1) – Unsatisfactory Professional Conduct: Conveyancing or Executry Practitioners etc

The Executive is asked to provide further details of the intended content of Instruments under these powers. The Executive notes the concern that the Committee has that some of the powers taken by these Regulations may be significant.

The Executive would prefer the modifications of primary legislation required to achieve the policy described in sections 36(4) and 37(1) to appear in the Bill. It intends therefore to bring forward amendments at stage 2 to amend both sections 36 and 37 to insert modifications and omit sections 36(4) and (5) and 37(1) and (2). It is intended that these be broadly in line with what is already provided for in section 42ZA (as inserted by section 36(2) of the Bill).
The Committee has asked the Executive to comment on whether the power in section 36(4) should be subject to super affirmative procedure. As the Executive intends to bring forward appropriate stage 2 amendments, these issues will be addressed in primary legislation and the question of whether super affirmative procedure is the most appropriate will not arise.

The Executive is asked to clarify why there is no requirement to consult before exercising the powers in both sections 36(4) and 37(1). The Executive would explain that the consultation paper “Reforming complaints handling, building consumer confidence: Regulation of the legal profession in Scotland” sought views on the concept of unsatisfactory professional conduct in chapter 11. As discussed above, the intention is of course to bring forward detailed stage 2 amendments relating to unsatisfactory professional conduct.

Section 45(6) – Register of Advisers: Advice and Assistance

The Executive is asked to provide further details of the intended content of Instruments under these powers.

The intention is that non lawyer advisers will be able to access payment from the Scottish Legal Aid Fund for advice and assistance in relation to categories of advice where solicitors do not commonly become involved in the provision of advice. It is intended that this will improve access to justice for those who currently find it difficult to obtain advice in relation to specific problems. The Executive is working with stakeholders in the advice sector and the Scottish Legal Aid Board to establish categories of case which would be appropriately prescribed. Once the initial categories of case are prescribed and the system has been established the Executive will evaluate how it is working on an ongoing basis with a view to addressing any gaps in advice coverage. Based on previous consultations, possible areas to be prescribed initially would include housing, certain aspects of social security, employment rights advice for employees and debt.

The Committee notes that the power in section 45(6) which authorises the expenditure of public funds is currently subject to negative procedure and the Committee is of the view that this is not adequate.

As discussed above, the power in section 45(6) will be used to extend payment out of the Scottish Legal Aid Fund for provision of advice and assistance to non lawyer advisers. The Legal Aid (Scotland) Act 1986 (“the 1986 Act”) makes provision at section 33 for solicitors and counsel to be paid for advice and assistance. Section 33 gives the Scottish Ministers power to make regulations relating to payment out of the Scottish Legal Aid Fund for work done by solicitors and counsel. This power to authorise the expenditure of public funds is subject to negative procedure in terms of section 37(1) of the 1986 Act. As the intention in section 45 of the Bill is to extend payment for advice and assistance to non lawyer advisers in a similar way, the Executive considers that negative procedure is consistent with the existing provisions of the 1986 Act.

Section 45(9) – New Schedule 1A to the 1986 Act – Further Provisions in Relation to the Register of Advisers

The Committee considers that the “adviser code” should be subject to Parliamentary procedure and asked the Executive to comment.

The provisions of schedule 1A of the Bill are intended to be consistent with Part IVA of the 1986 Act, which relates to the Criminal Legal Assistance Register. In a similar way to that provided for non lawyer advisers in the Bill, section 25B of the 1986 Act provides for a code of practice for
solicitors who undertake criminal legal assistance. Compliance with the code of practice is a prerequisite for registration on the Criminal Legal Assistance Register and solicitors can be removed from the Register for failure to comply. Section 25B(4) – (6) of the 1986 Act makes provision for the draft code of practice for solicitors providing criminal legal assistance to be approved by Scottish Ministers and it is not subject to any Parliamentary procedure. The Executive considers that the provisions for approval of the adviser code in paragraph 4(4) of schedule 1A of the Bill are appropriately broadly similar to the provisions in the 1986 Act relating to the Criminal Legal Assistance Register and therefore it is appropriate that they should likewise not be subject to any Parliamentary procedure.

**Paragraph 2(7) of Schedule 1: The Scottish Legal Complaints Commission – Pre-application Consultation**

The Committee has asked the Executive to provide further clarification of its intended use of the power in sub-paragraph (7)(d) of paragraph 2, to provide further explanation of the policy behind the proposed use of these powers and why the Executive considers that subordinate legislation is appropriate.

The Executive intends to bring forward amendments at stage 2 which will set fixed parameters that will prevent the power in paragraph 2(7) from being used to achieve extreme results. The Executive is considering providing that the Commission must at no time have fewer than 3 lawyer members or fewer than three non-lawyer members and must also not have more than seven lawyer members or more than seven non-lawyer members.

The purpose of the power to alter the number of members of the Commission is to provide flexibility should it be necessary, in light of the actual experience of the Commission’s operations, in future to vary the number of members of the Commission. It is intended that a review of the Commission’s membership in light of its workload and experience be conducted after two years. The Executive considers that subordinate legislation which is subject to the affirmative procedure strikes the appropriate balance between Parliamentary scrutiny and the need for flexibility.

The Executive is further asked to explain why there is no requirement for prior consultation before an order altering the number of members of the Commission is made. The Executive would explain that the policy intention is to exercise the power in light of the review of work pressures of the Commission and working practices of the Commission as set out in its rules and that any alteration to the number of members would be informed by advice from the Commission itself. Any alteration in the number of members would have budgetary implications and in this context the Executive notes section 20(4) of the Bill which provides for consultation with each professional organisation on the Commission’s proposed budget for the next financial year.

**Paragraph 17(1) of Schedule 1: Directions as to Exercise of Functions**

The Executive is asked to provide further information on the power given to the Scottish Ministers to issue directions to the Commission on how it should exercise its functions.

The Executive would explain that directions of this kind are frequently provided in relation to NDPBs. Ministers also have a general direction making power in relation to the Ombudsman (see schedule 3 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, paragraph 2), which has only been exercised on one occasion and was in very general terms. The direction making power in paragraph 17(1) is expressly limited to directions ‘of a general character’ and therefore does not permit Ministers to make directions of a specific nature. Intervention by Ministers in operational
matters, individual decisions or individual complaints would require a power to make directions of a specific nature and are thus excluded.

The Executive recognises, however, that the Commission is not a standard type of NDPB and is conscious that, as it stands, this provision may raise concerns about how the power might be used. The Executive is considering whether the power could be refined any further to put it beyond doubt that Ministers will not intervene in operational matters or individual decisions or complaints.

Yours faithfully


pp LOUISE MILLER
Co-ordinator
Legal Profession and Legal Aid (Scotland) Bill
The Committee reports to the Parliament as follows—

Introduction

1. This Report covers the work of the Justice 2 Committee during the Parliamentary year from 7 May 2005 to 6 May 2006. The Justice 2 Committee, together with the Justice 1 Committee, plays a principal role in scrutinising Scotland’s distinct justice system. The Committee has spent most of its time on legislation this year, scrutinising the Management of Offenders etc. (Scotland) Bill and the Police, Public Order and Criminal Justice (Scotland) Bill. The Committee also considered a Legislative Consent Memorandum relating to the Police and Justice Bill.

Bills

2. The Committee completed its consideration of the Management of Offenders etc. (Scotland) Bill. This Bill establishes new functions and duties for organisations involved in offender management, establishes Criminal Justice Authorities to provide strategic direction for reducing re-offending and provides for early release of certain prisoners under home detention curfews. The Committee considered more than 60 amendments to this Bill during stage 2 proceedings.

3. The Committee also undertook consideration of the Police, Public Order and Criminal Justice (Scotland) Bill. This Bill aims to reform the structure and organisation of police services in Scotland, to modify a number of police powers, to protect the public from dangers associated with the holding of events, or the possession of dangerous items such as fireworks or knives and provides for the enforcement of criminal law. The Committee held a number of evidence sessions on the Bill, including one in Glasgow. The Committee also undertook visits with Strathclyde and Lothian and Borders Police to gain an understanding of the issues involved in policing football matches. The Committee considered more than 270 amendments during Stage 2 consideration, which was completed in April.

4. The Committee also began consideration of the Legal Profession and Legal Aid (Scotland) Bill, which aims to reform the system for handling complaints against lawyers by the creation of a new statutory body, the Scottish Legal Complaints Commission and seeks to improve the delivery of all forms of publicly
funded legal assistance. The Committee will publish its stage 1 report in the next Parliamentary year.

5. The Committee also considered and reported on a Legislative Consent Memorandum on the Police and Justice Bill, legislation which was before the UK Parliament. The Committee expressed a number of concerns regarding the operation of the Extradition Act 2003 and agreed to seek to amend the Legislative Consent Motion to reflect these concerns.

**Other work**

6. The Committee received two written updates on the implementation of the Adults with Incapacity (Scotland) Act 2000 and members took oral evidence from the Deputy Minister for Justice and the National Practice Co-ordinator for the Adults with Incapacity (Scotland) Act 2000, Jan Killeen. The Committee also received an update on the operation of the Prisoner Escort and Court Custody Services Contract.

7. In addition, the Committee took evidence from the Scottish Prison Complaints Commissioner on his Annual Report and considered his proposal that his office be given a statutory basis.

**Subordinate Legislation**

8. The Committee considered 10 affirmative statutory instruments and 27 negative statutory instruments.

**Petitions**

9. The Committee considered 4 petitions this year on a range of issues, including police complaints, regulation of the legal profession, complainer’s rights and the management of sex offenders.

**Visits**

10. In order to further inform the Committee’s understanding of the justice system in Scotland, visits to the Centre for Forensic Science, at Strathclyde University, and to the Scottish Criminal Record Office, both in Glasgow, were undertaken in June 2005. As noted above, the Committee also undertook two fact finding visits in conjunction with the police to examine issues associated with policing football matches.

11. In February 2006, the Committee undertook a visit to Brussels. Members met with MEPs, European Commission and UKREP staff and gained valuable insight into the work of these institutions on matters that fall within the Committee remit.

**Meetings**

12. The Committee met 33 times from 7 May 2005 to 6 May 2006 including 4 joint meetings with the Justice 1 Committee. 5 meetings were entirely in private and 21 were partly in private. Of the meetings in private or partly in private, almost all were to facilitate discussion of draft reports.
13. Only one meeting was held outside of Edinburgh, in Glasgow City Chambers on 14 November 2005.
I am writing to inform the Committee that Fife Constabulary has been selected to pilot the alcohol test purchasing arrangements provided for in the Licensing (Scotland) Act 2005. The selection of Fife Constabulary was announced today to the Scottish Parliament in Parliamentary Question S2W-25501.

As members will know, during Stage 2 of the Licensing (Scotland) Bill the Lord Advocate intimated that he was content for test purchasing to be extended to alcohol and the Bill was amended to allow for this. The Lord Advocate also indicated that before the provisions of the Act fully come into force in 2009 alcohol test purchasing arrangements should be piloted to ensure it is carried out safely, fairly and effectively in a Scottish context. Section 105 of the 2005 Act will be commenced with effect from 1 June to make transitional provision for an alcohol test purchasing pilot scheme to take place in the Fife Constabulary area.

The pilot will be overseen by an Advisory Group which in addition to Scottish Executive and Crown Office officials includes representatives from ACPOS, COSLA and licensed trade and retail interests. It will be subject to an independent evaluation, the results of which will be used to inform the development of common operating protocols and procedures to be adopted by forces across Scotland when the test purchasing arrangements are rolled out more generally.
I anticipate that the pilot will get underway this summer and run for a year. This will allow near blanket coverage of licensed premises in the Fife area, subject to risk assessment, including both “off sales” and “on sales” premises.

Given the problems associated with underage drinking, I am sure that the Committee will welcome this important development.

Yours sincerely

LEWIS MACDONALD
Dear David,

I wrote to you in September 2005 regarding the Project for the redevelopment of Parliament House, the home of the Supreme Courts in Edinburgh. At that stage, the Scottish Court Service was announcing interim arrangements for accommodating the High Court of Justiciary in the building at Lawnmarket and Edinburgh Sheriff Court. However at that stage, the Scottish Court Service was still considering the long term options for Parliament House, so I am writing to you now to set out the conclusions of that options review.

On 28 April, the Scottish Court Service will announce the completion of the review of the project of which I advised you in December 2004. You may recall the background. The SCS recognised at that time that the most urgent priority was to reduce the risks inherent in the lack of proper security facilities which is an inevitable feature of such a historic building as Parliament House. The original project would have solved these problems but at a projected cost, with inflation, of as much as £200m and only after a further 13 to 14 years. This was clearly unacceptable.

The review quickly concluded that the separation of the criminal business of the High Court in Edinburgh from the civil business of the Court of Session was essential. Furthermore, whatever option was adopted, it would take time to provide the additional accommodation required to achieve this separation. The interim arrangement was as set out in my letter to you of September 2005 and changes are already being made to the Lawnmarket to increase the flexibility of use of the four courts. All of these will be capable of accommodating first instance business and three will be also capable of accommodating criminal appeals. All criminal business will therefore move out of Parliament House by mid-2006 and will be accommodated either at Lawnmarket or Edinburgh Sheriff Court. The SCS is also in discussion with the City of Edinburgh Council over the possible use of the District Court for some miscellaneous business, which would provide some further flexibility and make best use of the court space available immediately surrounding Parliament House.
The options review has concluded that the preferred option, given current business levels and the need for flexibility, would be to provide an additional two criminal appeal courts. Following a wide ranging survey of the available accommodation and comprehensive consultation with the user groups, the preferred site for these additional facilities emerges as the lower levels of the Elliott Wing of Parliament House. Essential to the effectiveness of this arrangement would be the addition of custody facilities, with access for custodies and the public being separate from those for the Judiciary and court officials and visitors to the Court of Session. However, as well as considering preferred options, we must consider affordability, and although the preferred option is substantially cheaper than the original redevelopment project, it will require funding over a shorter period and beyond the level of the annual budget currently available to the SCS. The proper way to consider that is through the Spending Review planned for 2007, so I have asked the SCS to go ahead with the most pressing works within their current budget until funding priorities are decided next year. They will take this forward in discussion with users of the building.

Completion of the modifications necessary for the interim arrangement will now make way for the refurbishment of Parliament House to meet the needs of the Court of Session. The project will provide greater accessibility for all members of the public, improved arrangements for witnesses, enhanced IT facilities in courtrooms and better security for all users. Incidentally, the SCS will reopen the canteen facilities for the public, for witnesses and for all staff and court officials in Parliament House next month. This may seem like a detail, but it is important in encouraging witnesses to remain in the building. SCS will shortly issue an OJEU notice inviting expressions of interest from bidders for the immediate tranche of work.

If you or members of the Committee have any questions about the options review or the plans for the Parliament House redevelopment, Eleanor Emberson, Chief Executive of the Scottish Court Service, would be happy to answer them.

I hope you have found this further update helpful.

Best wishes

CATHY JAMIESON