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

1. **Subordinate legislation**: Hugh Henry MSP (Deputy Minister for Justice) to move the following motion—

   S2M-4298 That the Justice 2 Committee recommends that the draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) Order 2006 be approved.

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

   Linda Costelloe Baker, former Scottish Legal Services Ombudsman; and then from—

   Alistair Coburn, Chairman, and Mark Irving, Lay Member, Scottish Solicitors’ Discipline Tribunal; and then from—

   Alice Brown, Scottish Public Services Ombudsman.

3. **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

Cover note (including SSI and Executive Note) J2/S2/06/14/1

Agenda Item 2

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/S2/06/14/2
Submission from former Scottish Legal Services Ombudsman J2/S2/06/14/3
Submission from the Scottish Solicitors’ Discipline Tribunal J2/S2/06/14/4
Supplementary submission from the Scottish Legal Agents Society J2/S2/06/14/5

Agenda Item 3

Further written submissions (PRIVATE PAPER) J2/S2/06/14/6

Documents circulated for information only—

Letter from the Scottish Executive on Booklets for Vulnerable Witnesses, including booklets

Forthcoming meetings—
• Tuesday 23 May, 2pm, Committee Room 1
• Tuesday 30 May, 2pm, Committee Room 4
JUSTICE 2 COMMITTEE

14th Meeting 2006 (Session 2)

Tuesday 16 May 2006

SSI title and number: The draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) Order 2006

Type of Instrument: Affirmative

Meeting: Tuesday 16 May 2006

Date circulated to members: Thursday 11 May 2006

Justice 2 Committee deadline to consider SSI: 22 May 2006

Deputy Minister for Justice to attend Justice 2 Committee meeting? Yes

SSI drawn to Parliament’s attention by Sub Leg Committee: Yes

1. In its 18th Report 2006, the Subordinate Legislation Committee drew the attention of the lead Committee and the Parliament to this instrument.

2. The purpose of the instrument is to provide for the Scottish Police Services Authority, created by the Police, Public Order and Criminal Justice (Scotland) Bill, to be treated as if it were specified in Schedule 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003. The Subordinate Legislation Committee raised concerns regarding the vires of the Order if the Bill had not been passed by Parliament by the time the draft Order is made. The relevant extracts from the report are attached as an Annex.

3. The Deputy Minister will attend this Committee meeting. The discussion will begin with an opportunity for members to ask any factual questions or ask for clarification whilst officials are seated at the table with the Minister. The Deputy Minister will then be asked to move the motion to open the debate. The Committee will then formally debate the motion. Officials cannot take part in that debate. The debate is limited to a maximum of 90 minutes (Rule 10.6.3), but may be much shorter. At the end of the debate, the Committee must decide whether or not to agree the motion and report to the Parliament accordingly.
4. If members have any queries or points of clarification on the instrument which they wish to raise with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible.

Clerk to the Committee
10 May 2006
The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) Order 2006, (SSI 2006/draft)

1. The Scottish Police Authority is to be set up under the Police, Public Order and Criminal Justice (Scotland) Bill which has not yet completed its passage through Parliament.

2. The instrument provides for the Authority to be treated as a specified authority and thus come within the jurisdiction of the Scottish Commissioner for Public Appointments until such time as the Authority can be formally added to the list of relevant bodies in the 2003 Act following the coming into force of the Police, Public Order and Criminal Justice (Scotland) Bill.

3. The Committee noted that the Bill has not yet completed its passage through Parliament and still has some way to go before its contents are finalised. It further noted that in terms of the enabling power, the order can only be made where a “body is to be established”. The Committee was uncertain whether in these circumstances it could be said that the Authority was to be established for the purposes of ensuring the vires of the Order when made.

4. Assuming that Parliamentary approval to the Order is obtained, the Committee asked the Executive to confirm when it intends to make the Order.

5. The Executive, in its response printed in Appendix 1, confirmed that assuming Parliamentary approval, the Order will be made as soon as possible after the Bill is passed by Parliament. This is anticipated to be either in late May or early June 2006.

6. The Committee notes the response. However, it remains concerned about the possible problems that might arise regarding the vires of the instrument if the Bill is not at least passed by Parliament by the time the draft Order is made in that there may then be doubt about whether it could properly be said that the Authority “is to be established” for the purposes of meeting the test in the enabling power.

7. The Committee draws the attention of the lead Committee and the Parliament to this instrument on the grounds that further information was requested from and supplied by the Executive; and to its concerns about possible problems that might arise regarding the vires of the instrument if the Bill had not at least been passed by the Parliament by the time the draft Order is made.

Appendix 1
On 25th April the Committee asked the Executive for an explanation of the following matter-

“The Scottish Police Authority is to be set up under the Police, Public Order and Criminal Justice (Scotland) Bill which has not yet completed its passage through the Parliament. It still has some way to go before its contents are finalised. In terms of the enabling power, the order can only be made where a body “is to be established”.

Assuming Parliamentary approval to the order is obtained, the Committee therefore asks the Executive to confirm when it intends to make this Order.”

The Scottish Executive responds as follows:

1. Assuming that the draft Order obtains Parliamentary approval, the Executive intends to make the Order as soon as possible thereafter. This means that the Order is likely to be made around the end of May or early in June.
Legal Profession and Legal Aid (Scotland) Bill

Comment by the Scottish Legal Services Ombudsman

The Committee will be aware that I have, for a very long time, supported reform of the way complaints about legal practitioners are handled. I am, therefore, pleased to see the proposals to establish a Scottish Legal Complaints Commission.

As I have written in detail to the Justice 1 Committee and in response to the Public Consultation in 2005, I am limiting my observations to key issues which I hope the Justice 2 Committee will wish to examine.

Setting standards
I have noted that complaint handling is only one part of professional regulation, though it is the public and visible face and the issue that comes under most scrutiny - and criticism. I do have concerns that the Bill aims to change only this part of regulation without the other components keeping pace. It is the regulator - Law Society of Scotland and Faculty of Advocates - that determines what is adequate professional practice. The Commission, as a complaint handling body will have to assess a complaint against adequate practice and will not have the power to amend the Rules and guidance relating to professional practice. To give a current example, the Law Society of Scotland did not expect solicitors to keep business files relating to the sale of endowment policies so there is little or no paper evidence on which to base an investigation. The Commission will not be able to change that. Reform in England and Wales is more coherent as regulatory oversight as a whole is being transferred to an independent Board with the complaint handling body accountable to the Board. Putting it bluntly, in Scotland the cart is being put before the horse.

The right to make a complaint
The Bill does include elements that I consider will be helpful in setting up a fairer and more responsive complaint handling system. I am pleased to see that it includes my own working definition of who has the right to make a complaint - any person who has been directly affected by the suggested inadequate professional service. That means that third party complainants, such as opponents, the other side in a property transaction, and witnesses, will have the right to make a complaint. All of these categories can be adversely affected by inadequate professional practice even though the practitioner’s duty of care and service is to the client. In some cases the client will be highly unlikely to make a complaint if, for example, their solicitor or advocate knowingly misleads a court to their benefit. The Bill’s wider and inclusive definition will allow the fair examination of all complaints relating to professional practice.

The definition of a complaint
I am pleased to see that the Bill includes my own working definition of what exactly constitutes a complaint - any expression of dissatisfaction. I have been concerned by the Law Society of Scotland turning an undoubted complaint into a “concern” so that it is not bound by its statutory obligations with regard to complaints, and by the narrowness of the Faculty of Advocates’ interpretation.
Conduct and service complaints

I disagree strongly that complaints should be split into conduct and service complaints. As the Justice I Committee noted in its Report, the issue of an appropriate definition for complaints is key to the complaints process. The Committee noted that the categorisation of complaints as either conduct or service was often problematic and had been raised by many individuals and organisations in evidence to its Inquiry. In my view, the Bill fails to grasp this nettle and the proposals will make an already confusing situation worse. There is, under one interpretation, the prospect of a single set of circumstances being investigated by the professional body, the Commission, and by the Courts in a negligence action.

I find the Bill confusing about what is meant by a conduct complaint, and Scottish Executive Justice Department officials were unable to provide clarification. If a conduct complaint is, by negative inference, anything that is not related to professional services provided by a practitioner, then I would support the Bill in that regard. This would mean that the professional body’s role would be limited to investigating complaints about the conduct of their members other than when providing professional legal services. It seems to me to entirely appropriate for the professional bodies to be responsible for investigating complaints about what are termed “private actings”, such as singing sectarian songs at a private function or making false statements to claim state benefits, to give examples in the public domain. If that is the intended meaning, then the Commission would handle all other complaints.

The alternative interpretation is that the elements of a complaint will have to be teased apart either at the outset or along the way to see if there might be a serious and reprehensible departure from the standards of conduct to be expected of a competent and reputable solicitor, or the equivalent for an advocate. I indicated to the Scottish Executive Justice Department that more than 200 complaints a year to the Ombudsman involved conduct issues and that up to a third of all complaints were dual classified at present. I also note from the Law Society of Scotland’s Annual Report for 2005, that 79 cases were upheld as both inadequate professional service and professional misconduct or unsatisfactory conduct.

If there is to be a dual track with the professional body and Commission required to consult, liaise and co-operate, then with the best will in the world (and there is no guarantee that will happen in practice) there will be delay, confusion and replication for the complainant and the practitioner. I commend to the Committee my proposal that the Commission should investigate all complaints about practitioners, other than private actings. If the complaint is upheld, the Commission should determine redress for the complainant, and then as a second step, if there are doubts about fitness to practice, determine if there should be protective measures for the future. Protective measures, ranging from supervised training to removing the right to practice, should be handled by a Human Rights Act compliant body.

I also note under this heading that I find the notion of professional misconduct to be outdated when assessing legal practitioners’ responsibilities to the public, referring as it does to the requirements of a private members’ organisation and what is acceptable to those members. I commend to the Committee my more modern alternative, which
is a requirement to undertake *adequate professional practice*, and for there to be an assessment of *fitness to practice*.

**The power to examine documents**
The Scottish Legal Services Ombudsman has the power to require the practitioner to provide documents notwithstanding any duty of confidentiality\(^1\). The Bill does not include a similar power for the Commission. I have had no problems at all in obtaining third party solicitor’s files though I always confirm that I will protect the solicitor’s duty of confidentiality in my written Opinion.

**Redress**
The Justice 1 Committee Report recommended that redress should be available to the complainant regardless of the classification of the complaint. The Committee recommended that compensation should be available where it is established that loss has been suffered as a direct result of the solicitor's conduct. My Annual Reports to Ministers contain a number of case studies relating to complaints by non-clients which show that these complainants can be caused significant loss, inconvenience and distress\(^2\). The Bill, however, limits the possibility of redress ordered by the Commission to the client, rather than to the complainant. The Bill proposes that the Scottish Solicitors Discipline Tribunal should have the power to order compensation to any person who has suffered loss, inconvenience or distress. Compensation ordered by the Commission for a client is capped at £20,000, but compensation by the Tribunal is capped at £5,000, with no explanation for this inconsistency.

**Funding**
I support the proposals to set a general levy which will fall on legal practitioners as a whole, and then to charge case handling fees. I note the expressed concerns that this mechanism may drive smaller firms of solicitors out of business. I have commented that the current arrangements are paid for disproportionately by the larger firms of solicitors whose commercial clients do not use the Law Society of Scotland’s complaints system. Those firms will, however, continue to provide a disproportionate amount of funding via the general levy and that is not unreasonable given the size of their businesses. There should, of course, be a decrease in the Law Society of Scotland’s practising certificate fee to take account of the removal of the need to fund the Client Relations Office. I am also hopeful that the very welcome 2005 Law Society of Scotland Rule that says that solicitors have a duty to respond to complaints, coupled with the prospect a handling charge, may focus solicitors’ minds on the benefits of resolving complaints at source. I have found evidence that smaller firms have tended to think that as they pay the Law Society of Scotland to deal with

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\(^1\) Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 Section 34 2 (B) Where any information requested by the ombudsman under subsection (2A) above is not within the knowledge of the professional organisation concerned, or any documents so requested are not within their possession or control, the Ombudsman may require the practitioner concerned in the conduct complaint to which the handling complaint relates a) to provide him with that information, in so far as it is within the knowledge of the practitioner; or (b) to produce to him those documents, if they are within the possession or control of the practitioner; and, notwithstanding any duty of confidentiality owed to any person by the practitioner as respects any such information or, as the case may be, documents, the practitioner shall comply with such a requirement.

complaints, they can simply pass them on. Complaints are best resolved as soon as possible and as close to the service provider as possible. The Bill’s provisions will help that happen.

**Human Rights**
My understanding is that from the complainant’s perspective, a complaint handling body does not determine their civil rights and obligations because the complainant has the right to make a claim through the Courts.

**Independence**
I note concerns about interference with the independence of the legal profession. I confirm and underline how important it is to protect the independence of the legal profession. I am, however, satisfied that the public appointments mechanism contains sufficient protections so that members of the Commission, though appointed by Scottish Ministers, will be independent. I note that the Scottish Public Services Ombudsman is appointed by the public appointments mechanism, yet is deemed to be adequately independent of the Scottish Executive and Scottish Parliament.

L M Costelloe Baker  
Scottish Legal Services Ombudsman  
April 2006
Legal Profession and Legal Aid (Scotland) Bill – Response by the Scottish Solicitors’ Discipline Tribunal

Section 8(3) How is the Commission to know if the Tribunal has made an award of compensation in respect of professional misconduct in connection with a matter they are now dealing with as IPS? There are certain cases where publicity is deferred, and cases where the Tribunal findings are appealed, where the findings are not put on the website until after a court case has been heard or after the appeal has been decided. There may also be a question of double jeopardy.

Section 16 There should be some provision to either give the Commission power to take a complaint to the Tribunal or power to recommend that the Law Society take a complaint to the Tribunal. If this is not done and the Ombudsman is abolished, there will be a gap and be no provision to cover individual complainers who have a legitimate view that a solicitor should be prosecuted before the Tribunal and this is not done by the Law Society.

Section 30 There may be confusion with regard to the status of any best practice notes issued by the Commission. It might be better if these were sent via the Law Society rather than being made by non qualified persons. There could be difficulties with issues such as whether breach of best practice notes issued by the Commission could be professional misconduct.

Section 35(2) This would only be appropriate where the Law Society have decided that there should be no prosecution for professional misconduct. It would be wholly inappropriate for the Law Society to make findings in fact when all they are doing at this stage is recommending that a case be prepared for prosecution before the Tribunal.

Section 36 There are concerns with regard to unsatisfactory professional conduct being committed by a firm. There are issues in connection with what date is to be taken and who are the partners in the firm at a particular date. It might also be sensible for there to be a mechanism by which the 21 day time period could be extended, provided that this was applied for within the 21 day period.
Section 38

The Tribunal has concerns with regard to this. There is no purpose in two distinct bodies having the task of assessing and awarding compensation in respect of the same matter. There may be some cases where professional misconduct and inadequate professional service arise out of the same matters. The section does not refer to the Tribunal taking into account any compensation awarded by the Commission. How is the Tribunal to know whether or not any compensation has been awarded by the Commission in respect of the same matter? There could be a problem of double jeopardy. There are also difficulties in connection with the practicality of this. In some complaints there are literally 30 or 40 complainers, some of whom, in Guarantee Fund complaints, do not even know the complaint has been taken to the Tribunal. Would it be necessary for the fiscal to ascertain from each of these complainers, whether or not they had suffered any loss? Who would be responsible for providing any evidence of the loss?

Section 39

The Tribunal agrees with the suggestion that there be an equal number of lay and non lay members on the Tribunal. It would however help administratively, if the quorum could be two, one solicitor and one lay member, so that if one member did not turn up there would not require to be an adjournment. If this happened then one of the other members present would drop out so that there would still be an even number of lay and non lay members. The Tribunal still has concerns about the implications of the chairman’s casting vote – see previous comments on consultation paper attached.

Section 43

If this was introduced it would mean that retired solicitors could not provide this service to the community.

Schedule 1

The Tribunal would welcome the involvement of the Commissioner for public appointments in the appointment of the Commission.

Schedule 3

There is an appeal to the Court of Session from Tribunal decisions but no appeal from decisions of the Commission, despite the fact that the Commission can potentially award financial penalties double those of the Tribunal.
Supplementary note for Justice 2 Committee following oral evidence on 2nd May from Scottish Law Agents Society

Master Policy

It appeared from the questions from Maureen Macmillan and the answers supplied on 25th April from Louise Miller that there may be some misconceptions regarding the Master Policy. On reviewing our oral evidence it may be that we did not make matters entirely clear.

The Law Society require solicitors to subscribe to the Master Policy. There is no statutory requirement for there to be a Master Policy rather than the Law Society ensure that firms carry adequate professional indemnity insurance. Such a provision is clearly in the public interest. It is not as appears to have been suggested a collective fund. While reference is made to the Master Policy it is a series of insurance policies, one for each practice unit which is paid for by that practice unit through the brokers to the insurers of whom the RSA is the lead insurer. It is commercial insurance, bought in the market, with the assistance of the brokers.

As one would expect the insurers will design a system which is intended to encourage good practice and discourage claims arising. Financial penalties might be seen as the most effective way of doing this. There is a self insured excess in respect of each and every claim of £3,000 per partner. So for a 4 partner firm the first £12,000 of each and every claim will be paid by the firm. There are also a series of additions to this. For example currently where there is a finding of inadequate professional services as well as negligence the excess is doubled. The same is true in respect of personal injury claims which become time barred. In addition the insurers use a system of no-claims discounts on annual premiums where no claims are made and increased premiums where there is a track record of claims.

In addition the insurers and the brokers are pro-active in encouraging good practice by holding free road shows for practitioners and publishing regular articles in the Journal of the Law Society regarding good practice.

Where circumstances arise which might give rise to a claim these require to be intimated to the insurers. Insurers under the principle of subrogation, which is a fundamental concept of insurance are entitled to step into the shoes of the insured and defend any claim and to do so without reference to the insured. Solicitors who do have negligence claims are on occasions surprised that the insurers settle a claim without reference to them which falls entirely within the self insured amount.

While the scheme is currently configured in this way the insurers in response to claims experience may change the self insured amounts, discounts, premiums etc so this should be seen as no more than a snapshot. The Law
Society does not play a role in the management of claims which is a matter between a firm and its insurers.

Cover under the Master Policy does not include cover for inadequate professional services. Nor does the Master Policy provide cover for conduct related cases. Many solicitors purchase cover for conduct related matters from the Legal Defence Union but this is not compulsory.

This reality of the classification of claims in the commercial insurance market place demonstrated that claims can be appropriately classified while we accept that there may be number of complaints which are hybrid.

Our oral evidence particularly in response to questions from Colin Fox might have made the point more clearly that while the Law Society currently has power to award up to £5,000 for inadequate professional services it is in our view unlikely that where an amount of say £3,200 is awarded this will be for inconvenience and distress. We refer to our original submission regarding the problems that lie behind a test based on the quality of services provided. If this fails to reach the standard of a reasonably competent solicitor then it is a breach of an implied term of the contract of where there is no contract but a duty of care then it will fall below the acceptable threshold for negligence. In practice therefore the existing powers in relation to inadequate professional services already subsume professional negligence. The current £5,000 limit means that even for a sole practitioner it will fall within the self insured amount because of the double excess where inadequate professional services are found.

With a limit of £20,000 which may include an element of negligence it will for many firms result in an intimation of circumstances to the insurers who may run the claim and not be interested in the service aspect. We consider such a result to be highly undesirable. For this reason we suggest that the grounds on which the new Commission might investigate be separated out into heads of service complaints and negligence/breach of contract cases. As s34 is presently drafted negligence is subsumed under inadequate professional services. In our view for complaints regarding the service delivery rather than the outcome the current £5,000 level is more than adequate. We note the Financial Ombudsman Service normally applies a cap of £1,000 for such heads of claim. We understood the evidence from the Law Society’s Philip Yelland to be that the average level of award for inadequate professional services is £474. If the costs of handling that complaint under the new system are £500 [on our view they will be higher] then there has to be some question as to whether the system is proportionate.

Our view is that ‘inadequate professional services’ hides a multitude of concepts and that it is possible to devise a scheme which is much more transparent. If the policy objective is to allow negligence claims of up to £20,000 to be heard before the new Commission then this does not need to be disguised as inadequate professional services.