JUSTICE 2 COMMITTEE

AGENDA

15th Meeting, 2006 (Session 2)

Tuesday 23 May 2006

The Committee will meet at 2.00 pm in Committee Room 1.

1. **Item in private:** The Committee will consider whether to take item 3 in private.

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

   Lindsay Montgomery, Chief Executive, Tom Murray, Director of Legal Services & Applications, and Colin Lancaster, Head of Policy, Scottish Legal Aid Board;

   Martyn Evans, Scottish Consumer Council; and then from—

   Trevor Goddard and Peter Turrell, Royal and Sun Alliance;

   Alistair J Sim, Marsh Limited; and then from—

   William Alexander, James Clark, Neil McKechnie, Stewart Mackenzie, Joan Pentland-Clark; and then from—

   David and Stephen Davidson, Mike Lloyd, Duncan Shields.

3. **Work programme:** The Committee will consider its work programme.

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 2**


Lines of questioning (PRIVATE PAPER) J2/S2/06/15/1
Submission from the Scottish Legal Aid Board J2/S2/06/15/2
Submission from the Scottish Consumer Council J2/S2/06/15/3
Submission from Royal and Sun Alliance J2/S2/06/15/4
Submission from Marsh Ltd J2/S2/06/15/5
Submission from William Alexander J2/S2/06/15/6
Submission from James Clark J2/S2/06/15/7
Submission from Neil McKechnie J2/S2/06/15/8
Submission from Joan Pentland-Clark J2/S2/06/15/9
Submission from Mr & Mrs Davidson J2/S2/06/15/10
Submission from Mike Lloyd J2/S2/06/15/11
Submission from Duncan Shields J2/S2/06/15/12
Submission from Stewart Mackenzie (PRIVATE PAPER) J2/S2/06/15/13

**Agenda Item 3**

Paper by the Clerk (PRIVATE PAPER) J2/S2/06/15/14
SPICe briefing on Christmas Day and New Year's Day (Scotland) Bill J2/S2/06/15/15
Summary of Responses and Conclusions on the Christmas And New Year’s Day Trading Consultation J2/S2/06/15/16

**Agenda Item 4**

Further written submissions (PRIVATE PAPER) J2/S2/06/15/17
Supplementary submission from the Faculty of Advocates J2/S2/06/15/18
Supplementary submission from Scotland Against Crooked Lawyers

Letter from Scottish Executive on the Legal Profession and Legal Aid (Scotland) Bill, 15 May 2006

Finance Committee Report

Subordinate Legislation Committee Report

Documents circulated for information only—


Forthcoming meetings—

• Tuesday 30 May, 2pm, Committee Room 4
Scottish Legal Aid Board

Evidence on Legal Profession and Legal Aid (Scotland) Bill

Introduction

1. The Board’s primary interest in the Legal Profession and Legal Aid (Scotland) Bill focuses on those provisions relating to legal aid. The Board does however also have an interest in the provisions relating to the establishment, powers and operation of the Scottish Legal Complaints Commission.

Parts 1 and 2

2. The Board has a number of interests in this part of the Bill. The Board employs solicitors for a range of purposes. Internally, our solicitors provide in-house legal services (contracts, conveyancing etc) and take decisions on applications for legal aid. We also employ a small number of solicitors who provide services direct to members of the public, including through the Public Defence Solicitors’ Office, or to advice giving organisations with which we have set up partnership based projects.

3. More broadly, the Board is responsible for registering solicitors providing criminal legal assistance and monitoring their compliance with a Code of Practice, drawn up by the Board and approved by Scottish Ministers. Finally, we interact with advocates and solicitors in private practice in a number of ways, deciding on applications for legal aid and assessing and paying their accounts in accordance with the legal aid legislation, regulations and guidance issued by us.

4. In the course of exercising these various functions, we have a strong interest in the proper performance of solicitors’ and advocates’ professional responsibilities to their clients, the courts and the legal aid fund. From time to time, this gives rise to concerns about the practices of some solicitors and advocates, which might result in complaints to their relevant bodies or, in extreme cases, the procurator fiscal. For this reason, the Board has read with interest the Parts of the Bill relating to the Scottish Legal Complaints Commission. These parts of the Bill follow upon the Scottish Executive Consultation “Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland”. The Board responded to that Consultation. We have a number of comments on the resulting provisions in these parts of the Bill.

Issues related to the Board’s ability to make complaints

5. It is not clear from the Bill whether the Board will be entitled to make a complaint to the Commission. Section 2 of the Bill explains that the Commission will receive complaints made by or on behalf of “any person having an interest”. It is not clear from the Bill whether the Board would be recognised as a “person” for this purpose and therefore be competent to submit complaints to the Commission. Although the Interpretation Act 1978 allows “person” to mean a corporate body where the context requires, the explanatory notes to the Bill talk of “people”, suggesting that
the focus may be on private individuals. It is important that the Board should not be excluded from making complaints to the Commission.

6. **It is not clear from the Bill how referrals (regarding the conduct of a solicitor or counsel) under Section 31 of the Legal Aid (Scotland) Act 1986 fit into the proposals for the new complaints process.** Under section 31 of the Legal Aid (Scotland) Act 1986 (the 1986 Act), the Law Society of Scotland and the Faculty of Advocates (the “relevant bodies”) are able to exclude particular solicitors or advocates respectively from undertaking legal aid work based on their “conduct”. Consideration as to the exercise of these powers would, in practice, tend to be triggered by a complaint made by the Board to the relevant body, although more recently these have also been triggered by a Committee of one of the professional bodies, on which the Board is represented.

7. Given the definition of conduct in Section 2 of the Bill (either professional misconduct or unsatisfactory professional conduct), it is not clear how the Commission will deal with complaints made by the Board under section 31 of the 1986 Act. Action by the relevant bodies under section 31 does not have to relate to misconduct, but simply “conduct”. We are concerned that the creation of the Commission should not prevent the Board from making a referral under Section 31. It is not clear whether the Board could continue to make a complaint directly to the Law Society, if the conduct complained of did not fall within the definition of either professional misconduct or unsatisfactory professional conduct.

8. Section 5 of the Bill requires the Commission to remit a conduct complaint to the relevant professional organisation. However, if complaints under Section 31 do not fall within the definition of conduct for the purposes of the Bill, it is unclear what the Commission would do with such a complaint sent to it by the Board, or passed to it by the relevant professional body under Section 24 of the Bill.

9. Section 35 of the Bill imposes a duty on the professional organisation to investigate a conduct complaint remitted to it by the Commission. However, these are complaints of conduct within the *meaning of the Bill*. It is unclear how this sits with the professional organisations’ duty to investigate complaints within the *meaning of Section 31 of the 1986 Act*.

10. **It is not clear from the Bill whether the Board can make a ‘services complaint’.** The new definition of services complaints may also affect the Board’s ability to complain in other regards. The person who has an interest for the purposes of a services complaint must be a person who has been “directly affected by the suggested inadequate professional services”. There may well be situations where a solicitor is not complying with provisions of the legal aid legislation or regulations but not in such a way as to “directly affect” the Board. For example, the Board could complain about a solicitor’s failure to co-operate in the recovery of expenses from the opponent. The failure prevents the Board from refunding the applicant’s contribution – it is the applicant who is directly financially affected. However, if non-compliance did not meet the test for either misconduct or unsatisfactory conduct, and no complaint was possible under Section 31, then it would appear that no redress would be available to the Board.
11. **It is not clear from the Bill whether the intention of Ministers is that the Board should not be able to seek compensation as a complainer.** Section 8 of the Bill appears to replicate the existing Section 53A of the Solicitors’ (Scotland) Act 1980 in respect of inadequate professional services. In the event that the Board could establish an interest as a complainer on a services matter, it would still be unable to obtain any compensation, since only the client is paid compensation.

12. It is unclear if the provisions in section 8 relating to taxation of accounts by the Auditor of the Court of Session apply to legal aid accounts, or only to private client matters. If they apply to legal aid accounts, this would appear to introduce a tension with legal aid legislation, given that the Auditor of the Court of Session only has jurisdiction to tax such accounts as are authorised by regulations made under the 1986 Act (primarily Court of Session and High Court cases) and the Sheriff Court auditors deal with accounts in respect of sheriff court cases. In any event, we are unclear why all accounts, which may include accounts relating to business conducted in the sheriff court, should be submitted to the Auditor of the Court of Session.

13. Section 36 creates a new category of “unsatisfactory professional conduct”, punishable by censure together with either a direction for further training or payment of a fine to the Council of the Law Society not exceeding £2,000 or payment of compensation to the client not exceeding £5,000. As the Board is not a client for these purposes, it cannot receive compensation. As already noted, it is unclear if the Law Society of Scotland will recognise “unsatisfactory professional conduct” as “conduct” for the purposes of Section 31 of the 1986 Act. Even if it does, there is a significant tension between the sanctions available under Section 31 of the 1986 Act, and censure under this Bill. The 1986 Act allows the professional bodies to exclude the member from provision legal assistance services.

14. Section 38 allows the Discipline Tribunal to direct a solicitor to pay compensation to the complainer. It is unclear whether the Board will be recognised as a person to whom compensation may be paid.

15. We would like to see clarification of these matters to ensure that the Board is able to properly raise complaints and seek redress where this is appropriate.

**Matters relating to the annual and complaints levies**

16. We note that Section 18 requires all solicitors to pay an annual levy towards the costs of the Commission. This levy will therefore apply to in-house public service solicitors, who are unlikely to be subject to complaints regarding inadequate professional services. The Board currently employs 33 solicitors of which only around 16 provide legal services to clients, either directly or indirectly. However, this levy will be paid for all the Board solicitors.

17. **The proposal for payment of a complaints levy, regardless of the outcome of the complaint, appears unfair and may reduce access to justice.** In addition to collecting an annual levy from solicitors, the Commission will also receive a levy every time the Commission is required to investigate a services complaint, regardless of
whether the complaint has any merit (assuming it has passed the Commission’s own filter for frivolous or vexatious complaints). For illustration purposes, the Financial Memorandum suggests that this special levy may be £300. There is no mechanism for a refund of this levy if the complaint is not upheld. In other words, even where a complaint is held by the Commission to be entirely unfounded, the practitioner will be required to pay the ‘complaint levy’. The Board regards this arrangement as unfair.

18. We are concerned that these provisions have potential to encourage complaints by clients who know that by complaining the solicitor will incur a non-refundable cost. We are also concerned that this potential additional cost could affect solicitors’ business decisions in legal aid cases, particularly with regard to handling contentious work, or cases where profit margins may be narrower. This could in turn impact on access to justice as solicitors may decide not to provide a legal aid service, or not to take on types of client or case that they perceive as more likely to lead to a complaint – even if those complaints may turn out to be unjustified - for example, complex cases involving financial provision on divorce. Small firms, including those in rural areas, may also be particularly careful about the cases they take on, as they are less able to absorb costs and spread risks.

Other matters

19. Finally, we would observe that the Bill does not amend Section 34 of the 1986 Act. At present, Section 34 allows disclosure of information by the Board for the purpose of investigating, prosecuting or determining any complaint of professional misconduct. Section 34 requires to be amended to make reference to “unsatisfactory professional conduct”, and should also refer to the investigation of complaints for inadequate professional services by the Commission.

Part 4 – Legal aid

20. The Board’s primary interest in the Bill relates to Part 4 on proposed changes to legal aid. The provisions in the Bill follow on from the Advice for All consultation issued by the Executive in 2005. That consultation set out a vision for legal aid and publicly funded legal assistance more widely and proposed a range of responses to the weaknesses identified in the current system.

21. The Board was strongly supportive of the proposals in the consultation, and particularly those that sought to improve the planning and coordination of advice funding and provision, through the use of flexible tools to ensure the availability of services to meet identified needs. The majority of respondents to the consultation were also in favour of the approach set out, which included enabling the Board to play a more proactive role in funding services, including through the use of grant funding and contracting.

22. Not all of the proposals in the consultation require legislative change. We are currently working with the Executive to take forward a range of initiatives linked to the Bill and the overall vision set out in the consultation. However, the Board believes that more legislative change is required than is set out in the Bill. In particular, and as discussed below, the Bill does not make specific provision for support of training to
promote future supply of solicitors’ services, or changes to financial eligibility for civil legal aid through a tapered scheme. We are currently endeavouring to clarify with the Scottish Executive the extent to which these proposals can be taken forward under existing legislation or perhaps by changes to regulation.

23. The Board is firmly of the view that such developments are necessary to ensure that Scotland’s legal aid system is able to respond effectively to the range of problems faced by people in 21st century Scotland and support the variety of ways in which information, advice, assistance and representation can help them resolve those problems.

24. Scotland's legal aid system was for many years regarded as a world leader, in terms of scope and coverage of the population. Particularly on the civil side, the Scottish system can no longer make those claims. The traditional case-by-case, solicitor-centred model still has a very important role to play, but we do not believe that it is sufficiently flexible to ensure delivery of the services needed to promote access to justice in modern Scotland.

25. The vision set out in the Advice for All consultation recognised these limitations and pointed towards a more joined up, comprehensive and responsive system. The Board is therefore disappointed by the limited scope of the Bill, but will continue to work with the Executive and other stakeholders to find ways of giving effect to Ministers’ vision for the development and improvement of legal aid.

Criminal legal aid in solemn proceedings

26. Section 44 of the Bill transfers the responsibility for granting legal aid in solemn proceedings from the court to the Board. The Board supports Ministers’ wish to improve consistency and transparency of decision making and achieving greater control over both costs and fraud risks. The Board believes that transferring responsibility for the granting of solemn criminal legal aid will assist in ensuring the consistent application of the financial test set by Parliament. We do not believe that such a change would result in any delay to the progress of solemn cases or would hamper the defence solicitor’s ability to provide professional representation at all stages of the case, subject to a relatively minor change in legal aid regulations being made.

27. There is no interests of justice test in solemn cases as there is in summary cases; the underlying assumption is that the matter being prosecuted is serious enough to merit legal representation. Parliament did however require that solemn legal aid should only be available where the court is satisfied that the accused would be unable to meet the costs of his own representation “without undue hardship to him or his dependants”. As stated in the Explanatory Notes to the Bill, section 44 of the Bill requires the Board to apply the same test.

28. There is little information available as to how the courts apply the test; the Board is not aware of any guidance available to sheriffs as to what might constitute undue hardship or how an applicant’s resources might be assessed. The timing of the application to the court suggests that the applicant may not always be in a position to
provide documentation to verify the information on income and outgoings that the Board would suggest is necessary in order for the test to be applied effectively.

29. The Board has very limited powers when it comes to investigating potential false disclosure of financial information in solemn legal aid applications. Where we identify examples of understated or undeclared resources we do not, unlike civil legal assistance or summary criminal legal aid, have the ability to terminate legal aid – only the court can do this. As it is often unclear exactly how the court has arrived at its decision to grant legal aid, it is not always easy for us to assess the significance of the variations we detect.

30. The Board currently applies an undue hardship test in summary cases. We have established clear processes for assessing applicants’ resources and for determining whether these resources enable the applicant to meet the likely cost of their case without undue hardship. These processes are followed consistently across all cases (we have an internal Independent Checking and Quality Unit that reviews the application of our internal guidance by assessment officers).

31. The Board will need to develop a similar approach to the undue hardship test in solemn cases, reflecting as we do this the wider range of costs that might be incurred in instructing a defence agent in a solemn case and the higher likelihood of custodial disposal in solemn cases which would affect an applicant’s ability to fund a case.

32. We appreciate that there are concerns in some quarters that a transfer of the grant of solemn legal aid to the Board would lead to delays in cases being processed through the courts. We do not think that such problems will arise for two main reasons.

33. First, our performance in summary cases is extremely good. 99% of cases are dealt with within our target time of 10 days. In fact, we deal with around 80% of the 8000 applications we receive each year in less than 2 days, in our hands and, with very few taking more than 5 days.

34. As we move towards electronic submission and processing of applications over the coming year or so, we can expect an even higher proportion of cases to be turned around within these very short timescales. Given that we have to apply both a means and a merits test in summary cases, we would expect to be able to take means decisions on solemn cases very quickly indeed.

35. Second, various provisions ensure that legal aid is available in solemn cases prior to a decision being taken by the court at present, or the Board in future. Legal aid is available automatically in solemn cases until an application for legal aid is determined or the accused is bailed or remanded in custody. However, there is a risk that in a case the accused may be fully committed at the first hearing or that for some reason no application for legal aid is made at the first hearing but delayed to the committal hearing. In both these situations, automatic legal aid would not be available.

36. Legal Aid cover will be required in these situations. However, in summary cases and appeals, a system of ‘special urgency’ legal aid operates, under which the solicitor is able to undertake work during the short period while a legal aid application is being
considered. We have already suggested to the Scottish Executive that the existing special urgency regulation be amended to cover solemn cases, thereby filling this potential gap in provision.

Register of advisers: advice and assistance

37. Section 45 amends the 1986 Act to enable advisers other than solicitors or counsel to provide advice and assistance. There are two main elements of the section 45 provisions: those relating to the services registered advisers will be able to provide; and those setting up the register of advisers and detailing the content of the Code of Practice (the adviser code). We have comments to make on each of these elements.

Advice and assistance

38. **We agree that the legal aid fund should support services provided by non-legally qualified advisers.** The Board has long recognised that the legal aid system reflects only one part of the landscape of advice services; those delivered by solicitors and counsel. The world has changed and there are now many forms of advice available on different areas of the law and provided by a range of agencies, some but not all of which employ solicitors. In this sense, the legal aid system is out of step with wider society by focusing only on services provided by lawyers.

39. We therefore supported the proposal in the Advice for All consultation that the legal aid fund should support services provided by non-legally qualified advisers. Section 45 provides for this in a very specific way by allowing registered advisers to provide advice and assistance as defined in the 1986 Act.

40. **Case by case funding is one mechanism for providing funding but grant-funding is our preferred option.** In our response to the consultation, we suggested that payment for advice and assistance on a case-by-case basis should not be the primary route through which the Board could fund services provided by non-lawyer agencies. Grant-funding would be a more effective and appropriate tool for securing the availability of services. Case-by-case funding through advice and assistance would be a fall back position where grant funding would not be appropriate in any given situation, such as where levels of demand were not clear enough to justify a fully grant-funded service.

41. **We believe that the way in which the not-for-profit sector operates means that many organisations may choose not to use case-by-case funding.** Most agencies in the not-for-profit sector operate on the basis of grant funding and so are unlikely to have the systems and procedures in place to enable them to operate on a case-by-case funding basis. Advice and assistance is relatively simple to operate, but nevertheless requires an application form to be filled out in each case and an account to be submitted at the end of the case setting out the detail of the work carried out and fees due. This reflects more closely how solicitors deal with private clients; it is not how most advice agencies operate. An extension of advice and assistance to registered advisers would also require those advisers to comply with the existing conditions for a grant of advice and assistance, including a means test, the collection
of contributions and the recovery of fees from property recovered or preserved. For these reasons, we are unclear how many advice agencies will wish to become registered to provide advice and assistance.

42. **We think that the legal profession will see advantages to the extension of advice and assistance.** We think that the legal profession may see significant opportunities to employ paralegals or other advisers to carry out work which would either not be chargeable to the legal aid fund at present if carried out by those advisers, or which may in fact be carried out at present by solicitors. This would suit the way in which firms work: paralegals work alongside and under the supervision of lawyers in many areas of private practice, and a number of law centres already employ highly skilled but non-legally qualified advice staff. We are unclear whether this is the extension of activity that Ministers anticipated in bringing forward this provision.

43. **There is a problem in the drafting of the definition of advice and assistance in the Bill – it does not allow registered advisers to provide a full range of services.** Section 45(3) specifies which parts of the definition of advice and assistance are to be extended to registered advisers. Section 6 of the 1986 Act provides for a range of activities to fall under the definition of advice and assistance. The proposed amendment only extends one part of this definition to registered advisers (“advice …on the application of Scots law to any specified categories of circumstances which have arisen in relation to the person seeking advice”).

44. This means that the other elements of advice and assistance set out in the 1986 will not apply to registered advisers (advice on “steps which that person might appropriately take”, or assistance in taking those steps). This restriction does not to our mind reflect the range of services registered advisers currently provide to their clients, or the range of services it would be appropriate for the legal aid system to fund. The provision as drafted would effectively allow only very initial advice to be funded, which does not seem to us to achieve best value out of even that funding. If case by case advice and assistance is to be provided effectively by registered advisers, we would argue that the full definition set out in the Act at present should be adopted.

45. **The Board favours grant funding as the primary funding mechanism. This will allow us to identify gaps in provision and meet specific needs.** Our preferred option for funding work by registered advisers would be grant funding. As noted above, this is in keeping with the way most of the not-for-profit sector operates at present and would enable the Board to act strategically. Essentially, grant funding could be used to help people sort out the same kind of legal problems that the existing legal aid schemes were set up to deal with, but in a proactive, planned and directive way designed to meet specific needs or to fill identified gaps.

46. The Board has a very limited ability at present to ensure that advice and assistance is provided by solicitors in areas of particular need, whether legally or geographically. The same would apply to registered advisers. Grant funding on the other hand would enable the Board, working with others in a coordinated and consensual manner, to identify areas of need and offer grants to those able and willing to provide services to meet those needs. This is entirely in keeping with the vision, set out by Ministers in their consultation, of a planned and coordinated system in which funders and
providers work together in an evidence based way to ensure the availability of high quality services according to need.

47. We are working closely with the Executive to develop plans for the wider development of the planned and coordinated approach to funding and provision. We are also keen to develop ways of funding and delivering services that may not require primary legislative change, such as the use of employed solicitors.

48. However, we would suggest that additional provisions are required in the Bill itself if the Board is to be able to work effectively with others to deliver the vision set out in the paper. The key element of this is the addition of provisions enabling the Board to fund information, advice, assistance and representation through the use of grants, or contracts, rather than just the case-by-case mechanisms set out in the 1986 both at present and as amended by the Bill.

Register of advisers and adviser code

49. The Board and the Executive have worked together to develop a cross-sectoral quality framework which maps the range of legal advice services available to the public and the quality standards used. We believe that quality assurance is key to making the whole system work better. This is reflected in our work with the Law Society to develop quality assurance mechanisms for solicitors providing civil legal assistance and ongoing development of similar systems for solicitors and counsel providing criminal legal assistance. We therefore support the wider development of quality assurance mechanisms, in part to ensure that all publicly funded advice services are of an appropriate standard, whether provided by a lawyer or otherwise. However, we also believe that widely recognised quality standards can promote effective referral between advisers and agencies in different sectors and can contribute to better planning of service provision.

50. For these reasons, during 2004/05 the Board worked with the Executive and met with a wide range of stakeholders to pave the way for the development of a cross-sectoral quality framework. This would be relevant to lawyers and non-lawyers, those in the private, not-for-profit and statutory sectors and cover a wide range of services with the aim of being recognised by providers and funders alike.

51. This work proceeded on the basis that many quality systems already existed and that a new and separate set of requirements could only add to existing burdens. Instead, it was expected that this work would lead to agreement over the key elements of any quality system and recognise those existing systems that covered these key elements. For those providers that were not signed up to an existing system, or for those systems that did not include all key elements, a ‘generic’ standard would be developed to which reference could be made by providers and funders alike.

52. In addition to this work, the Code of Practice and register of advisers will set standards for those eligible to provide advice and assistance. The need for quality assurance to accompany an extension of advice and assistance to non-lawyer advisers is reflected in the provisions in the Bill related to the register of advisers and the adviser code. Only registered advisers and organisations will be eligible to provide advice and assistance and to be registered, advisers and organisations will have to
comply with an adviser code, drawn up by the Board, approved by Scottish Ministers and laid before Parliament.

53. The Board can see the attraction of the idea of an adviser code and register, in that it provides the Board with a statutory basis for setting standards for services provided by registered advisers and funded through legal aid. In this respect, the Bill provisions mirror fairly closely those already in the 1986 Act relating to the registration of solicitors and firms providing criminal legal assistance.

54. The detailed provisions on the Code set out in the Bill require the Board to specify standards, conduct, practice and training. The Board would wish to approach these requirements by reference to existing standards where possible and appropriate, rather than setting a whole new range of requirements for organisations and advisers who may already be meeting several sets of requirements for different funders, professional bodies or umbrella organisations. In that way, we would seek to avoid duplication, while making sure that it gives adequate protection to clients and the taxpayer.

55. The Board would prefer, where possible, to be able to register organisations rather than individuals and to make each registered organisation responsible for ensuring that any adviser providing advice under the organisation’s auspices is competent to do so. In monitoring the organisation’s compliance with the code, the Board would then check that systems were in place to make sure that individuals were adequately trained, supervised and supported. Where an individual provides advice other than in connection with a registered organisation, we would still require the individual to become registered, in effect as a sole practitioner.

56. The Board is already giving consideration to the content of the code, so that an illustrative draft can be provided to the Committee for consideration at Stage 2 of the legislative process. In developing this draft, the Executive and the Board will be consulting with stakeholders and a series of meetings is already underway. In this way, the Board hopes to be able to develop a code which is relevant to the organisations it is aimed at, is as non-bureaucratic as possible and both reflects and recognises the existence of such quality systems as the various organisations have developed to date.

57. We will continue the development of the over-arching approach to a cross-sectoral quality framework. We would also wish to work in consultation with the sector to ensure that the adviser code and registration process can be viewed as part of, and consistent with, that wider framework.

Other matters

58. Section 46 of the Bill essentially reinstates provisions that were present in the original 1986 Act but which were inadvertently repealed by the Westminster Parliament when it passed the Legal Aid Act 1988 (which set up the Legal Aid Board for England and Wales). These are technical changes that enable the Board better to administer funds received from contributions, expenses and property recovered and preserved as a result of a legally aided action.
Part 5 - General

59. Section 47 specifies that nothing in the Bill applies to, amongst other things, the provision of advice in relation to immigration and asylum. Our understanding is that these provisions are designed to reflect the fact that various activities constitute reserved matters and, in the case of immigration and asylum services, regulation and complaints handling fall under the jurisdiction of the Office of the Immigration Services Commissioner. However, legal aid in relation to immigration and asylum is in fact a devolved matter. The Board is concerned that section 47 as drafted appears to exclude immigration and asylum from the terms of any of the provisions on legal aid, including the register of advisers, advice and assistance by registered advisers and the handling of contributions. If this is indeed the case, we would argue strongly that section 47 should be amended to exclude Part 4 of the Bill from its terms.
evidence to justice 2 committee on the legal profession and legal aid (Scotland) bill
March 2006
About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds; they may be patients, tenants, parents, solicitors’ clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC’s Chairman and Council members are appointed by the Secretary of State for Trade and Industry, in consultation with the First Minister. Martyn Evans, the SCC’s Director, leads the staff team.

Please check our web site at www.scotconsumer.org.uk for news about our publications.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS
Can consumers actually get the goods or services they need or want?

CHOICE
Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION
Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS
If something goes wrong, can it be put right?

SAFETY
Are standards as high as they can reasonably be?

FAIRNESS
Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION
If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

Published by the Scottish Consumer Council
March 2006

We can often make our publications available in braille or large print, on audio tape or computer disk. Please contact us for details.
Introduction
The Scottish Consumer Council welcomes the general principles of this bill. We have an interest in both of the main aspects of the bill - complaints about the legal profession and legal aid - from the perspective of consumers who use legal services. We have for some years argued that there is a need for an independent body to deal with complaints against lawyers, to ensure that the public has confidence in the legal system. We have also long argued that there is a need to introduce new, innovative and more effective ways of providing publicly funded legal assistance. We are disappointed that the bill does not progress this latter issue to the extent that we had expected, as discussed in more detail below in relation to Part 4 of the bill.

Part 1- The Scottish Legal Complaints Commission

We have long been concerned to ensure that complaints about lawyers in Scotland are handled in a way that operates in the interests of Scottish consumers. We therefore very much support the Scottish Executive's stated aim of the proposed reforms contained in the present bill: 'to put the users of legal services at the heart of regulatory arrangements.'

Consumers who use lawyers do so at important and often stressful and difficult times in their lives. They place important transactions in the hands of their lawyers, and if things go wrong with that relationship it can have a devastating effect on client confidence. Where dissatisfaction does arise, consumers need to have no doubt about the impartiality of the dispute resolution mechanism.

This evidence focuses primarily on the arrangements for handling complaints against solicitors. Solicitors provide by far the greatest proportion of legal services to clients, and therefore most complaints that are made concern those services. However, the bill also concerns the future regulation of complaints against advocates, conveyancing and executry practitioners, and those granted rights of audience under the Law Reform (Miscellaneous Provisions) Act 1990. We believe that it is appropriate that similar arrangements should be made in respect of these groups of professionals; it would not be fair to either consumers or lawyers if non-solicitors were subject to different arrangements.

In 1999, we published research into the experiences of those who had complained to the Law Society of Scotland about a solicitor. Half of those who responded believed that their complaint had not been handled fairly. The detailed responses revealed a clear perception that the Society was not impartial in its handling of complaints, appearing to take the side of the solicitor.

We believe that the greatest weakness in the present system for handling complaints against solicitors is the lack of consumer confidence in the ability of the Law Society of Scotland to adjudicate impartially on complaints. At present, the Society has a dual role: firstly, to regulate solicitors and represent the public interest in relation to the solicitor profession, and secondly, to represent the interests of its members.

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1 Policy Memorandum relating to the Legal Profession and Legal Aid (Scotland) Bill, at paragraph 26

that confidence. Once lost, it is very difficult for such confidence to be regained, no matter how many improvements are made to the system.

While we give credit to the Law Society of Scotland for the considerable improvements it has made in recent years, any complaints system run solely by a profession’s representative body appears anachronistic and outdated today. The development of ombudsman schemes in financial services and the reform of regulation in other professions such as medicine and architecture point to the significant impact the consumer voice has had in recent years.

The move is away from in-house complaints handling towards independent schemes, because that appears to be the only way to ensure that consumers will have confidence in the adjudication of complaints. This issue of confidence is crucially important, particularly in the provision of legal services. In our view, the establishment of an independent body to deal with complaints about lawyers is the only way forward to ensure public confidence in the legal profession.

We therefore welcome the proposal to establish an independent Scottish Legal Complaints Commission to deal with complaints about lawyers, where they have not been capable of resolution at an earlier stage. This concept is central to the proposed new system: consumer complaints should be dealt with quickly and effectively at a local level, by the business or professional involved, so far as possible. Many complaints can be resolved by way of an apology or informal agreement at this stage. Only where local resolution fails, should the complaint then go to a higher complaints handling body.

It is in the interests of both client and solicitor that complaints are dealt with as early as possible. We welcome the policy intention behind the bill that complaints should be dealt with at an early stage, by the practitioner who provided the service complained about. We believe that such local resolution is the best way to resolve complaints before they escalate, and we have therefore welcomed the recent introduction by the Law Society of Scotland of a practice rule requiring all firms to have a complaints procedure and a client relations partner.

Section 3(2) of the bill provides that the Commission need not deal with a complaint where the complainer has not first raised the matter with the practitioner or his or her firm. This does, however, provide scope for the Commission to accept a complaint under these circumstances, where it considers this to be appropriate. There will be some instances where the complainer will feel unable to raise the matter direct with the practitioner, and we therefore welcome the fact that the Commission is given this discretion.

The bill also aims to ensure that practitioners and their firms do everything they can to resolve complaints by providing that the Commission may refer a service complaint back to the practitioner or firm if it considers that they have not made a sufficient attempt to negotiate a settlement. It also requires them to notify the Commission within a notified period to provide an account and an explanation of the steps they have taken to negotiate a settlement.

Service and conduct complaints

We have long been concerned that the various categorisations applied to complaints by the Law Society of Scotland are confusing, and that complainers often do not know the difference between the different types of complaint. We have argued that they should not have to know the difference, and we welcome the definition of a complaint in the bill as ‘any expression of dissatisfaction’.

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3 This is defined in Section 3(4) as a premature complaint
4 Section 6 (2) (b)
5 Section 6 (c)
6 Section 34
It is sometimes very difficult to draw the line between *inadequate professional services* (IPS) and *professional misconduct*. The distinction may sometimes boil down to a matter of degree: if a solicitor fails to reply to one letter or telephone call from his or her client, depending on the circumstances the service the client received might be inadequate. If, however, s/he fails to reply to any communication from the client, this might be considered to be conduct “which would be regarded by competent and reputable solicitors as serious and reprehensible”, and therefore would be professional misconduct.

We are concerned that the bill makes a clear distinction between service and conduct complaints, by providing that service complaints are to be dealt with by the Commission, while those regarding a practitioner’s conduct are to be referred to the relevant professional body. We can see that there is an argument in favour of referring conduct complaints to the professional bodies, as this would ensure that those bodies are aware of the problems which exist within the relevant profession, and could address these in the form of practice rules and professional guidance.

While we have previously been persuaded by this approach, we now consider that, on balance, conduct complaints should also be dealt with by the Commission. We are persuaded by arguments made by the current ombudsman and others that many complaints have elements of both service and conduct, and that these are very difficult to separate. The distinction between the various types of complaint is not always clear, even to solicitors, and members of the public cannot be expected to distinguish between them. We therefore believe that if conduct complaints are referred to the professional bodies, there will continue to be a lack of public confidence in the system, with the result that the bill will fail to meet its primary objective.

Were conduct complaints to be dealt with by the Commission, the Law Society of Scotland would still have an important role in promoting the reputation of the solicitors’ profession as a whole, rather than ruling on individual complaints. It would also have a clear role in trying to ensure that complaints are properly dealt with by firms, and offering training and guidance to its members. Without the burden of a complaints handling role, it would have the ability to concentrate more of its resources on its promotional and representational role. It would also continue to have a vital role in regulating the profession in relation to admissions, education and training, while promoting good practice and generally enforcing its code of conduct and practice guidelines.

**Complaints about fees**

We also think that the Commission should have power to deal with complaints about the fees charged by practitioners. At present, the Law Society of Scotland is unable to deal with such complaints, and the only recourse for those who are unhappy with the fee they have been charged by a solicitor is to have the account taxed by the auditor of court. However, there is a risk that the client will have to pay for this. Unless the auditor finds that the account was excessive, it is likely that the client will have to pay the auditor’s fee, in addition to what the auditor determines is a fair and reasonable fee for the solicitor’s services. This possibility may well deter clients from using the taxation procedure. We also have serious concerns that the current taxation procedure lacks transparency and consistency. We therefore consider that the system would be fairer and more transparent if the Commission were to deal with fees complaints in the future.

**Mediation**

We welcome the proposal that the Commission will have the power to resolve disputes by mediation, where both parties agree. This should help to reduce the number of cases going to formal investigation,

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7 Sharp v Council of the Law Society of Scotland, 1904 SC 129 or 1984 SLT 313.
8 Section 6 (4) and (5)
thereby reducing the cost and time involved for the parties. We are very much in favour of using the most appropriate method of resolving disputes, and consider that less formal means of resolution should be used before recourse to more formal methods where possible. However, our 1999 research found that more than half of those who had been offered conciliation by the Law Society of Scotland did not find it helpful. We expressed concern that some complainers may feel pressurised into accepting conciliation, because they did not appreciate that it was not compulsory.

It is therefore important to ensure that both parties understand what is involved in mediation, and in particular, the fact that it is a voluntary process. The Commission would also need to be mindful of the potential imbalance of power between the complainer and the practitioner. Most complainers will not have the benefit of independent advice, and we would not wish to see a situation where some complainers may reluctantly agree to a settlement with which they are not happy, because they feel intimidated.

Compensation

We welcome the powers of the Commission under section 8, where it upholds a service complaint. The proposed increase in the limit up to which compensation can be awarded, from £5000 to £20,000, is particularly significant for those who have cause to complain about their legal practitioner. Increasing the limit to this level should have a significant deterrent effect in ensuring that firms do not fail to provide an adequate service.

Negligence claims

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

We therefore welcome this provision, which will mean that a considerable proportion of complainers with negligence claims will no longer have to face the risk, expense and uncertainty of taking their claims to court. Moreover, the court process can be slow, and we would hope that this procedure will allow claims to be dealt with quickly and efficiently, allowing both the complainer and the practitioner to get on with their lives sooner than at present.

We have previously expressed the view that any limit on negligence claims is arbitrary, and we can see no reason in principle why the Commission should not be able to deal with negligence claims of any value. We welcome the provision in section 8(7) that Ministers will consult with appropriate consumer interests should they decide to amend the compensation limit.

Other powers

9 Section 34
10 Scottish Legal Services Ombudsman Annual Report 2004-05
We welcome the Commission’s powers to monitor compliance with its directions,\(^\text{11}\) to examine documents and demand explanations,\(^\text{12}\) and to obtain information or documents from the professional organisations.\(^\text{13}\)

We also welcome the duties placed upon the Commission to monitor practice and identify trends in both service and conduct complaints, and to publish reports and guidance on these matters.\(^\text{14}\) As we have said, we think that conduct complaints should be dealt with by the Commission, but the professional bodies should continue to have a central role in promoting good practice in the relevant professions. The Commission should therefore liaise with the professional bodies in the production of such guidance.

We also welcome the Commission’s duty to provide advice to the public on the process involved in making a complaint.\(^\text{15}\) We hope that the Commission will provide a telephone helpline, and publish clear and accessible information for the public on the complaints process.

We are particularly pleased to see that section 14 gives the Commission power to enforce any direction it makes under section 8 (2) in the courts. One of the major criticisms of the Scottish Legal Services Ombudsman has been that, while she has power to make recommendations to the professional bodies, she does not have powers to enforce them. Research has found that many complainers feel the ombudsman does not have sufficient ‘teeth’, and should be given increased powers.\(^\text{16}\) The new Commission will have such ‘teeth’, allowing it to effectively enforce its directions.

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

**Membership of the Commission**

We welcome the fact that the Commission will be chaired by a non-lawyer member, with a non-lawyer majority.\(^\text{17}\) This should ensure that the Commission is seen as truly independent of the legal profession. We like the use of the term ‘non-lawyer’ rather than ‘lay’; we have evidence from other areas of our work that the term ‘lay’ is not always well understood. It may be seen to imply a lack of knowledge and experience, when in fact non-lawyer members are likely to have significant knowledge and expertise in other areas of life. We are pleased that the bill makes specific reference to appointing those with experience and knowledge of consumer affairs and complaints handling. We would also welcome the knowledge and experience of the lawyers appointed to the Commission; like the non-lawyer members, they would be there to represent the public interest, rather than the interests of their own profession.

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\(^{11}\) Section 12  
\(^{12}\) Section 13  
\(^{13}\) Section 28  
\(^{14}\) Sections 26, 27 and 30  
\(^{15}\) Section 25  
\(^{16}\) *Complaints about Solicitors: a study of consumers’ experiences of the Law Society of Scotland’s complaints procedure*, Scottish Consumer Council, 1999; *Survey of Complainers to the Scottish Legal Services Ombudsman*; Scottish Executive Central Research Unit, 2000  
\(^{17}\) Schedule 1
**Funding**

In line with the policy intentions of the bill, we believe that the legal profession, individually and collectively, should be encouraged to try to resolve complaints without complainers having to resort to the formal complaints system. A ‘polluter pays’ approach will encourage this, and we therefore support the bill’s approach: a general levy on all members of the profession, and a complaints levy on firms against whom a complaint is made, provided that the complaint is not frivolous, vexatious or otherwise ineligible.

**Part 3- Legal Profession: other matters**

We are pleased that Section 39 provides that the Scottish Solicitors’ Discipline Tribunal should have equal numbers of solicitor and non-lawyer members. We think, however, that, as with the Commission, the tribunal should be chaired by a non-lawyer. While the legislation allows for a non-lawyer to chair the tribunal, the current chairman is a solicitor, and we believe that in practice this has always been the case.

We welcome section 42 of the bill, which is intended to pave the way for the commencement of Sections 25-29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which relate to the granting of rights of audience in the Scottish courts to non-lawyers. We have long argued that greater competition in the provision of legal services would be in the interests of consumers, and should be encouraged, subject to adequate safeguards.

Consumers should have a wider choice as to who represents them in court, should they feel unable to represent themselves. We believe that there are some non-legal professionals who could very competently represent clients in court, such as insolvency practitioners in bankruptcy cases. These provisions are clearly in the interests of consumers, but they cannot be utilised until they are brought into force. At that stage, any organisation wishing to make such an application must prove that it fulfils the criteria laid down by the legislation.

We are aware that there may be an issue in relation to section 42 regarding non-lawyer providers of executry services. As we understand it, while at present others, such as accountants, can provide most executry services, they cannot make application for confirmation of an estate, but must refer this to a solicitor. We consider that this matter should also be brought within the scope of section 41, in the interests of greater competition and consumer choice.

We welcome the clarification of the status of solicitors admitted as notaries public, but who are no longer practising, and are not therefore covered by the Law Society of Scotland’s master policy for indemnity insurance. The current situation may lead to confusion, and may pose an element of risk to consumers.

**Part 4 - Legal Aid**

An important feature of a just and inclusive society is the ability of all of its members to enforce their rights, meet their responsibilities and resolve their disputes. The costs of doing so should be affordable, while the processes available should be both appropriate and free of undue delay. We welcomed the recognition by the Scottish Executive in last year’s *Advice for All* consultation that more effective targeting of publicly funded legal assistance can contribute to greater social inclusion in Scotland. Publicly funded legal assistance is one of the most effective ways of ensuring that those in need can access justice. We therefore support the bill’s provisions for a complaints levy on firms against whom a complaint is made, provided that the complaint is not frivolous, vexatious or otherwise ineligible.

18 Solicitors (Scotland) Act 1980, Schedule 4, paragraph 4

19 Section 43

20 Advice for All: Publicly Funded Legal Assistance in Scotland - the Way Forward, Scottish Executive, 2005
funded legal advice, information and representation are essential public services, which are required to ensure that those who need to resolve their disputes are not excluded from the civil justice system due to cost or to lack of knowledge, help and/or advice.

We have long argued that, in order to ensure that it meets the real needs of consumers, the present system of public funding for legal and advice services requires to be radically restructured. At present, legal aid can only be provided by solicitors; consequently the present legal aid scheme concentrates on traditional areas of private legal practice, such as family law and reparation. This has resulted in unmet legal need, particularly in the area of ‘social welfare law’, which includes welfare benefits, debt, housing, consumer and employment issues. Many consumers therefore rely heavily on non-solicitor advice services and law centres for assistance with such matters.

Non-legally qualified advisers currently make a significant contribution to the provision of legal advice, assistance and in some cases, representation, in these areas of law. At present, however, such services cannot be funded by legal aid. We believe that publicly funded legal assistance should be based on the needs of those who use the civil justice system. People should be directed towards the most appropriate adviser for their problem, who may not always be a lawyer, and public funds should be made available to ensure that these services are provided. We therefore welcome the steps that the Scottish Executive is taking towards extending publicly funded legal assistance.

The Advice for All consultation clearly recognised that legal and advice services are currently provided by a wide range of agencies, and the vast majority of those who responded to the consultation were in favour of the Scottish Legal Aid Board being able to fund provision by non-legally qualified advisers as well as solicitors and advocates. We are therefore very disappointed that the provisions in section 45 are so limited. While it was clear from Advice for All that some of the changes proposed, such as the establishment of a national co-ordinating body for publicly funded legal assistance, were for the longer term, it was equally clear that the intention was to give the Board power to fund non-solicitors, including grant funding, in the short to medium term.

However, section 45 simply extends the current system of legal aid advice and assistance to non-solicitor advisers, allowing such advisers to apply to register with the Board to provide advice and assistance. Once registered, they may then provide advice and assistance under the existing legal aid scheme, as solicitors currently do. This means that, rather than a grant being awarded to an advice agency to provide advice on a contractual basis, an individual application form will need to be completed in every case.

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

Secondly, the provisions would require agencies to means test clients. Many advice agencies, most notably citizens’ advice bureaux, offer their services free at the point of delivery. Some agencies are opposed to means testing as a matter of principle. This was recognised in the 2001 report of the Working

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21 Advice for All: Publicly Funded Legal Assistance in Scotland- the Way Forward; Analysis of Written Consultation Responses, Scottish Executive, 2006

22 Advice for All -see note 20- at page 3
Group on the Review of Legal Information and Advice Provision in Scotland, which concluded that the conditions for funding would have to take account of this opposition to means testing and charging, and noted the need for flexibility to allow agencies to access other funding to cover the costs of providing services to clients who were not financially eligible.23

We are therefore of the view that, unless the bill can be amended to introduce provision whereby the Board can award grant funding to advice agencies, it will have little impact, and will fail in its objective of ensuring that people receive advice from the adviser with the most appropriate skills, knowledge and experience. There will be an issue as to the proportion of the Board’s budget which should be earmarked for such grants.

While we do not think that the funding mechanism in the bill takes the correct approach, there is clearly a need to introduce some form of quality assurance for all those delivering publicly funded legal and advice services. Those who use these services are entitled to expect that those providing them, whoever they may be, are competent, have adequate training and expertise, and that the services are of a good standard. We consider that a register, as proposed in section 45 is the way forward, but we think that it would be disproportionate in terms of cost and time to require each individual adviser to be registered.

Given the substantial turnover of volunteer advisers within many agencies, we think that, while individual advisers should be required to follow the code, it would make more sense to designate a specific ‘compliance’ person within each agency (in the case of CABs, one such person in each CAB), who is registered with, and therefore responsible and answerable to, the Board. This would follow the current approach of the Board’s code of practice for solicitors undertaking criminal legal aid work. We think that there should be an ‘exception’ register of those advisers who are found not to be fit and proper people to give advice, which would be held by the Board.

There is an issue here about parity between solicitors and other practitioners, as defined in the bill, and other advisers, in relation to how complaints about them are handled. There is a need for a proportionate and independent mechanism for dealing with complaints about inadequate professional service and professional misconduct relating to such advisers.

Section 45 provides that Ministers may specify by regulations categories of advice and assistance which non-solicitors might provide. We would suggest that these should include areas of social welfare law such as benefits, employment, housing, consumer issues and debt. These are areas of law which private practice solicitors generally do not deal with, and consumers may therefore find it difficult to obtain advice on these matters.

Finally, we note that section 45 specifically excludes those who have acquired rights of audience under the 1990 Act from the register, and we would query why this should be the case. Given that they are not solicitors or advocates, such practitioners cannot grant legal aid advice and assistance under any other provisions, so far as we are aware, and we cannot see why they should be treated less favourably than others in this respect.

23 Review of Legal Information and Advice Provision in Scotland, Scottish Executive, 2001, Part 8
1. Introduction

R&SA is the lead insurer (one of a panel of insurers) of the professional indemnity Master Policy arranged by the Law Society of Scotland for all solicitors in private practice in Scotland, and has been involved with this policy since its inception.

R&SA is also the professional indemnity insurer of all advocates in Scotland arranged through the Faculty of Advocates.

As such the great majority of professional indemnity claims against the legal profession in Scotland are handled by the R&SA specialist claims team in Glasgow.

1.1 Introductory Points on the Master Policy for the Law Society of Scotland

In simple terms, professional indemnity insurance indemnifies the member of the legal profession in respect of their legal liability to third parties arising from breach of professional duty (typically negligence).

All solicitors in private practice in Scotland are required to insure through the Master Policy – thereby guaranteeing a minimum level of cover per practice and subject to a standard and wide wording. The current limit of indemnity per practice is £1.5m any one claim and it is an annual policy. Solicitors are able to purchase higher limits of indemnity separately if required.

The Master Policy is insured by a panel of insurers, with R&SA being the lead insurer, meaning that the company handles the claims on behalf of the panel, each insurer paying its percentage of every claim.

The Master Policy is arranged by the Law Society of Scotland on behalf of all solicitors (its members), who are the insured. To do this and to negotiate the premium and terms each year with the insurers, and to provide professional advice the Law Society employs the insurance brokers Marsh. The contract of insurance is between each separate Insured practice and the Insurers.

1.2 Introductory Points on the Faculty of Advocates Policy

The master policy for professional indemnity insurance is arranged by the Faculty of Advocates on behalf of all advocates in practice in Scotland (the individual advocates being the insured)

The policy is underwritten by R&SA with a minimum limit of indemnity of £500,000 any one claim per advocate. There is an option to purchase higher limits of indemnity if required.

The policy provides cover for legal liability to third parties following breach of professional duty.
1.3 Introductory Points on R&SA’s Submission of Evidence to the Justice 2 Committee

This submission is limited to the part of the Bill which concerns the proposed creation of the Scottish Legal Complaints Commission (“SLCC”). Within that part, R&SA’s interest centres on the proposals for the handling of Services Complaints (as they are termed in the Bill) and, separately, the proposed role for the SLCC in monitoring the effectiveness of the Master Policy.

2. Comment Made in Response to the 2005 Scottish Executive Consultation

R&SA was a respondent to the 2005 Scottish Executive Consultation Paper on “Reforming complaints handling, building consumer confidence: Regulation of the legal profession in Scotland”. In that response we made a general comment on the clear distinction we identified between the handling of complaints and negligence claims against the legal profession. Our concerns about the broad thrust of the policy proposals now published derive in the main from that distinction and therefore we consider it worthwhile to reiterate in full the comment previously made:

“We believe that Complaints handling and Negligence claims against the legal profession are two different and distinct subject matters and need to be clearly distinguished.

Current arrangements provide this distinction and separation:
- the Complaints system is conducted by the professional bodies and reviewed/overseen by the Scottish Legal Services Ombudsman.
- negligence claims against members of the profession are the subject of insurance and are handled mainly by the professional indemnity insurers (the exception being the smallest claims which fall within the self-insured amount under the policy, when the insured firm will deal with the claim itself).

The processes involved are different:
- Complaints handling is based on breach of the professions’ own rules (e.g. inadequate professional services or professional misconduct) and the remedy is basically compensatory (i.e. provision of awards up to a maximum amount).
- negligence claims involve establishing a duty of care is owed, that there has been a breach of that duty, and that a loss directly attributable to such breach has been caused – i.e. they are based on law and due legal process through the courts (first action and appeals). Resolution, where it is accepted that the Insured is liable, is by way of payment to the third party who has suffered financial loss arising from the negligent act. The professional indemnity insurance indemnifies the legal practitioner for this legal liability, although in practice the insurers make payment direct to the third party for their loss.

It is our understanding that all the other large professions in Scotland and the UK (e.g. architects, accountants, surveyors, etc) maintain a clear distinction between complaints and negligence claims.

It seems to us that Complaints handling became the focus of both the Justice 1 Committee and Clementi. As this consultation document states, consumer criticism and dissatisfaction has centred on Complaints handling, and the legal bodies have readily recognised the need for review and change in the Complaints handling arena. The evidence for dissatisfaction with, or the need for change in, the area of negligence claims and the associated legal process is less certain and unproven.

Solutions to the Complaints handling issues that cross over into the negligence and legal liability arena would confuse the fundamental distinction described above, and could lead to duplication, inefficiency and potentially to distortions of the legal process. This should be avoided and there is a need to maintain within the handling of negligence claims the balance between the rights of the
users of legal services and the rights of the legal practitioners themselves, whatever the size of those negligence claims”.

3. The SLCC and Services Complaints

It seems clear from our reading of the Bill that the distinction highlighted above will not survive. As we understand the proposals, the SLCC will assume responsibility for handling Services Complaints (defined as complaints about the adequacy of the professional services provided by a legal practitioner). Since Inadequate Professional Services are defined in the Bill to include “any element of negligence in respect of or in connection with the services”, it seems clear that those drafting the Bill envisage a key role for the SLCC in the consideration and determination of negligence claims against solicitors and advocates in Scotland. If we are wrong in this assumption then it would be helpful to gain a clear understanding of the role actually envisaged for the SLCC in this regard.

3.1. Issues arising from the SLCC considering & determining negligence claims

To the extent that the assumption we make above proves to be correct, we have the following observations on the practical issues we believe the SLCC will need to take account of:

3.2. Ambit:

a) The Policy Memorandum to the Bill records the policy of the Scottish Executive, that complaints from clients should be dealt with wherever possible by the service provider. The Bill states that complaints will only be considered after the legal practitioner has had a “reasonable opportunity” to deal with them. In the context of Service Complaints featuring an element of alleged negligence, we would make the observation that what is a “reasonable opportunity” may differ markedly from case to case according to size, complexity and other factors. Our concern is that sufficient opportunity may not be given to legal practitioners (and their insurers) to resolve negligence claims prior to the SLCC commencing investigations.

b) Will the SLCC consider Services Complaints involving one or more other elements which would currently engage the Master Policy? We have in mind fraud as an obvious example.

c) Notwithstanding the £20,000 compensatory limit presently envisaged, on our reading of the Bill it seems that the SLCC will consider Services Complaints irrespective of the amount of loss alleged to flow from the negligence element.

d) It seems likely that the SLCC will look at all Services Complaints irrespective of the complexity of the negligence (or other) element. This could be a source of concern, for example in relation to the level of confidence in the decision making process.

3.3. Legal Principles:

a) What legal tests will the SLCC apply to determine allegations of negligence? We assume that these will be at least as stringent as those applied by insurers on behalf of legal practitioners and ultimately by the Courts. We have in mind in particular the onus upon the claimant to establish that a duty was owed, that it was breached and that such breach is causative of the loss claimed.

b) Time limits: Schedule 3 of the Bill refers to the SLCC fixing time limits for the making of complaints. In doing so and in protection of the rights of legal practitioners we anticipate the SLCC will wish to take account of and abide by the Prescription and Limitation (Scotland) Act 1973.
c) Contributory negligence: we would hope that the role of the complainant in the events giving rise to the dispute will be taken into account when evaluating the compensatory award (if any) to be made.

d) Admission of evidence: we consider that the SLCC should permit legal opinion and/or expert evidence to be adduced by or on behalf of the legal practitioner during the investigation process and at appeal.

3.4 Representation:

a) We assume that the SLCC will permit complainants and legal practitioners to be represented during the investigation process and at appeal. As professional indemnity insurers we would, for example, wish to have the opportunity to appoint legal representation on behalf of the legal practitioner.

3.5 Operational Issues:

a) Competence: given the role we anticipate they will have, it will be important to ensure that each case handler employed by the SLCC is technically able to determine questions of negligence and/or other legal principles.

b) Mediation: generally speaking we welcome the reference in the Bill to the use of mediation. It will be important to ensure that each mediator employed by the SLCC is competent to mediate.

c) Determination & Breakdown of Compensatory Award: the proposed limit for compensatory awards to be made by the SLCC is £20,000. We are interested to understand the process the SLCC will adopt in evaluating the award to be made (if any) in each Services Complaint. We consider it vital that each award be broken down into its constituent parts, e.g. compensation for distress/inconvenience, compensation for vouched loss, compensation for unvouched loss (if awarded).

d) Conflict: we would highlight the potential for issues of conflict to arise in the event of one or more Services Complaints involving two or more legal practitioners. We expect the SLCC will wish to have procedures for handling such cases appropriately in order to protect the rights of each legal practitioner.

e) Multi-Party Complaints: we would highlight the potential for multi-party complaints featuring a negligence element, some of which may involve other professionals in respect of whom the SLCC will have no authority. Again, our concern here is for the rights of each party. In such cases it seems likely that the decision of the SLCC will be subject to particular scrutiny by all concerned.

f) Consistency: we regard it of prime importance that the SLCC takes all appropriate steps to ensure demonstrable consistency over a range of decisions on Services Complaints incorporating elements of negligence (and other causes of loss currently within the scope of the Master Policy).

3.6 Appeals:

a) As we understand it, the Bill provides for the right of internal appeal against an upheld Services Complaint. The only other form of appeal mentioned is by way of Judicial Review. We query whether this is ECHR compliant notwithstanding the explanation given in the Policy Memorandum on this point.
4. The SLCC’s Monitoring of the Professional Indemnity Arrangements

Section 29 of the Bill contains proposals for monitoring the effectiveness of the Guarantee Fund and the professional indemnity arrangements (currently in the form of the Master Policy). We are not able to comment on the operation of the Guarantee Fund, this being a matter for the Law Society of Scotland. Our comments are therefore restricted to the professional indemnity arrangements.

The Bill does not specify how the proposed monitoring will take place, nor indeed what will be monitored. The Policy Memorandum which accompanies the Bill does, however, state that the SLCC “is expected in particular to monitor turnaround times in settling claims made”. In our response to the 2005 Scottish Executive Consultation Paper, we made the following comments on this aspect:

“Lengthy delays in reaching settlement of negligence cases and any distress to individuals caused as a result are to be regretted. The context is however that the great majority of claims (several hundred a year) under the Master Policy are settled quickly and without any complaint on time to settlement. For example within the last complete insurance period of the Master Policy (2003/4) of all small claims (under £5,000) where we have accepted liability on behalf of the insured, 93% were settled within 12 months. The remaining 7% all settled within 36 months. This speed of settlement period is measured from date of claim to closure of file once costs etc have been dealt with; on average the actual date on which settlement has been made with a third party claimant will be on a shorter time scale than this.

It should be recognised that the speed of settlement is not ultimately within the control of the insurers in all cases. Handling and settlement of claims is also dependent on provision of information, the co-operation of insureds and claimants, and the operation of due legal process (if necessary to determine legal liability and quantum in the courts). Within all large bodies of claims, a small minority are difficult and problematic in achieving resolution, and thereby tend to take a longer time to settle. Contributing factors in this small minority of claims under the Master Policy can include lack of co-operation and unrealistic expectations of the third party.

R&SA handles several hundred claims a year under the Master Policy - yet the number of complaints received by us is tiny (less than 1% in 2004).

Regarding the operation of the Master Policy the following are relevant:-

- The Master Policy Claims Handling Philosophy clearly details the insurers’ priorities in terms of standards of service to be followed in handling claims. R&SA considers this Philosophy to be all important in our handling of claims, and in our dealings with third party claimants. Fairness is a key component of this philosophy – fairness to third party claimants and to individual legal practitioners.
- The role of the Insurance Brokers includes monitoring of our claims handling performance, together with auditing of claims files by the Broker.
- R&SA has engaged independent auditors to review the claims files under the Law Society Master Policy. This assists us in managing the claims and ensuring the Philosophy is followed.
- R&SA monitors all time to settlement periods for the Master Policy claims.
- The insurers promote and encourage methods of Alternative Dispute Resolution (ADR) such as mediation - to resolve disputes, reduce costs and speed up settlements.
- There are requirements on Insurers in terms of their duties to the Insured, with whom they have a contractual liability (through the insurance policy and certificate).
- The Insurers of the Master Policy are regulated by the Financial Services Authority.

Given the above we do not believe that such an oversight role is necessary or appropriate for the Master Policy.”
4.1 Likely Impact of New Services Complaints Environment:

To the comments above we would add the observation that to the extent the SLCC becomes involved in the consideration of negligence claims against solicitors, then whatever the professional indemnity arrangements in force at that time, it seems reasonable to conclude that the SLCC will itself assume a concomitant role in influencing turnaround times in the settlement of claims made.

5. Conclusion

As a professional indemnity insurer from an underwriting perspective our concern is to be able to assess risk adequately so that we may price effectively for the risk. The proposed changes that this Bill brings, particularly in the powers envisaged for the SLCC to determine negligence claims against both solicitors and advocates to a limit of £20,000 (which figure is capable of amendment by the Scottish Ministers from time to time), introduce a significant element of uncertainty to the risk assessment and pricing process.

From a claims perspective we seek to meet our commitments under the contract of insurance to our policyholders and at the same time to be fair and equitable to third parties/claimants. Again the proposed changes at this point of understanding introduce a degree of uncertainty about the extent to which we will be engaged in the process and able to meet these commitments, particularly in the field of negligence claims resolved within the compensatory limit planned.

Therefore our submission to the Committee at this stage has focused on highlighting these uncertainties and seeking clarification of how it is envisaged that the SLCC will operate in practice, thereby enabling us to take a more informed view of an appropriate professional indemnity insurance underwriting and claims handling response to the new regime anticipated in 2008.

Peter J Turrell BSc(Hons) MBA PGDip FCII
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Technical Claims Manager, Professional & Financial Risks
UK Claims
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21st April 2006
The Scottish Parliament, Justice 2 Committee

Legal Profession and Legal Aid (Scotland) Bill

Submission

by Marsh Ltd

MARSH
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Scope of Submission

This submission is made by Marsh Ltd. Marsh Ltd is the broker appointed by The Law Society of Scotland to The Law Society of Scotland Master Policy for Professional Indemnity Insurance for solicitors in Scotland ("the Master Policy").

This submission is confined to commenting on:

- The proposed arrangements for resolving Services Complaints involving an element of negligence ("negligence claims")
- The proposed role of the Scottish Legal Complaints Commission ("the Commission") in monitoring the effectiveness of the Master Policy
- Aspects of the operation of the Master Policy – no comment is made in relation to, for instance, The Scottish Solicitors' Guarantee Fund.
- Matters concerning solicitors' negligence (or allegations of negligence).

By way of background, the Appendix to this submission briefly explains:

- The concept of professional negligence
- The process of pursuing a claim for (alleged) professional negligence
- The operation of the Master Policy

as well as providing extracts from the relevant statutory provisions and Practice Rules relating to the compulsory Professional Indemnity Insurance requirements applying to solicitors in private practice in Scotland.

Prepared by:
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Marsh Limited
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24 April 2006
Submission

1. Proposed arrangements for resolving Services Complaints involving an element of negligence ('negligence claims')

Are the proposed arrangements in respect of negligence claims likely to achieve their objective i.e to result in improvement, relative to the current arrangements?

The answer to this depends on:

- how the proposed arrangements will operate
- what measure of improvement is appropriate

1.1 How the proposed arrangements will operate

It is not sufficiently clear from the provisions of the Bill:

- what test of negligence will apply
- who will have the onus of proof
- what standard of proof will apply - balance of probabilities or some other standard
- whether defences, such as time bar or contributory negligence, will be available to the solicitor
- what process will be adopted for hearing/deciding negligence claims
- whether there will be an opportunity for the parties to be legally represented

Clarification of these issues would be required to enable us to comment meaningfully on how the process will compare with the current process for resolution of negligence claims.

1.2 What measure of improvement is appropriate

Various potential measures of improvement might be considered relevant:

1.2.1 speed of resolution of negligence claims

It is not clear from the provisions of the Bill how the resolution of negligence claims would be likely to be consistently faster under the proposed process than under the current resolution process.

Where complex issues of causation and quantification are involved, there are potential delaying factors such as the requirement to obtain expert opinion on legal, valuation and other issues. It is not clear how the proposed process would avoid or overcome these potential delaying factors.
The complexity of a negligence claim is not proportionate to the size/value of the claim - even relatively low value negligence claims can involve considerable complexity.

If it is envisaged that the speed of resolution of negligence claims will be increased in all cases, how is it envisaged that this will be achieved in a way that is consistent with the parties' rights being properly vindicated?

Factors currently affecting the time taken to resolve negligence claims include the complexity of the claim, the willingness of the claimant to cooperate in progressing resolution of the claim, having to await the outcome of other litigation, the speed with which the claimant progresses the claim and the adoption of a reasonable stance in relation to matters in dispute.

How would these delaying factors be avoided under the proposed process?

1.2.2 legal representation

Is it envisaged that the process will make it unnecessary for the claimant or the solicitor to have legal representation, thereby avoiding legal costs?

The vast majority of those pursuing negligence claims are currently represented and, unless the process, test or onus of proof are going to change, it is not clear how the requirement for representation in relation to negligence claims would change.

Even relatively low value negligence claims can involve considerable complexity in relation to issues of liability, causation and/or quantification. Accordingly, the parties' best interests will be served by having experienced/professional representation. In the absence of such representation, there would be a heightened risk of the parties' interests being prejudiced.

1.2.3 outcome of negligence claims

Is it envisaged that in some way the outcome of negligence claims would differ from the outcome under the current arrangements?

It is not clear whether or how the outcome of negligence claims under the proposed procedure might differ from the current position unless, for instance, the test/standard of negligence is lowered, contributory negligence is disregarded or a more generous measure of damages/compensation is applied. In that event, the effect of the Bill would be more than merely the introduction of an alternative dispute resolution process: the Bill would create new remedies and/or alter the substantive law. In those circumstances, the rights of the solicitors concerned, and of their insurers, would be adversely affected.

Under the current arrangements, where the parties cannot reach a mutually satisfactory agreement following negotiation, dissatisfied claimants have recourse to the courts and potential appeals. The availability of only a limited appeal to the courts, by way of Judicial Review, must create concerns about the restriction in scope for challenging the Commission's decisions. This will be a potential concern to solicitors and to Master Policy insurers and there must be a question about the consistency of such an arrangement with human rights legislation.
1.2.4 perceptions

If it is considered that the changes will result in an improved perception of the way in which negligence claims are resolved, is there not a danger that consumers will be confused by having service complaints as well as negligence claims dealt with by the same body/process?

Will there not be an expectation that the test, standard and onus of proof that apply to a negligence claim will be the same as apply to service complaints involving no element of negligence?

1.2.5 Impact on availability/terms and conditions of Professional indemnity insurance

Subject to receipt of further detail of the proposed arrangements, it is not possible to state with certainty whether these arrangements would have overall negative or positive impact.

Some of the concerns expressed above could potentially have an adverse impact on the availability/terms and conditions of cover. For instance, insurers are likely to be concerned about any aspect of the process which results in a lack of consistency of decision/outcome; absence of provision for legal representation of the insured solicitor throughout the process; the lack of effective appeal etc.

The potential responses of insurers may include:

- insurers excluding cover for such claims
- insurers increasing the Self-Insured Amount (excess) in respect of such claims so that such claims are effectively largely excluded from cover unless the aggregate Self-Insured Amount has been reached (Note: The Master Policy insurers increased the Self-Insured Amount applicable to Inadequate Professional Service ('IPS') awards on account of the increase in the maximum level of award with effect from 1 April 2005. As the maximum level of IPS award is now £5,000 and the minimum level of Self-Insured Amount applicable to IPS awards is now £6,000, IPS awards are now effectively excluded from Master Policy cover.)
- insurers applying an 'inner limit' (different/lower limit of indemnity applicable to specified categories of claim) in respect of such claims

The impact of such policy conditions could be that solicitors are substantially self-insured for such claims or, potentially, uninsured. In the latter event, there is a potential public protection issue (no certainty that a valid claim will be met).
2. Commission's proposed role in monitoring the effectiveness of the Master Policy

It is not clear what is intended by the proposed monitoring function

- how is it envisaged 'effectiveness' would be assessed?
- will the monitoring function be workable?
- why is such a monitoring function necessary or appropriate?

2.1 How would 'effectiveness' be assessed?

If, for instance, 'effectiveness' is to be judged by reference to the speed of resolution of negligence claims, this may be regarded as a simplistic approach and of highly questionable value. A range of diverse and uncontrollable factors are capable of impacting on the speed of resolution of negligence claims. If 'effectiveness' is to be judged by the scope of cover negotiated with/offered by insurers it is respectfully submitted that the Commission will not be in a position to effectively assess such matters.

2.2 Would the proposed monitoring function be workable?

Information on, for instance:

- the time taken to resolve negligence claims
- the value of claim settlements

will be known only to the insurers and/or the solicitors concerned.

What entitlement will the Commission have to require commercial insurers to provide this information? This is information that even the insurers' regulators are not entitled to demand.

2.3 Why is the proposed monitoring function necessary or appropriate?

We know of no equivalent arrangement in any jurisdiction worldwide.

The cover provided by the Master Policy is a commercial insurance arrangement between commercial insurers and solicitors operating as principals in private practice in Scotland. The Master Policy, like all Professional Indemnity Insurance arrangements, is principally for the protection of the parties paying the premium – in this case solicitors operating as principals in private practice in Scotland.

Insurers handle negligence claims on behalf of their insureds, namely the insured solicitors. The proposed monitoring role seems to imply that there is some direct right of claim on the Master Policy by members of the public, which is not the case.
Appendix

1. Concept of professional negligence

In any claim for (alleged) professional negligence, the party asserting the claim will require to establish:

- Whether a duty of care was owed
- Whether the duty has been breached, and how
- What loss has arisen as a direct result of the breach

2. Making a claim for (alleged) professional negligence

2.1 The onus of proof is on the party alleging professional negligence.

2.2 Those pursuing negligence claims are generally advised to seek legal representation in pursuing claims.

2.3 If a claim cannot be resolved by negotiation, the claimant will require to raise court proceedings.

2.4 The vast majority of claims currently are resolved by negotiation without recourse to the courts.

2.5 Only the courts can order a party to pay compensation (damages) for professional negligence.

2.6 Nothing in the operation of a policy of Professional Indemnity Insurance alters the test of negligence or the onus of proof.

3. Professional Indemnity Insurance

3.1 The general purpose of a policy of Professional Indemnity Insurance is to protect the professional person against legal liability to pay damages to persons who have sustained financial loss arising from his own professional negligence or that of his employees in the conduct of the professional practice.

3.2 Policies offer indemnity strictly on a legal liability basis and moral liability is not covered.

3.3 Claimants have no direct claim for indemnity/compensation against the insurers.

4. Compulsory Professional Indemnity Insurance for Scottish solicitors

4.1 Since 1978, all solicitors in private practice have been required to have cover under a Professional Indemnity Insurance arrangement, 'the Master Policy'. This ensures that all solicitors in private practice in Scotland have insurance against losses arising out of their negligence. Section 5 of this Appendix describes the Master Policy framework.

4.2 The automatic and continuous availability of cover on an annual basis guarantees that any claim validly established against a solicitor arising from that solicitor's negligence will be paid even if the solicitor's practice has ceased to exist and the solicitor is unable to pay a claim or premium or excess.
4.3 COVER IS CURRENTLY PROVIDED UNDER THE MASTER POLICY TO A LIMIT OF INDEMNITY OF £1,500,000 EACH AND EVERY CLAIM.

4.4 The claims handling procedure is outlined within the description of the role of Insurers in Section 5.6 of this Appendix. Negligence claims are handled by the Master Policy Insurers in accordance with a claims handling philosophy (Section 6 of this Appendix) which has the approval of the Law Society of Scotland ("the Society"). The Society is not involved in the handling/resolution of individual claims.

5. Master Policy Framework

5.1 In accordance with S.44 (1) of the Solicitors (Scotland) Act 1980 and the Solicitors (Scotland) Professional Indemnity Insurance Rules 2005 the Society maintains a Master Policy on behalf of Solicitors in private practice. The relevant provisions are reproduced at section 7 of this Appendix.

5.2 As agents to the Society, the Brokers act, under instruction, to place the Master Policy for the entire profession with a common set of insurers and with a common set of terms and conditions.

5.3 The respective roles of the Society, the Brokers and the Insurers are briefly described, as follows:

5.4 The role of the Society:

5.4.1 Establish the terms and conditions of cover to be provided by the Master Policy insurers on behalf of all Solicitors’ practices.

5.4.2 Appoint a broker to the Master Policy.

5.4.3 Whilst the Society has no involvement in the conduct of individual claims it does approve:

- the claims Handling Philosophy to be complied with by the insurers in the conduct of claims under the Master Policy
- the criteria for appointment of panel solicitors by the insurers
- the Guidelines to be complied with by the Panel Solicitors in the conduct of claims dealt with under the Master Policy

5.5 The primary role of the Brokers to the Master Policy:

5.5.1 Arrange for the Master Policy to be underwritten by appropriate insurers.

5.5.2 Monitor the performance of insurers.

5.5.3 Accept notification of claims in accordance with the terms of the Master Policy.

5.5.4 Refer claims to the Master Policy insurers. The Brokers do not become directly involved in the conduct of individual claims.

5.5.5 Investigate complaints concerning the insurers’ conduct of claims.

The Brokers attend to other matters on an ad hoc basis.

5.6 The role of Insurers:

5.6.1 Assume agreed proportion of risk.

5.6.2 Handle claims.
6.6.3 Operate in accordance with the Master Policy Claims Handling Philosophy (text reproduced at section 9 of this Appendix).

6.6.4 Establish panel of solicitors in accordance with criteria agreed with Society and appoint a panel solicitor in cases of complex or high value claims or those in which proceedings are raised against a solicitor/practice.

6.6.5 Ensure panel solicitors' compliance with the Claims Handling Philosophy. Check progress reports submitted by panel solicitors to instructing insurers and conduct random audit of files.

6.6.6 Address complaints in accordance with formal complaints procedure in the event that an insured solicitor or claimant or claimant’s agent has a grievance in respect of the handling of a claim by insurers or panel solicitors. In the latter case, if a matter of client service or conduct is concerned it is understood that there is recourse to the Law Society of Scotland in accordance with the Society's standard complaints procedures.

Note: Since inception of the Master Policy Scheme the Master Policy has been co-insured. Therefore no single insurer underwrites 100% of risk or pays 100% of negligence claims. Moreover the various insurers have no liability for the proportion underwritten by their fellow co-insurers in any circumstances.

Claims are handled by the insurer with the largest percentage participation – the lead insurer. In the event of conflict of interest, claim will be handled by one of the co-insurers.

5.7 This division of roles and responsibilities clearly establishes responsibility and accountability for delivery of a Master Policy to solicitors in private practice and for the protection of their clients.

Section 6 of this Appendix briefly describes the basic parameters of cover under the Master Policy.

6. Master Policy Cover

This section is intended to highlight facts which are considered pertinent to this submission. It is not intended as a précis of policy cover.

6.1 The Master Policy is a policy of Professional Indemnity Insurance. See the description of Professional Indemnity Insurance at section 3 of this Appendix.

6.2 The Master Policy indemnifies solicitors in respect of claims arising out of breach of professional duty, not merely claims for negligence. The cover extends, for example, to certain instances of fraud/dishonesty on the part of solicitors or their staff.

6.3 The scope of cover under the Master Policy is wider than the cover provided under standard Professional Indemnity Insurance policies. Extensions are designed specifically to respond to the types of claim that may arise out of the conduct of solicitors' practices.

6.4 For the further protection of members of the profession and of the profession's clients, the Master Policy incorporates the following features:

- Automatic 'run-off' cover – this is continuing cover under the Master Policy (as long as the Master Policy continues on its current terms) on broadly the same terms and conditions as those applicable to a current/active solicitor's practice.
Note: Professional Indemnity Insurance operates on a 'claims made' basis which means that there is cover only for claims made during the period of the policy. If a professional practice ceases on account of e.g. retirement or insolvency, ordinarily there is no continuing professional indemnity insurance protection unless the practice or its representatives arrange 'run-off' cover on an ongoing basis. The Master Policy provides automatic 'run-off' cover.

- No right to avoid or repudiate — under the policy terms and conditions, insurers waive their rights to avoid providing cover for non-disclosure or misrepresentation.

Note: Policies of Professional Indemnity Insurance make it a 'condition precedent' to cover that claims are notified within strict time limits and failure to comply entitles the insurers to repudiate and avoid providing cover for the claim. The terms of the Master Policy prevent the insurers from taking such punitive action.

- Waiver of the excess (self-insured contribution) in the event an insured solicitor is insolvent at the time a claim against the solicitor is settled.

Note: Policies of Professional Indemnity Insurance are normally subject to an excess and the excess requires to be paid by the insured party at the stage the insurers have agreed settlement with the claimant and are actually paying the claim. In the event that the insured party has become insolvent prior to settlement of the claim, ordinarily that part of the claim will not be met by the insurers. The claimant may be unable to recover payment of that amount depending, for instance, on the funds available in the insured party's sequestration. The Master Policy prevents claimants finding themselves in that position by requiring the insurers to pay/ waive the excess in the event of a solicitor's insolvency.

6.5 The Master Policy operates as a protection for members of the public by guaranteeing that any claim validly established against a solicitor arising from that solicitor's negligence will be paid even if the solicitor's practice has ceased to exist and the solicitor is unable to pay. The level of cover is currently £1,500,000 for all solicitors' practices.

6.6 The majority of claims dealt with under the Master Policy are settled or otherwise resolved by negotiation and/or mediation without court proceedings.

7. How negligence claims are handled

7.1 It is necessary to distinguish between 'insured claims' and 'self-insured claims':

- 'self-insured claims' i.e. claims where the value of the claim (the total amount payable to the claimant, inclusive of the claimant's costs) is assessed by the insurers to be likely not to exceed the Self-Insured Amount ('excess') under the solicitor's Master Policy cover

- 'insured claims' i.e. claims where the value of the claim is assessed to be likely to exceed the excess under the solicitor's Master Policy cover

7.2 In the case of self-insured claims, the Master Policy insurers and solicitors appointed by the Master Policy insurers are not normally directly involved in the claim resolution process. Those claims will typically be resolved by negotiation between the solicitors concerned and the claimant or agent acting for the claimant. If the claim cannot be resolved by negotiation, court proceedings may be pursued by the claimant/claimant's agent.
7.3 In the case of insured claims, the Master Policy insurers will typically assume responsibility for the resolution of the claim. In cases of particular complexity, high value or involving litigation, the insurers will appoint a solicitor ('panel solicitor') to handle the claim on behalf of the insurers and the insured solicitor. In the majority of cases, such claims are resolved by negotiation with the claimant or, more usually, the claimant's agent.

7.4 Under the current Master Policy arrangements the levels of excess applicable to different sizes of solicitor's practice are currently:

<table>
<thead>
<tr>
<th>Size of solicitor's practice</th>
<th>Typical Self-Insured Amount ('excess')</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sole practitioner</td>
<td>£3,000</td>
</tr>
<tr>
<td>2 partner practice</td>
<td>£6,000</td>
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<tr>
<td>3 partner practice</td>
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<td>£42,000</td>
</tr>
<tr>
<td>15 partner practice</td>
<td>£45,000</td>
</tr>
</tbody>
</table>

Under the current Master Policy terms and conditions, the Self-Insured Amount applicable to Inadequate Professional Service (IPS) awards is double these Self-Insured Amount levels.

7.5 Currently, a negligence claim of up to £20,000 value against a solicitor's practice of 7 or more partners would typically be self-insured i.e. the Master Policy insurers would not normally be involved in handling the claim.

7.6 Currently, a negligence claim of up to £20,000 value against a solicitor's practice of 6 or fewer partners would be an insured claim i.e. the Master Policy insurers would be involved in handling the claim.

7.7 As the maximum level of IPS award is currently £5,000 and the minimum level of Self-Insured Amount applicable to IPS awards is currently £6,000, IPS awards are effectively excluded from Master Policy cover.

7.8 The provisions of the Bill state that the proposed claim resolution arrangements will apply only in relation to negligence claims up to £20,000. Applying the current Master Policy terms and conditions, negligence claims dealt with by the Commission as 'negligence complaints' would appear likely to be subject to a doubled Self-Insured Amount. On that basis, currently, firms with more than 3 partners would be self-insured in respect of such matters.
8. Extracts from relevant statutory provisions and Rules

The Solicitors (Scotland) Act 1980, Section 44 (1)

'The Council may make rules with the concurrence of the Lord President concerning indemnity for solicitors and incorporated practices and former solicitors against any class of professional liability, and the rules may for the purpose of providing such indemnity do all or any of the following things, namely—

(a) authorise or require the Society to establish and maintain a fund or funds;

(b) authorise or require the Society to take out and maintain insurance with any person permitted under the Insurance Companies Act 1974 to carry on liability insurance business or pecuniary loss insurance business;

(c) require solicitors or any specified class of solicitors and incorporated practices or any specified class thereof to take out and maintain insurance with any person permitted under the Insurance Companies Act 1974 to carry on liability insurance business or pecuniary loss insurance business.'

Solicitors (Scotland) Professional Indemnity Insurance Rules 2005 (Extracts)

The Society to

"take out and maintain with authorised insurers to be determined from time to time by the Council a master policy in terms to be approved by the Council to provide indemnity against such classes of professional liability as the Council may decide. The Council at its discretion may amend the terms of the master policy from time to time."

Every solicitor in private practice to

"be insured under the master policy and:

(a) to comply with the terms of the master policy and of any certificate of insurance issued to him thereunder; and

(b) to produce along with each application for a practising certificate a certificate from the brokers certifying that the solicitor in question is insured under the master policy for the practice year then commencing or the part thereof still to run as the case may be, or such other evidence as may be acceptable to the Council."
9. The Master Policy Claims Handling Philosophy

"Claims Handling"

Our (i.e. insurers') standards of integrity and service must be clearly demonstrated through:

- Speed of action.
- Sound and clear advice to the Insured Practice.
- Promptly and expertly establishing the circumstances and amount of the claim.
- Providing a clear and early response to the Third Party claim i.e. pay, reject, compromise.
- Keeping the Insured Practice continuously advised of progress.
- Pro-active positive claims handling. The litigation process to be a "last resort" and should only be followed after exhausting all other options to resolve the claim amicably including mediation.

The Positive Approach:

We (i.e. insurers) perceive this as:

"An attitude of mind committed to timely and cost effective resolution of claims" by:

- Identifying the desired result at the outset and at every key stage re-examining strategies and actions.
- Being pro-active in forcing the pace towards a satisfactory conclusion.
- Clearly setting out quantum and causation points to Claimants Solicitors where the claim is presented on an incorrect basis.
- Considering and evaluating the financial implications of litigation costs.
- Keeping files continually under review.
- Properly and fairly balancing the respective interests of Insurers, the Insured Practice and the Claimant.
- Actively promoting mediation where appropriate."
26 April 2006

Scottish Parliament
Justice 2 Committee
Edinburgh

By fax only

Dear Sirs,

I have enclosed as discussed my submission to the Justice 2 Committee on the Legal Profession and Legal aid Bill.

Please accept my apologies since the submission is not as coherent as I would have liked but discussions were ongoing with Cathy Jamieson’s office until the 21 April 2006 which would have had a significant impact on the content of this submission depending on the decision that the Minister took.

Yours faithfully

W Alexander
Submission to the Justice 2 Committee on the Legal Profession and Legal Aid Bill

My name is Bill Alexander; I have campaigned for commencement of Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 for 11 years. I have a Masters Degree in Law and have appeared in Court proceedings, Arbitration and Statutory Adjudication. I also have an interest in Pro Bono representation. I am a founder member of the Association of Commercial Attorneys and currently act as Secretary for this body.

In order to place my recommendations in context, I have outlined below the background to what I believe are some of the problems within the Justice System of Scotland.

Background

Every civilised country should have a justice system that acts in the best interests of the people. It should be impartial, and accessible by all of those who have need of it. Regrettably, the Scottish justice system does not meet this criteria, instead we have a legal services market that seeks to restrict access to justice whilst allowing the legal professions to exploit their statutory monopoly to generate substantial profits irrespective of the fact that this means an ever increasing number of people and businesses are being denied their human right to a fair hearing.

The legislative flaw that section 42 of the Bill seeks to correct has a much more significant role than may have been portrayed in that Section 32 of the Solicitors Scotland Act 1980 is the reason why access to justice has become too expensive for many people in Scotland. It has also historically been used as justification by the courts to prevent anyone who is not a solicitor trying to represent another party (excepting of course small claims and the first part of summary cause proceedings) in court. To realise the significance of this part of the 1980 Act it is imperative that an understanding of Scottish Civil Court procedure is grasped. All Scottish civil courts proceedings are instigated in a written form i.e. a writ. If you cannot afford a solicitor and you do not qualify for civil legal aid then you have to act on your own behalf as a party litigant. Unlike England you are not allowed any assistance by someone who is not a solicitor (a Mackenzie Friend). For someone, who has no legal knowledge, understanding of written pleadings or court procedure to try and represent themselves, it is a daunting and often impossible task and cannot, in any circumstances be regarded as a fair hearing under Article 6 of the Human Rights Act where there is “equality of arms”. The courts have determined that even lodging written defences has been classified as a form of writ and also the range of instances where it has been determined that a party has received payment for drafting or preparing a writ is quite considerable resulting in a situation where it is almost impossible for anyone who is not a solicitor to provide any assistance unless it is free of charge. Even a token payment of one pound to cover expenses would mean that a criminal offence had been committed. If you cannot lodge a writ or defences then you cannot
appear in court and you cannot represent a party even if that party had a genuine reason, like health problems, for wishing it.

If you examine the other parts of Section 32 it is interesting to note that an exception has been made in that civil servants who are not solicitors can draft and prepare writs and be paid for doing so. This would seem to indicate that the purpose of Section 32 is to restrict choice as opposed to maintaining standards. I have carried out extensive research and I can find no evidence that would support the necessity for this part of the Act ever to have been brought into being. It appears that the legal professions managed to persuade the Government of the day that the legislation was required without there ever having been any research carried out and without any consideration of the implications that would result from the creation of a de facto statutory monopoly.

I first notified the Justice Department about this problem with the 1980 Act over three years ago.

In 1990 both Houses of Parliament passed the Law Reform (Miscellaneous Provisions) (Scotland) Act with the intent of creating more choice for consumers in legal representation. An undertaking was given that no other parts of the Act would be commenced until Solicitor Advocates has been established in order that the Lord President would not be burdened too much. In 1995 Lord President Hope agreed with the Secretary of state for Scotland that Solicitor Advocates had “budded down” and that a date for commencement of Sections 25 to 29 of the Act should be 1 July 1996. Nothing happened, the Sections were never commenced and apparently no one knows why although the current head of Civil Justice Mrs. Brannan, who was working on the legislation in 1996, seems to be of the opinion that there were inadequate resources to allow the Regulations to be put in place. Lord Forsyth who was the Secretary of State for Scotland at the time has recently intimated his surprise that the Sections were never commenced. It would appear that none of the civil servants bothered to tell him at the time nor, for that matter, did any of them request additional resources. It would also appear that Lord Forsyth failed to check on the progress of the legislation.

It is interesting to note that the English equivalent legislation to Section 25 to 29 via the Courts and Legal Services Act 1990 was passed without any fuss or bother. A number of bodies have successfully applied and have been praised by Lord Chief Justice Woolf and the current Lord Chancellor to such an extent that procedures are underway for members of these bodies to become judges. Lord Woolf has publicly stated that these bodies are of benefit to the English legal system.

In 2002 the Association of Commercial Attorneys was formed to make an application under Sections 25 to 29. A request was made by them to the Scottish Executive for commencement of the Sections but this was refused with the position of the Executive being that there were “no plans to commence the Sections for the foreseeable future”. To this day no explanation has ever been given as to the reasons why. In 2003 I raised a petition at the Scottish Parliament for commencement of Sections 25 to 29 which received unanimous support from the Petitions Committee. After the 2003 Scottish
Parliament elections the new Justice Minister took the view that research was needed to consider whether or not Sections 25 to 29 should be commenced. The justification that was put forward to Parliament by Mike West was that commencement could be a burden for the courts. This suggestion had no factual basis and was, at best reckless, if not misleading. It is impossible for the commencement of Sections 25 to 29 to ever cause a burden for the Courts. At the time of preparing this submission the working group has still not published its report.

When I asked the Justice Department to provide evidence that commencement would be a burden for the courts I was told verbally by Colin Imrie, the head of the Access to Justice Division, that the view came from the Lord President’s office. Lord Cullen has refused to comment. In 2005 the Information Commissioner Kevin Dunlop substantially upheld my appeal for information to be released regarding Sections 25 to 29 but the Justice Department has now challenged this decision at the Court of Session. The reason why this information is so important is that any applications made under Sections 25 to 29 have to be considered by the Lord President. If, as suggested by the Justice Department, the Lord President had already formed a view that commencement was a burden then any application would be doomed to failure before it started. It is unconstitutional and inappropriate for a Judge to interfere with the settled will of Parliament.

The Justice Department finally ran out of excuses and at a meeting in January 2006 informed the Commercial Attorneys, the Patent Agents, and the Trade Mark Attorneys that Ministers had decided that the case was made for commencement of Sections 25 to 29 but that commencement would not take place until the legislative defect in the 1980 Act was rectified. No reasons have ever been given to indicate what brought about this change of attitude but I am of the opinion that the Working Group simply failed to achieve its purpose which was to kill off Sections 25 to 29 for good. When pressed as to why reassurance could not be given to the bodies interested in these provisions by commencing Sections 25 to 29 immediately the Justice Department suggested that there might be another body who would make an application before the defect was corrected which would embarrass Ministers. To be blunt this is absurd, if, after three years of research the Justice Department cannot give details of the mysterious mischief making organisation, then I would suggest that none exists and it is simply yet another red herring to facilitate even more delay. It is worth noting that no timescale has actually been given by the Justice Department although Hugh Henry has intimated in a letter to Jo Swinson MP that commencement might take place in the spring of 2007 assuming the safe passage of the Legal Profession and Legal Aid Bill.

On the 28 March 2006 the Association of Commercial Attorneys wrote to the Justice Minister suggesting that a compromise could be reached where commencement could take place now but with a delay until the end of March 2007 before the legislation became law thereby addressing the concerns about premature applications but at the same time guaranteeing that entering into discussions over proposed Regulations would not be a waste of time. This suggestion was rejected as being inappropriate. No reason has been given as to why this would be inappropriate and no consideration seems to have been
given to the many people who would like to see more choice in legal representation as soon as possible.

It is my firm belief that commencement is extremely unlikely due to the impending Scottish Elections which will have the effect of delaying the process until 2008 at the earliest, assuming, of course, that the new Justice Minister is favourably inclined towards commencement. Taking into account the fact that there will inevitably be more consultation and evaluation, this will mean that the earliest that anyone will be able to appear in Court from a body that makes a successful application will be 2011 or 2012. It is now simply too late for Sections 25 to 29 to be of any real benefit to the people of Scotland.

Taking into account the lack of any evidence to substantiate the views of the Justice Department over the years in their arguments against commencement, is seems relatively clear that any organisation foolish enough to make an application would be unlikely to ever get a fair hearing because of the bias that exists within the Justice Department.

Recommendations

If the points that I have made above are in any way accurate, then the problem regarding access to justice will not be addressed by the Legal Profession and Legal Aid Bill. All that will happen is that the legal professions will simply increase their charges to take into account the costs associated with the new regulatory body and the problems associated with lack of choice will increase with even more tragedies and hardship occurring.

Proposal 1

It is my submission that Section 32 of the 1980 Act is repealed in its entirety and that the Courts should allow a right of audience, which is a common law right and can be conferred immediately, to a new type of representative who can be called a “people’s attorney”. The criteria for the right to appear could be as follows:

(i) The person has to have a legal qualification or experience in court proceedings or at least demonstrate that they will be of assistance to the Court.

(ii) The person has to swear an oath as an officer of the Court and conduct his or herself in much the same way that Solicitors and Sheriff Officers do.

(iii) Professional Indemnity Insurance for at least twice the value of the case that is being heard. (This can be checked by the Sheriff Clerks quite easily).

The Courts will be more than capable of monitoring the situation and will be able to provide actual evidence to the Lord President about whether or not there are any problems. I have absolute faith in the ability of the judges to make this work because of the fact that they are currently able to accommodate party litigants who have no legal experience whatsoever. If a “people’s attorney” behaves inappropriately then their right
of audience would be withdrawn. If there are too many problems the facility can be withdrawn completely or restricted to those who have proven that they can appear in court in an appropriate manner.

There are people who have legal qualifications, who work in Citizens Advice, from Trade Unions all of whom could be suitable for this role. This would address the problem that still exists where someone who does not qualify for legal aid but cannot afford a solicitor or where they simply cannot get a solicitor to act is denied access to justice. This would be an interim solution until such time as the position over section 25 to 29 is resolved and whether or not any applications are successful. It will put the people of Scotland as a priority and ensure that no-one has to appear in court without representation, unless they want to. It will also address the request from the European Competition Commission that more choice is given in the Scottish legal services market. The Justice Department has no alternative proposals if Sections 25 to 29 are not commenced so this suggestion will allow time for them to develop policy on the basis of actual evidence rather than the unsubstantiated scaremongering that has been a substitute for reasoned evaluation over the years. The legal professions will remain as before, they simply will not have their monopoly and might be required to change their stance somewhat but I am sure they will survive. The Law Society will certainly argue that they would be in an unfair position having to have a complaints procedure and being burdened by legislation but I believe that the number of individuals who would apply to become people’s attorneys would be relatively small initially so that in the short term no real impact on the Law Society would occur. What will be provided is a degree of hope for those who have been abandoned by the justice system of Scotland. Restrictions on the Law Society could be removed if it was felt that there was a degree of unfairness towards solicitors whilst all the time bearing in mind how well established the legal professions are and how long they have benefitted from their monopoly.

If it transpires that the “people’s attorneys” are a success then Scotland will have the most open, people friendly, legal system in the world whilst at the same time ensuring that there is a sensible, practical, degree of protection for those who need access to justice and that their human rights are safeguarded.

Our great institutional writers like Hume and Stair who set out the foundations for Scots Law would be proud of their legacy and Scotland could be starting our second period of enlightenment where social inclusion and competition sit comfortably beside each other and where Scots Law is an example to the rest of the world.

I would be happy to give evidence to the Committee if it was felt that it would be of assistance.
Submission from James Clark on the Legal Profession and Legal Aid (Scotland) Bill

The following is a submission to the Justice 2 Committee in response to the call for evidence at Stage 1.

Attached is the 3 page letter from the Office of Fair Trading, dated December 2004 to Mr. Mackenzie, referred to therein. I believe it to be relevant that on page 3 the OFT declare the issue to be one of access to justice rather than a competition issue (hence why the OFT dropped their investigation into the operation of the Master Policy), which is why it is relevant to my submission to Justice 2 Committee.

Your Committee has been charged with the responsibility of assessing the detail of the merits of the above bill (“Stage 1 consideration”). I am disappointed to see that only the “usual suspects” have been invited to orally address your Committee. As eight of the thirteen parties so invited have direct links with the Law Society of Scotland, does this indicate an “in-built” bias in favour of the Law Society that will attend to your assessment of the proposed legislation? It is my concern that the permanent executive/parliament staff whose duty it is to serve the committee may have just such an in-built bias, and that this is reflected in the list of those invited to address the committee. Given the level of public response to the consultation paper “Reforming complaints handling, building consumer confidence”, which we are informed was second only to that induced by the consultation regarding the smoking ban in public spaces, this narrow and restricted list of parties mostly related to, or earning a living within the legal services industry, is a cause for concern.

To my mind the area of greatest concern that requires to be addressed by the proposed legislative changes, is that of the Monopoly inherent in the current structure. The proposed bill attempts to address the issue of the monopoly provision of insurance through the ‘Master Policy’ Professional Indemnity insurance scheme arranged by the Law Society of Scotland, by granting oversight of its operation to the proposed new independent complaints handling body. In my view, this is the absolute bare minimum that is required and is an essential feature of the proposed changes.

The ‘Master Policy’ is a monopoly by reason of the fact that it is compulsory for all solicitors to have their ‘Master Policy’ insurance paid up, in advance of their being granted renewal of their annual practicing certificate by the Law Society of Scotland.

I am informed that the ‘Master Policy’ covers all solicitors for the first £1,500,000 of any claim made against any practicing solicitor in Scotland, and that many firms carry additional insurance for liabilities over and above this sum. For the purposes of the new complaints procedure and the independent complaints handling body, the new body’s ability to award compensation will be of the order of £10,000 to £20,000 pounds or so, and should clients have suffered losses in excess of such a sum, then they would, in any event, require to raise proceedings in the Sheriff Court or the Court of Session.

With this in mind, and given that the Office of Fair Trading (“OFT”) has had the issue of the potential restriction “raised repeatedly by users of legal services in Scotland”, it being alleged to this official body that the “mutual interest of Scottish solicitors’ in avoiding claims on the Master Policy might be resulting in a refusal to supply services where the client required assistance in acting against another solicitor.”. I was therefore greatly surprised that the OFT was not one of the parties invited to address your Committee on this subject (reference is hereby made to the letter to Mr. S. Mackenzie from the OFT, reproduced herewith as production A).

While I was not one of those who previously contacted the OFT in this regard, I concur wholly with the expressed concerns that this monopoly insurance structure acts as a disincentive to solicitors taking on, and more importantly, vigorously pursuing the interests of any client, when acting against another solicitor and fellow insured party under their own mutual insurance policy. From the experience of my own family, the operation of this master policy is
contrary to the interests of the public; contrary to the principal incorporated in the Human Right Act 1998 and E.C.H.R. (of access to a fair hearing); and operates in favour of the interests of the Law Society of Scotland’s membership and their single insurance policy, by reason of forcing those who are denied qualified and skilled legal representation to become ‘Party Litigants’ in order to pursue their just cause, with all the inherent disadvantages of the lack of skill or knowledge of a lay person attempting to operate within the highly daunting “technical” and “specialised” field of Court procedures (I refer you to the “Annotated Rules of the Court of Session”, amounting to some 1,200 odd pages of fine print, published by W. Green, for an idea of the magnitude of such a challenge to a lay person), while facing the opposition of the full compliment of experience and specialist knowledge, Senior Counsel et al, of the said indemnity insurance policy’s legal defence resources in Court.

I would further argue that the monopoly insurance policy also removes an incentive towards best practice within the profession as a whole, by removing a “price pressure” to improve overall attention to their client care by the individual solicitor, or firm, and that this is also a lack of an incentive towards “early settlement” of disputes directly at the instance of the actual legal firm/client. The price pressure would come from the increased premiums of those firms / practicing solicitors who lost their “no claims” bonuses, and would act as a reward and incentive to the best and most diligent members of the profession who would be offered lower premiums (the concept is easily analogous to that of the motor car drivers insurance system, and the Law Society of Scotland would still be able to require proof annually of a current insurance certificate, prior to issuing the practicing certificate, in the same way that the Car registration/road tax disc is only provided for a car upon production of a current M.O.T. and insurance certificate, by the registering person).

My preference would be for the termination of the ‘Master Policy’ monopoly arrangements (on the basis that these arrangements are ultra vires the E.C.H.R. and Human Rights Act 1998), and that these arrangements be replaced with the requirement that all solicitors provide evidence that they have arranged the same minimum level of indemnity cover for the year (£1,500,000), from a diverse number of sources, thereby removing the potential restriction to access to justice (a fair hearing) in Scotland as described above, as has been “raised repeatedly by users of legal services in Scotland” with the OFT. The consumers of legal services would thereby be able to find a firm of solicitors who are insured by a different insurance underwriter/provider from that of the firm of solicitors against whom they have a genuine complaint. In instances where there are no legal grounds for action/complaint, the consumer should have greater confidence in such negative advice received from a legal firm, where that legal firm does not share the exact same insurance policy as the firm against whom the consumer has a grievance/complaint (i.e. when there is an absence of such a blatant, inherent, conflict of interest).

The new Independent Complaints Handling Body

I remain of the firm view that the entire complaints handling process should commence through this body acting as a “single gateway”, and that the nature and classification of the complaint should be assessed by this body. Thereafter, should the Committee believe that “Conduct” complaints should continue to be heard by the Scottish Solicitors’ Discipline Tribunal, in order to have a hope of enjoying the public confidence that has been the stated aim of the consultation process (and one might suggest, an imperative in a democracy, given its foundation upon access to a fair hearing under the law), the process of the handling of all complaints into “conduct” must fall under the oversight and supervision of the new independent Complaints Body. By such oversight, the former practice of the misrepresentation/misinterpretation of the consumer’s complaint (including the wholesale reinterpretation, and substantial omission, of the factual basis of the actual complaint raised by the dissatisfied client) as has occurred to my certain knowledge in at least two cases under the old “Reporter” system, should be able to be properly, and openly, addressed.

The response of the Law Society of Scotland to the complaints that its ‘Reporter’ system was not working properly (that the “independent” reporters did their best to sort out the core elements of the complaint from what were rather jumbled and muddled submissions), has
been utterly inadequate. The perception remains with those who have endured the previous system, that there was a wilful misinterpretation and misunderstanding of what a former client’s complaint was truly about. In one instance that I know of (where there was a complaint about substantial negligence on the part of the solicitor instructed (verging on *culpa lata*), which caused a pecuniary loss to the client, eventually leading to the former client becoming a party litigant in their own cause to correct the resultant “errors”) the client’s complaint about gross negligence of the solicitor was represented by the Law Society’s ‘Reporter’ as a complaint about a lack of timely response to phone calls and letters, and therefore classified as a “service” complaint. The perception persists that the sole beneficiary of this misreporting (the answer to ‘Qui bono est?’) was the maintenance of the low cost of professional indemnity insurance premiums arranged through the Law Society of Scotland for its membership (as compared to standard rates for indemnity cover for other trades/professions).

Let me assure the Committee that this is no isolated incidence of ‘miscomprehension’ or ‘misunderstanding’. The regularity of the occurrence of such misrepresentation and/or misunderstanding of the complaints made by the consumers of legal services as described above, and the resultant perception in the mind of the public, was (among other issues) what led to the public’s response to the consultation “Reforming complaints handling, building consumer confidence” being so large, and coming down so overwhelmingly against ‘complaints handling’ remaining in the hands of the Law Society of Scotland (91% of the public respondents - reference Table 2, on page 23 of the excellent “Analysis of written consultation responses” report by the Scottish Executive).

I urge the Committee to widen its panel of parties/bodies invited to give oral evidence to include ‘Which?’ and the OFT. Thereby broadening the representations of “consumer” interests and the structural issues, upon which you will be forming your views in regard to this legislation. Further, I would urge you to be wary of the Law Society of Scotland’s attempts to portray the consequences of this legislation as being to have an enormously and disproportionately negative impact upon small rural practices. It should be noted that all such rural practices require to instruct an Edinburgh practice when acting on behalf of a client with regard to a Court of Session action (therefore all the larger more serious cases and appeals). Further, in my experience, and from discussions with other parties who have had an appalling service and apparently negligent representation by legal services firms, the greater part of the problem lies with the supposedly sophisticated, big, city practices, who are closer to the centres of authority and wield greater influence within the Law Society of Scotland.
Dear Mr Mackenzie,

OFT Case Closure: Master Policy for Professional Indemnity Insurance of the Law Society of Scotland.

As you are aware, the Office of Fair Trading ("OFT") has been investigating whether the Law Society of Scotland's ("LSS") rule that requires solicitors to purchase professional indemnity insurance ("PIL") through the Master Policy is contrary to the Competition Act 1998 ("CA98"). In particular, our investigation has considered whether the rule is an arrangement that prevents, restricts or distorts competition, in the market for solicitors' services. Following our investigation of this matter, we have decided to close the case. A summary of our investigation and the reasons for our decision not to proceed are set out below. However, we remain concerned that the current arrangements for handling complaints against solicitors in Scotland appear not to have the confidence of the public.

Summary

We opened this case in May 2004 on the basis that we had reasonable grounds to suspect a restriction on competition from the inability of Scottish solicitors to choose their own PIL provider and perhaps to seek PIL on better terms than are offered by the Master Policy. In particular, we considered whether the Master Policy might be reducing the capacity for solicitors with a good claims record to benefit from the competitive advantage inherent in a lower premium.

A further potential restriction which has been raised repeatedly by users of legal services in Scotland, is that the alleged mutual interest of Scottish solicitors in avoiding claims on the Master Policy might be resulting in a refusal to supply services where the client required assistance in acting against another solicitor.

In addition, we considered whether, given the operation of less restrictive arrangements for PIL in other jurisdictions such as England and Wales, the decision by the LSS to require all solicitors in
Scotland to obtain their PII through the Master Policy might be considered an unnecessary restriction on competition between solicitors in Scotland.

**Competition and the level of premium**

We have considered the Master Policy guidelines and premium documentation as provided by the LSS and are satisfied that under current arrangements PII premiums do take account of the relative risk associated with different sized legal firms, and the expertise provided by the number of partners within the firm. It appears that bigger practices pay more in premiums and those practices with a high ratio of partners to non-partners pay less than practices with very few partners (and therefore more limited supervision or expertise). Further, and most importantly, a discount or penalty is included in the calculation of premiums depending on the practice’s claims record. Thus firms with a good claims history are eligible to receive a premium discount, whereas firms with a poor claims history would pay a higher premium.

On the basis of this information, we have concluded that it is unlikely, given the current arrangements for the setting of premium, that there is strong and compelling evidence that these arrangements appreciably restrict competition between individual solicitors’ firms by denying them the freedom to seek insurance outside of the Master Policy. We have noted, in the course of the investigation, received representation from any solicitors’ firm alleging that its ability to compete is restricted by the current arrangements.

We noted from the information provided, that the LSS has in the past regularly reviewed and increased the impact of a firm’s claims record on the level of premium payable under the Master Policy. The LSS has also expressed an intention to continue reviewing this into the future. The OFT has encouraged the LSS to continue to do this to ensure that the claims record of a solicitors’ firm is adequately reflected when premiums are set under the Master Policy.

**Refusal by solicitors to provide services.**

We have considered whether the alleged mutual interest of Scottish solicitors’ in avoiding claims on the Master Policy might be resulting in a refusal to supply services where the client required assistance in acting against another solicitor. This issue was raised with us by a number of complainants. While there is evidence to suggest that some potential clients have experienced difficulty in finding a solicitor to represent them, we do not have sufficient evidence to prove that the alleged mutual interest of Scottish solicitors in avoiding claims under the Master Policy is a significant factor in a solicitor’s decision not to represent a client. In the absence of such evidence we consider that the difficulties experienced by some legal services clients in gaining representation, ought to be considered as an access to justice issue and not a competition issue.

**Alternative PII arrangements to those of the Master Policy.**

Finally, we considered whether the decision to maintain in force a Master Policy and to require all solicitors to obtain their PII cover under the policy was restrictive of competition, where alternative arrangements, less restrictive of the freedom of solicitors to choose how best to obtain PII cover, were successfully operated in other jurisdictions. In particular, we considered the PII arrangements in operation at the Law Society of England and Wales. In this regard, we considered that under current arrangements there may be a benefit to the LSS, its members and their clients, of
collective bargaining by the professional body to secure uniform and affordable PI for Scottish solicitors. It was not clear, given the scale of the profession in Scotland, that the apparent benefits of the England and Wales arrangements, in terms of greater freedom to solicitors to seek insurance directly from an approved pool of insurers, could similarly be achieved in the context of solicitors in Scotland. We did not, therefore, consider that there is strong and compelling evidence that the decision by the LSS to maintain in force the Master Policy arrangements had the effect of preventing restricting or distorting competition. We note that the LSS has reviewed on a number of occasions the appropriateness of arrangements for PI and we have encouraged it to continue to conduct such reviews regularly with a view to ensuring that arrangements in place are those that minimise restriction to competition while ensuring that solicitors have adequate PI cover.

Consumer concerns about arrangements for complaints and redress

A remaining concern (although not one that appears to be directly related to competition at present), is the consumer disquiet in Scotland in relation to the operation of the Master Policy, and of complaints handling and consumer redress more generally, that was apparent in representations that were made to OFT in the course of this investigation. To serve the public interest effectively, the effect of the Master Policy on the handling of complaints against solicitors needs to be viewed with trust by the public. Questions have been raised by a number of complainants about whether there is sufficient distance between the LSS and the brokers and insurers, which highlight the importance to consumers of robust and independent systems of redress. This is a major theme of the recently published Clementi report that makes recommendations about the arrangements for complaints handling and redress in relation to the legal profession in England and Wales.

As you may be aware, the OFT has a role under the Enterprise Act 2002 to provide general advice and promote competition. We will be making representations to the Scottish Executive about the implications of the Clementi report for users of legal services in Scotland. Either by responding to the forthcoming Scottish Executive consultation on complaints or otherwise, we will be recommending to the Scottish Executive that in considering future arrangements for complaints handling and redress in Scotland it has full regard to the recommendations in the Clementi report.

While we understand the closure of this investigation may be a disappointment to you, we believe this is the best way forward given our competition remit.

Thank you for your cooperation in this matter, and for bringing your concerns to our attention.

1 Review of the Regulatory Framework for Legal Services in England and Wales: Final Report; published 16 December 2004
Submission from Neil J. McKechnie on the Legal Profession and Legal Aid (Scotland) Bill

Firstly, my apologies for the shortness of my response but I have just become aware of the Bill. I thought I may have been contacted regards providing a submission, as I have already previously contributed to the Justice 1 Committee.

However, I am pleased to have the opportunity now.

My main contribution to the Bill concerns the regulation of Legal Profession part.

I have read through the whole Bill and it should be obvious to any unbiased individual who has an understanding of the way that the Law Society of Scotland have conducted their business with regards to complaints against their members that this proposal will not only fail to reform the complaints handling process for the better but that in fact it will further infringe the rights of individuals who are disadvantaged by the actions of dishonest solicitors.

The Bill has to start off with the premise that solicitors are in a unique position within society whereby they are above any other individual, are required to have a character above reproach and their clients are in many ways at the mercy of their solicitor, as at present the biggest problem is that the Law Society of Scotland because they are ‘above the law’ will attempt to limit the liability of their members.

I have suffered personally from the actions of a dishonest solicitor. Then suffered further because the Law Society of Scotland failed to prosecute him after he broke the Solicitor Scotland Act 1980.

Then when I complained against their member they have knowingly misrepresented my heads of complaint by adjusting the wording, failed to accept some of my heads of complaint and now they are asking me to provide their member with my information to help him defend himself against me.

This, after their member has disposed of my Client File, which is against the Solicitors Scotland Act 1980. Which they are choosing to ignore.

This is an organisation in my case who have shown that they are indeed not showing fairness in the dealings of the complaints process and I am inclined to believe that my case is not in isolation.

Above the Law, as the Law Society of Scotland have kept a £2000 plus sum from me for a number of years whilst also having records showing that they did not own that money and had my name and address.

Why did they keep this money from me and did not inform me? Was it because if they had informed me that they were holding my money it would have alerted me to the fact that their member had committed an offence against me? Or, was it that if I had not claimed the money that was rightfully mine that they would have consumed it into their funds? Or, some other reason? I will leave you to draw your own conclusions?

When I reported that a suspected fraud had been committed by the Law Society of Scotland to the Fraud police. I was told that the police could not do anything about it as the Law Society of Scotland were above the law.

This situation is still ongoing and the Law Society are still refusing me information I need to properly defend my case.

Now to the Bill in more detail.

It would seem that the Bill has been drafted by lawyers or certainly in conjunction with the Law Society of Scotland as instead of reforming their role, which they have already shown by
their actions that they are unfit to fulfill, the Bill is actually strengthening the position of the Law Society and will fail individual clients of solicitors.

There are basic parts of the Bill which maintain the status quo of the old regime.

The influence of the Law Society of Scotland or at least lawyers is evident in the use of ‘complainer’ to describe the person who puts in a complaint against a solicitor.

It may interest you to know that other words from a thesaurus for 'complainer' are whiner, moaner, faultfinder, knocker, nit-picker and whinger.

The definition of complain is; to say something that is wrong or unsatisfactory.

Is this really the wording you want to convey?

The word ‘complainer’ should be removed and replaced with something more appropriate.

Why not use either of; claimant, questioner, petitioner or pursuer for the dissatisfied client and defendant for the solicitor?

There are a number of other issues with the wording in the Bill that confers a legal bias in favour of the Law Society of Scotland that will ultimately mean that if this Bill ever became an Act and was tested, as I am sure it will, it will be found that instead of reducing the powers of the Law Society of Scotland to prevent the abuse of their power in favour of their member it will do the opposite.

Very briefly, Section 4(2) Strike - 'consult and co-operate' and substitute with "liase".

Section 7(a) Strike - 'sufficiently acceptable' and substitute with "sufficient".

Section 32 - If necessary peoples names have been redacted. What have reports on trends got to do with defamation.

The main reason I believe that this bill is not fit for purpose and the Law Society know this and have a vested interest in seeing the reform of their profession fail, so that any future ‘tinkering in their affairs’ as they might see it is avoided in the futures and the status quo is preserved.

The Law Society of Scotland department who deal with complaints at the moment in many cases cannot discern between a inadequate professional service complaint against one of their members and a misconduct complaint.

As I understand it that is why when they are formulating complaints at the beginning of the process that they basically include all of the pursuers heads of complaints under both categories of complaint.

Thereby, as the nature of the evidence unfolds in the investigation of the complaints it can become clear that what initially started as an obvious case of service the consequences of such can result in serious misconduct and vice versa.

The arrangements in this Bill does not efficiently nor satisfactorily deal with this fact and three things would arise as a result.

The pursuer would be disenfranchised as the process would grind to a halt and they would not get a fair dealing of their complaint.

The costs of the new system will quickly spiral.

The delays in dealing with each pursuers complaint would increase.

The above state of affairs will create a climate where the rights of the pursuer will not be upheld and the Law Society of Scotland may say ‘I told you so!’
A system has to be set up to allow the complaints to migrate between one category of complaint to another as the evidence is addressed.

It has to be simplified and it has to be slick in operation.

The other important consideration that has to be taken into consideration is that the Law Society of Scotland is still representing it’s member solicitors and the system will only work if there is goodwill on behalf of the Law Society of Scotland.

I think as such there is still a major question here of conflict of interest.

It is essential then that the only way in which this reform is going to satisfy all of the original aims of the executive is if it is solely managed by the one body and that that body is made superior to the Law Society of Scotland in terms of reaching conclusions about a case.

The Law Society of Scotland’s role would not diminish but would exponentially increase to a body that serves it members interests with respect to the demands of the profession and so it can concentrate it’s efforts in helping their members to raise their standards and to award solicitors for good practice and to similarly make sure that solicitors who have been found guilty by the new body are punished accordingly.

I have laid out my suggestions in my previous submissions to the Justice 1 Committee, which include a Solicitors Charter and the opportunity for customers to ask their solicitor to show them their disciplinary record (which if he was honest may have several accolades and a high rating) Or (where he had been found guilty would show that he had a low rating against the different classifications of complaint).

This would allow the customers to make an educated decision as to whether they wanted to enter into an agreement with a solicitor.

This rating system could similarly be adopted for professional competence for each solicitor in an area of expertise and their level of CPD and for example a category for satisfied customers.

A solicitor lets remember who as I understand it under present rules can charge their customer any fee they see fit.

This would weed out the incompetent and bad solicitors while at the same time in a short space of time would elevate the profession and the standing and authority of the Law Society of Scotland ensuring that they would gain a good reputation from solicitors and the public alike.

To conclude, my feeling is that this Bill is a not a serious attempt to reform and that if it was passed would soon prove to have the opposite effect.

I think that the public reaction to such a Bill becoming an Act even after further adjustment by the Parliament would result in political suicide and a failure to grasp the core of what is required.

The only solution as I see it now is to abandon this Bill almost in it’s entirety, save a few minor parts and resubmit a Bill that will have the support and will protect the majority of people instead of the minority.

Thank you for the opportunity to give of my views, they are honestly held views that are in no way intended to be against any individual or organisation.

I am happy for my submission to be made public including my name and address and I see no need for any of my submission to be redacted.
I would be happy to appear before the Committee to put forward my view and may yet require further Ministerial assistance with my specific case.
Herewith my written SUBMISSION to Justice 2 Committee, The Scottish Parliament, Holyrood, Edinburgh, given 18th April 2006, subject: “The Legal Profession And Legal Aid (Scotland) Bill.”

If it is your Committee’s intention to show even a semblance of parity of opportunity to influence it’s perception and understanding of the real issues involved in this Bill, having regard to the stated aim of gaining Public (ie.Client) Trust with your reforms, it would seem to me, and I suggest to your electorate the wider public, also, you will require to be seen to receive oral representations from persons other than those on your ‘official’ list (90% of whom are only professionally concerned with the continuing prosperity and welfare of the Legal Profession, their client base) otherwise you will be seen as being guilty of showing extreme bias towards the legal profession. Therefore my **first** contention in this Submission is, that I should be invited to participate in oral evidence-taking for stage one of the above named Bill, scheduled to commence 25th April, and continuing until 23 May 2006, because I have **invaluable personal experience and knowledge** from a **customer’s point of view** of how this present system has worked, is working, over 20 years, and would be able through these experiences, to represent many of the multiple dissatisfactions, and the actuality of negative experiences, **endured by so many clients (as can be devined from the exceptionally large number of Respondees to the Public consultation of last May = 504)** received from amongst the vast numbers of your legally mistrusting, general public, who, if normal statistical ratios are applied to such a response figure, must be considered to number several hundreds of thousands of the population, as a whole.

**NB.** The following is not a request to the Justice 2 Committee to take note of my particular, personal, legal problems, nor is it intended to ever discuss same with you. It is given merely as a **Summary of the credentials which make me a suitable proponent to give Oral submission to your Committee:**

I am a seventy year old woman, who has **invaluable experience and knowledge** about the workings and effects on a client, of the present legal complaints system, which is under scrutiny. Having been refused legal representation (although I personally contacted/appealed to at least 15 top Edinburgh ‘family’ law firms, in an effort to find one who would
represent me some four to five years ago), and being refused legal assistance under the much vaunted Law Society's 'Trouble-shooter' scheme, (refused as "not suitable" for same). I also experienced refusal of Legal Aid, when applied for, after I had, through the 'influence' of a friend, finally obtained reluctant legal representation for five weeks, in March/April 2003; I was refused, despite having had my Pension stopped for four years, by a Court Appointed Legally qualified, Fiduciary Agent, being practically penniless as a result. So I was then forced into the position of becoming a Party Litigant, in order to try to rectify an appalling legal mess. Since becoming my own solicitor and advocate, in 2003, my situation has improved beyond recognition, although I have had to fight the whole way through Court in order to get justice. I now have, ongoing and well advanced, a Case against the SIX individuals, four of whom are members of the Legal Fraternity, who have caused the financial mess now pertaining in this £2,000,000+ Estate (sum realised after death in Dec.1985), which I perceive as having been wrought by initial Fraud, then illegal cover-up for over 20 years (and is, crucially, very relevant as an example of the 'workings'/'influence' of the Law Society of Scotland's "Master Policy" Indemnity Insurance Scheme, involving, as it does, a claim for many £millions in compensation and reparation).

You can therefore be entirely satisfied that I am one of the "other thorns in our flesh" referred to by the Chief Executive, Douglas Mill, of the Law Society of Scotland, in that infamous internal memo, written in June 2001.

It is no light matter being allowed to go forward as Party Litigant; Their Lordships and Ladyships have to scrutinise one's Summons along with the evidence produced, and give their permission to proceed ... thus you can be assured, even at my great age, I am capable of eloquent and rational argument, which is kept short and to the point.

I have already taken part in the Justice 1 Committee's 12th Report, of 2002, and would refer you all on the Justice 2 Committee, to: pages 3 and 56 thereof. I would also refer you to my Response - with it's additional supporting evidence incorporated, number 489 - to the Minister for Justice, Cathy Jamieson's Public Consultation of May 2005(& should be easily retrieved from: Elaine Hamilton, Legal Services Policy Team).

There have been a further two letters, addressed to ALL 129 MSP's and therefore all members of Justice 2 Committee will have been in receipt of these, dated 16th December, 2005 with 4 page attachment, (which includes
the Law Society Internal Memo, referred to above) & on 15th March 2006, about both of which, I would like all on J. Ctte 2 to be reminded/referred.

The Law Society of Scotland already have access to yourselves and your fellow MSP's, at Holyrood, via an unrepresentatively large pressure grouping presence, in the form of: -

a). MSP's with a legal professional background, or connection, who number at least one third of the 129 total.
b). Besides this number, the Scottish Executive has in it's 'employ' - at great public expense - at least 174 Legal Professionals, within it's ranks of highly paid and securely pension-assured-insured, public servants, who will all have easy and unlimited access to most of the 129 MSP's currently supposed to be representing the interests of the ordinary 'voting' Scottish Public at Holyrood. I think my point is well made, on inbuilt bias.

Besides the invaluable contribution I can make to clarifying / exposing unhelpful present legal practices, and how they effect the practical daily lives of your constituents, by making access to Justice for all our citizens a failed Human Rights & ECHR issue, I would seek to address Justice 2 Committee on why it is that I (along with most of your voting public) see it as an essential part of this Bill, that oversight authority over "Conduct" complaints should rest with the proposed New Independent Complaints-Handling Body.

Also, I seek to be given the opportunity to redress and give voice to, from personal experience and knowledge, the perceived failings of the present 'Reporter' system, currently in use and much praised by, those 'obviously wholly unbiased advices and views' given over the past few years to your Justice Committees 1 & 2, and again, presently, by members of the Law Society of Scotland, whose job it is to administer same.

And I would wish to have the opportunity to address you about the imperative need for the proposed new, independent complaints-handling committee, to also be given oversight powers with regard to the operation of the Master Policy, Indemnity Insurance (in the event that the present structure of total adherence to the Master Policy Indemnity Insurance Scheme by the profession, is not declared "Ultra Vires" and contrary to the 1998 Human Rights Act), - and to answer any questions arising.
Scottish Parliament
Justice 2 Committee
Edinburgh
EH99 1SP

We wish to give evidence to Justice 2 Committee on the Legal Profession and Legal Aid (Scotland) Bill on Tuesday 9th May 2006

Dear Convener,

here is a situation 100 times worse than the Shirley McKie fiasco which Executive Departments are involved in yet again.

No 1) Legal Profession - We engaged Solicitors who colluded to defraud us with purported defence agents over a period from 1998 - present. This was duly reported to the Law Society of Scotland and case manager David Dickson confirmed in writing this was a matter for Strathclyde Police who to date have lied to protect corruption within the Legal Profession. This incriminates not only Strathclyde Police with Human Rights Violations against us but the Scottish Executive via the First Ministers Crimestoppers which states all are subject to Criminal Investigations. This in our situation is sadly not the case. The Law Society of Scotland also stress when being made aware of Criminality by one of their members they report it right away to the Crown. A Case Managers letter to us in August 1999 confirms this to be inaccurate. This was also confirmed to us by a Strathclyde detective who stated to us that the Law Society of Scotland was fully aware of the use of any parties name without their written authority was an act of criminality. The Solicitors in question used peoples names without authority in different actions against us. They repeated this after being reported in 1999 to the Law Society for the same unlawful actions. Using the said parties name illegally exactly one year after being first reported shows their complete disregard for the Police, The Court and Scottish Law. Hence the reason the Law Society of Scotland and Strathclyde Police have attempted to cover this up. This I can assure you will be a futile exercise. At present HMI are investigating Strathclyde Polices' actions regarding our allegations against the Officers who have been presented with evidence of Criminality and lied that they had conducted investigations. This can be proved 100% as the witnesses supplied to them can confirm that they have never been interviewed by anyone from Strathclyde Police. Why HMI have failed to engage another Police Force with immediate effect will come to light in due course as Strathclyde Police Freedom of Information Office have confirmed that the only statements they hold are from us, the complainee, and not any from any witnesses they have been supplied with. This Police Force have also lied to our MSP that Criminal investigations did take place. If HMI fail to instruct another Police Force to investigate our allegations this would allow us the right to approach Justice Minister who with the First Minister was fully aware of our situation and this is not Human error. These parties have highlighted in Parliament the McKie Case was Human Error - this cannot be considered as the evidence is conclusive of FRAUD by many wards of Court. Therefore self regulation must be taken off of the Law Society and Sheriffs and Judges must be held accountable for their actions so to ensure the public are protected.

No 2) Legal Aid Scotland Bill - This has been an ECHR compliance issue that the Executive have
failed to adopt. The reasons being that Access to Justice and Legal Aid was near impossible to obtain without having a Solicitor. The Legal Services Ombudsman asked the executive to answer in detail why as many people could not obtain legal representation. The answer to this we have provided via No 1. Also we attended an appeal in Court Of Session for the last four years without Legal representation and Legal Aid which is a violation of our Human Rights. This was so the Law Society members would not be exposed for FRAUD. This has resulted in our home having to be sold to cover costs which should have been covered by Legal Aid further highlighting the Executives failure in their duties to the populace. We feel the Legal Aid (Scotland) Bill is an issue that the Scottish Executive can no longer deny the populace considering this bill should have been passed several years ago highlights the Executives part in denying the populace of Scotland access to justice. In our opinion this too little too late for the public that have suffered to date. Is the Executive wanting to start afresh and forget about all the injured parties who have suffered the chance to have legal aid and legal representation which represents Equality in Arms in a Court of Appeal.

We would fully accept an invite to place our evidence before the Justice 2 Committee on May 9th 2006 both orally and documentary but we feel the Justice 2 Committee who have Law Society members in their midst will remove our submission as it is damaging to the Law Society of Scotland and many Executive Departments, mainly Strathclyde Police who have failed in their duties by allowing a cover up of our situation. We have discussed our case openly with Ian Mckie and have informed him of a Human Rights Action on our behalf will be lodged in due course. This will ensure the Executive cannot cover up the malice and corruption we have had to endure by Executive employees who have taken it upon themselves to cover for Law Society members involved in Criminality.

If you do find favour and allow us to present evidence on May 9th perhaps the Executive will then be seen to be open, fair and accountable in this investigation. Time will tell if Justice 2 is acting in the populaces best interests or just a smoke screen which will result in you can fool some of the people some of the time but you can’t fool all of the people all of the time.

We await your response.

Yours Sincerely,

Mr and Mrs S Davidson.

This will be used as a production in our forthcoming Human Rights action.

CC: Her Majesty's Inspectorate (Malcolm R Dickson M A)
Legal Profession and Legal Aid (Scotland) Bill

Summary of evidence from Mike Lloyd

1. Introduction
2. Investigation of Professional Misconduct by the Law Society of Scotland
   2.1. Statistical evidence of investigation failure rates
   2.2. Documentary Evidence
   2.3. Eyewitness Evidence
   2.4. Case Study Evidence
3. Evidence to the Justice 1 Committee 2001-2002
4. Conclusion
5. Annotated Bibliography
1. Introduction

I write to you as someone who has amassed comprehensive information on our legal profession's mistreatment of legal consumers and, in particular, profound investigative failings by the Law Society of Scotland in its statutory duty to investigate professional misconduct. I have appeared in many national newspapers, legal profession journals and my current legal publications are read globally, every hour of every day.

It is my intention to demonstrate to the Justice Committee that the Law Society of Scotland, for a variety of reasons, simply cannot be trusted to properly investigate misconduct allegations levelled against solicitors. In support of this contention I would ask the committee to consider the following evidence:

1. Statistical Evidence – from Scottish Legal Service Ombudsman annual reports
2. Documentary Evidence – the Law Society Internal Memo
3. Eyewitness Evidence – consideration of evidence to the former Justice 1 Committee 2001-2002 and evidence provided in response to this Bill
4. Case Study Evidence – from 3 Law Society investigations, 2 Scottish Legal Service Ombudsman opinions and a decision by the Scottish Solicitors Discipline Tribunal
5. Evidence provided to the former Justice 1 Committee 2001-2002 by the Law Society of Scotland and Marsh UK

1 www.SLSO.org.uk/reports.html
2 http://www.scottish.parliament.uk/business/committees/historic/justice1/inquiries-02/lps-pdfs/lps-024.pdf - Internal memo is on page 9
3 http://www.scottish.parliament.uk/business/committees/historic/justice1/inquiries-02/just1-lps-index.htm
2. Investigation of Professional Misconduct by the Law Society of Scotland

2.1. Statistical evidence of investigation failure rates

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Failure to properly investigate</th>
<th>Total refusal to investigate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>65%</td>
<td>36%</td>
</tr>
<tr>
<td>2004</td>
<td>42%</td>
<td>20%</td>
</tr>
<tr>
<td>2003</td>
<td>50%</td>
<td>20%</td>
</tr>
<tr>
<td>2002</td>
<td>66%</td>
<td>20%</td>
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<tr>
<td>2001</td>
<td>51%</td>
<td>28%</td>
</tr>
<tr>
<td>2000</td>
<td>55%</td>
<td>55%</td>
</tr>
</tbody>
</table>

The table above is based on SLSO annual reports. I would draw the Committee's attention to the section of each annual report dealing with the Law Society's failure to properly investigate complaints. On page 23 of her 2004 report, Linda Costelloe Baker charts 9 years of historical investigative failure rates. The average investigation failure rate throughout this period is approximately 50% and the SLSO referred to this 50% rate in her evidence to the former Justice Committee Inquiry. This grave statistic alone should convince even the most forgiving soul that something is fundamentally wrong at the Law Society. Senior legal professionals (assisted by educated lay people) are either grossly negligent; on a scale that would be truly abhorrent to other professionals or, as I would respectfully submit, these shameful annual statistics, coupled with other evidence in this submission, shows the Law Society of Scotland to be nothing less than institutionally corrupt.

2.2. Documentary Evidence

The Law Society Internal Memo can be viewed on the Scottish Parliament website and was written in 2001 by Mr Douglas Mill, the Law Society's chief executive. It was sent some months later by the Law Society to Mr Stewart MacKenzie, a vocal critic of self-regulation and subject of the memo. Mr Mill proposes a "summit meeting" with Alistair Sim (Marsh UK) to look into "both the complaints and claims aspects" of Mr MacKenzie, who was badly let down by a series of solicitors. Mr Mill goes on to describe Mr MacKenzie as "intelligent and well organised’ and who would “come over very well at a JHAC investigation [Justice 1 Committee investigation]”. The memo, which was copied to the president, vice-president and director of client relations, is in direct contradiction to evidence subsequently provided to parliament by both the Law

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4 www.SLSO.org.uk/reports.html
5 http://www.scottish.parliament.uk/business/committees/historic/justice1/or-01/101-1502.htm Col 3020
6 http://www.scottish.parliament.uk/business/committees/historic/justice1/inquiries-02/1-lps-pdfs/lps-024.pdf - internal memo is on page 9
Society and Marsh. Both institutions claimed in evidence that “the Society cannot influence the conduct of the insurers one way or the other”. Why then did the Law Society chief executive propose a “summit meeting” with the insurers to do exactly that?

2.3. Eyewitness Evidence

I know many of the legal consumers who made submissions to the former Justice 1 Committee⁷. Many of these tragic individuals, most of whom are intelligent and public-spirited, are firmly of the view the Law Society does its utmost to protect solicitors from the consequences of professional misconduct. A summary of their harrowing submissions can be viewed on the following webpage:
http://www.sacl.info/eyewitness.htm

2.4 Case Study Evidence

My own interest in self-regulation began shortly after my decision to act on behalf of my father, Henry James Lloyd, in relation to his misconduct complaints against 2 firms of solicitors, Biggart Baillie and Campbell Riddell. I also acted for my father in 2 subsequent, upheld complaints to the SLSO regarding those Law Society Investigations and represented him in a civil action at Glasgow Sheriff Court.

The Law Society investigation of Biggart Baillie (1st attempt)

The Law Society Reporter, client committee and council all cleared Biggart Baillie of any wrongdoing, including IPS. I complained to the SLSO on my father’s behalf and the SLSO issued an opinion⁸ which included the following:

"I fail to see why 2.5 hours work took 15 weeks, and consider there was avoidable delay."

"Standard Law Society procedure is to intimate conduct complaints to the individual solicitor concerned and to give that solicitor the opportunity to comment - Mr M Lloyd [a bricklayers’ labourer] was right."

"I am concerned that these inconsistencies were not picked up during the course of the investigation” - [conflicting statements made by Biggart Baillie Client Relations Partner regarding the solicitors involved]

⁷ http://www.scottish.parliament.uk/business/committees/historic/justice1/inquiries-02/just1-lps-index.htm
⁸ SLSO - Case No. LSO/0021/01
"I note however that she only sent a copy to the Client Relations Partner of Messrs Biggart Baillie and not to Mr Lloyd" [ secret Law Society Q.C. opinion on ownership of papers]

"I am very concerned that Mr Lloyd's questions have not been answered...I am therefore NOT Satisfied that the correct procedures were followed in this case" - p108

"I am therefore NOT Satisfied that Mr Lloyd's complaints about conflict of interest and collusion have been understood or investigated" - p110

"I am NOT satisfied that this complaint was investigated thoroughly or fairly" - regarding the strange disappearance of the client's file.

"I recommend that the Law Society clarifies which solicitors were involved and intimates the complaints to them in accordance with normal Law Society procedure." - p126

"I recommend that both complaints should be investigated according to correct procedures, with notifications sent to the appropriate solicitors." - p128

"Mr Lloyd was caused great frustration and inconvenience because he thought that the Law Society failed, and continued to fail, to understand the basis for his complaints and failed to take his evidence into account. I agree with Mr Lloyd and consider that there should have been no need for him to keep repeating his evidence. I recommend that the Law Society pay Mr Lloyd the sum of £300 compensation for their failure to deal with his complaints effectively." - p129

Important Note: During this Law Society investigation, the 1999/2000 Law Society president was Philip Dry, senior partner at Biggart Baillie.

The Law Society investigation of Biggart Baillie (2nd attempt)

The Law Society accepted the findings of the SLSO and agreed to re-investigate Biggart Baillie. Mr Philip Yelland, Client Relations Director, personally took charge of the re-investigation. The Law Society Qualified Reporter and Client Committee once again cleared Biggart Baillie solicitors of professional misconduct - and I complained, for a second time, to the SLSO. Her opinion on this purported re-investigation of the president's law firm included the following findings:

"I AM SERIOUSLY CONCERNED to note that the Law Society did not formally intimate the conduct complaints to Mr Kidd or Mr McFarlane. The

9 SLSO - Case No. LSO/405/02
Law Society normally write to solicitors setting out the Law Society's statutory powers - it did not do that in this case, despite my criticisms in the earlier Opinion." - p 60.

"The Law Society did not uphold the conduct complaint because of a commonly held belief which the Reporter said was not correct. It is widely accepted that IGNORANCE OF THE LAW IS NO EXCUSE and it is somewhat surprising that this does not extend to the Law Society in determining complaints. In his complaint to me Mr Lloyd said that he thought that this was a matter which could affect clients in the future and I agree with him. I am NOT satisfied that the Law Society has dealt appropriately with the erroneously held belief." - p73

"I AM CONCERNED that a faulty understanding of the legal position has once again been used to exonerate the solicitors in terms of the conduct complaint. I am not satisfied that the Director of the Professional Practice Department's note that surely there must have been a conflict of interest was taken into account " - p91 a "faulty understanding" by as many as 50 top Law Society brains?

The SLSO did not order a further misconduct re-investigation as she was "doubtful the outcome would be any different". Biggart Baillie, as a firm, admitted IPS in that they "acted in conflict" and "issued 2 versions of an opinion when they shouldn’t have". Acting in a conflict of interest situation is normally classed as Professional Misconduct, not IPS.

SSDT finding of deceit against Campbell Riddell10

In 2005, the Scottish Solicitor Discipline Tribunal found Campbell Riddell solicitors had indeed "set out to deceive Henry James Lloyd by issuing a doctored version of his conveyancing opinion". This followed many years of Law Society attempts to protect these solicitors from the consequences of their misconduct.

This finding of deceit supplemented paragraph 12 of Sheriff Principal Bowen's judgment in my father's civil action, in which he castigated Campbell Riddell regarding their conduct towards my father. 11

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10 SSDT findings on Messrs Campbell Riddell Breeze Paterson, May 2005
11 Glasgow Sheriff Court - Case No. A1700/01
3. Evidence by the Law Society of Scotland and Marsh UK Ltd

Written Evidence by Marsh UK Ltd

Para 2.4 "The Society is not involved in the handling or resolution of individual claims." – Alistair Sim, Marsh UK Ltd  

Oral Evidence by Marsh UK Ltd

Gordon Jackson: The other point was that the Law Society makes it difficult for clients to receive payment. I would not have thought that the Law Society could interfere with the process.

Alistair Sim: The Law Society cannot interfere with the process between it and the insurers. The insurers handle claims that are intimated to the master policy and pay them. We come between those two bodies, as brokers. The society is not in a position to influence the level of settlements or the conduct of the insurers one way or the other.  

Oral Evidence by the Law Society of Scotland

Martin McAllister [Law Society of Scotland]: "Negligence is not a matter for complaint. It involves a breakdown in the contract between the client and his or her solicitor, and the outcome of such cases is determined ultimately in the courts. It is important that we make that distinction. The society has laid down rules about professional indemnity insurance, to ensure that solicitors have the proper cover and that clients can be compensated properly when solicitors are negligent. If someone contacted the Law Society to complain about a matter that clearly involved negligence, we would not deal with that."  

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12 http://www.scottish.parliament.uk/business/committees/historic/justice1/inquiries-02/just1-lps-index.htm
13 http://www.scottish.parliament.uk/business/committees/historic/justice1/or-01/j01-3502.htm - Col 3057
14 http://www.scottish.parliament.uk/business/committees/historic/justice1/or-01/j01-2202.htm - Col 2603
4. Conclusion

I would ask the Justice 2 Committee to fully investigate and carefully consider all of the issues raised within this document which are of relevance to the LPLA Bill.

The content of the internal memo directly contradicts evidence provided previously to parliament by the Law Society and Marsh UK, as detailed above. Mr McAllister received a copy of the memo and was alerted to its damaging contents during his time as a Law Society official.

It should be of great concern to the Justice Committee that senior Law Society officials have been alerted to the chief executive's intention to influence the outcome of a claim – yet appear to have embarked upon a "code of silence". Mr Mill and at least two of the memo recipients still hold positions within the Law Society. It should also be noted that the reason for the proposed "summit meeting" was that Mr MacKenzie would "come across well" in giving evidence to parliament against the Law Society and self-regulation. The Law Society cannot be allowed to pervert the outcome of parliamentary inquiries with such barefaced lies.

In the Biggart Baillie case above, it is simply inconceivable that so many of Scotland's top legal brains were "ignorant of the law" and "failed to understand or investigate complaints of conflict of interest and collusion" levelled against the then president's law firm. I don't believe they were ignorant. This was deliberate self-protectionism and parliament now has a duty to ensure such self-protectionism cannot influence the outcome of legal misconduct investigations in the future.

The foregoing evidence raises serious doubts about the ability of the Law Society to properly and fairly investigate legal misconduct allegations. Those same Law Society members, who have been covering-up professional misconduct and/or criminality for years, will continue to do so. That is, unless the Scottish Parliament introduces a truly independent legal complaints system, staffed by individuals unconnected to the Law Society of Scotland or wider legal profession.

I would, of course, be willing to provide the committee with an oral submission if required, or to provide further evidence as may be deemed appropriate.

Yours sincerely,

Mike Lloyd BSc
5. Annotated Bibliography

5.1. thescotsman.scotsman.com/business.cfm?id=1939022005

Campbell Deane, legal correspondent of *The Scotsman*, refers to me as a "crusader for justice" and, despite his position as a law society member, appears to credit my attempts at protecting and informing legal consumers.


The Law Society opts for a "no comment" interview when challenged by *The Herald* on the contents of the internal memo.
Submission from Duncan Shields on the Legal Profession and Legal Aid (Scotland) Bill

JUSTICE 2 COMMITTEE CALLS FOR EVIDENCE AT STAGE 1 OF THE LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

See attached copy of my submission to the consultation on legal reform regards my own and children's experience at the despicable and abusive hands of the Scottish legal system.

I wish to briefly make only a few comments as I have not had sufficient time to go over the detail of this bill.

However I can express the following that

1. To separate out the service and conduct aspects of a new independent body leaving conduct in the hands of the corrupt Law Society of Scotland would totally undermine the great efforts the campaigners (victims) against this despicable system have made in exposing the enormity of the lives irreparably damaged by the evil way our present civil legal system operates. It should be wholly for an independent body to regulate conduct and not left in the hands of those who have a HISTORY of turning a blatant blind eye to utter corruption. One prime example is Kennedy Forster well documented below who was allowed for almost a decade to defraud many people of their assets.

The Law Society of Scotland only moved on this after major exposure over a long period by the Galloway Gazette.

Prior to that they did NOTHING to stop the plundering of elderly dying patients by this monster of a human being who was sanctioned by the godfathers operating from the Law Society of Scotland and fully supported by Law Society members operating within the lawyers corrupt piggy bank the legal aid board.

2. Immediate steps should be taken to REMOVE all judges and members of the Law Society of Scotland from the operations of the Legal Aid board maybe one of the most despicably corrupt bodies I and my fellow victims have EVER come across. THEY are responsible for funding mass evictions of anyone who has their own home while they allow lawyers to run up HUGE bills with impunity.

3. The master policy run by the Law Society of Scotland has already been proven to be corrupt by a writ served on Marsh International in New York (see attached writ) showing contingency payments paid by the likes of the Law Society of Scotland that are wholly illegal, fraudulent and corrupt. A whole new system of compensation for victims should be carefully considered.

4. Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) 1990 Act should be IMMEDIATELY commenced to stop the monopoly abuses of Law Society members acting collusively to help people whose assets can be stolen by them failing to get ANY representation whatsoever. The most disgraceful way corrupt lawyers plunder peoples lives and destroy them seemingly with the unanimous support of judges sitting on Scottish benches. Many of the victims groups have PLENTY of evidence to back this up. I have personal experience of standing before law lords at the Court
of Session with witness's who blatantly ignored laws protecting children's rights. My own child's rights despicably undermined by this appalling system. All of this while I faced long term cancer the effect of this on my children indescribable.

DUNCAN SHIELDS  
Previously 
(....) (recently stolen by hoodlums working within the legal system of Scotland. Sanctioned and funded by the Legal Aid Board and the Scottish Executive)

Please use this email ONLY for contacting me  
PLEASE ENSURE ALL ATTACHMENTS ARE PUBLISHED ALONG WITH MY SUBMISSION

Submission in relation to Consultation on legal reform  
Scottish Executive

Submission  
Duncan Shields

1 Aug 2005

As a long time sufferer (10 years) of the persecution and harrassment imposed on myself as a cancer patient, and my children, I have gathered sufficient knowledge from fellow victims of a system of law in Scotland which is completely unjust and out of control.

The directors of the Law Society of Scotland and the Legal Aid board are ALL implicated in the extortion racket and corruption perpetrated by lawyers such as Kennedy Forster

Quote Galloway Gazette 2004
" 
THIS week The Galloway Gazette reveals how the Law Society of Scotland ignored complaints about disgraced former solicitor Kennedy Forster for NINE YEARS and only acted after our exclusive coverage of clients misgivings.

As reported in last week's Gazette, Forster was finally jailed for six and a half years for embezzling over £660,000 from client accounts even though The Law Society had told the Gazette as late as April 2000 that there were no aspects of the Forster case which required their intervention.
But just two weeks later, after further revelations by The Gazette, The Law Society finally handed over the Forster case to the Crown Office for possible criminal proceedings.

One former client told the Gazette this week that he felt betrayed by The Law Society and felt that no action would have been taken had The Galloway Gazette not brought extensive publicity to the case. The Scottish Legal Services Ombudsman has also expressed unhappiness about the way in which The Law Society deals with complaints against solicitors following the Forster case. Yet despite this, the Law Society last week sought to put a positive spin on its eventual handling of the Forster case after the former solicitor was finally jailed in the High Court.

Its President, Joe Platt insisted that the Society always worked in the best interests of the public. He said: "This is an example of the Law Society doing its job well and taking every effort to ensure that the public are protected from any rogue solicitor."
But Gazette Editor Peter Jeal said: "Far from demonstrating that The Law Society has 'done it's job well' the Forster case has only served to highlight the need for an independent complaints authority to be set up.
"What is clear from this sorry tale is that The Law Society cannot possibly serve the interests of its members, solicitors, and the interests of the public at the same time.

"On their own admission, they only started to take this case seriously in April 2000 after The Gazette highlighted client concerns which date as far back as 1991. "We will be calling on the Justice Minister, Cathy Jamieson, to put in place an independent complaints authority to deal with complaints against solicitors."

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Gazette campaign gains national momentum

THE Galloway Gazette has written to Scottish Justice Minister Cathy Jamieson to end self regulation for solicitors and set up an independent complaints body in the wake of the Kennedy Foster case.

And, the Gazette has received calls from all over Scotland congratulating this newspaper to taking a stand and "representing ordinary people all over the country" on this issue. Forster was jailed for six and a half years two weeks ago for embezzling more than £600,000 from clients, including charities and churches. Yet, despite complaints stretching back more than nine years, The Law Society failed to act.
Last week, we carried a detailed report on those failings which according to one caller this week, Stewart McKenzie from Perthshire, “has got all of Scotland buzzing.”
Border Television also reported on our story on Monday night.
Mr McKenzie has been pressing for changes in the way solicitors are regulated after he failed to get his complaints against a solicitor properly dealt with by The Law Society of Scotland.

He also gave evidence to a Scottish Parliament inquiry into the issue but, he says, large parts of his submission to the parliamentary committee were scored out by the Parliament’s own lawyers – members of The Law Society – before being heard.
Mr McKenzie added that the inquiry committee was made up mostly of MSP’s with legal backgrounds.

The inquiry, which ended in October last year, decided, incredibly, to let the present system of self regulation continue despite a string of complaints about the Law Society.
Sheila Clark, of Largs, Ayrshire also contacted the Gazette this week.
“Thank you for taking up this issue. The Galloway Gazette is speaking for the people of Scotland,” she said.
“It’s so refreshing to see a newspaper standing up for people.”
Ms Clark has also been embroiled in a battle to get her complaint against a solicitor dealt with impartially and also feels let down by The Law Society.
In a letter to Justice Minister, Cathy Jamieson this week, Gazette Editor Peter Jeal called for action to ensure that complaints against solicitors are taken out of the hands of the Law Society.

“We, and many others, do not believe that any organisation can represent the interests of their members and the public, when they have complaints against those members,” said Mr Jeal.

“This is the greatest example of a conflict of interests it is possible to see and undermines totally the credibility of the justice system.”
He added: “This is a very serious matter which is long overdue for action to resolve it.”


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In the Dock

The sorry tale of inaction by The Law Society of Scotland

BY Stephen F Norris

THE Law Society of Scotland itself stands in the dock this week, accused of a cover up over its handling of complaints against disgraced Stranraer solicitor Kennedy Forster.
The Gazette can exclusively reveal that the Society’s Guarantee Fund
Department formally reported their suspicions about Forster’s dodgy dealings to the Crown Office on April 20th, 2000, only DAYS after this newspaper broke the story on April 7th.

At the time The Gazette was told by the Society: “There are no aspects which require the Society’s intervention at this time.”

Until then, serious complaints made by local businessman David Inglis about misconduct by Forster, senior partner in law firm Ferguson and Forster, had, he said, been “swept under the carpet” by the Society since 1991. The Society tried to draw a line under the Forster affair in August 1999, when having had their initial whitewash of Forster rejected by the Scottish Legal Services Ombudsman, they handed down the token punishment of ‘unprofessional conduct’ to Forster. No financial penalty was imposed and Forster was allowed to continue practicing. Less than eight months later The Gazette exposed the unfolding scandal and Forster was on his way to prison.

Earlier, in 1993, the Society had found Forster’s junior partner, Carl Crone, guilty of the more serious charge of misconduct in an attempt to counter serious complaints from Mr Inglis, now of Blair Way, Newton Stewart. This was despite Mr. Inglis’ complaints being against Kennedy Forster and the firm itself. Mr. Crone confirmed at the time that he was unhappy at being left “to carry the can.”

The firm had been Mr Inglis’ agents bidding for the former Littlejohn’s ironmongers in Victoria Street, Newton Stewart, when on the day before offers were due to close Mr. Inglis phoned Mr. Crone to say he was coming in to submit a final offer, only to be told “it’s a bad day today.” Hours later, after office hours, he was informed by Carl Crone that he could no longer act for him because the firm’s senior partner, Kennedy Forster, had been negotiating with the owner of the property with a view to buying it all along.

Mr. Inglis had immediately phoned Kennedy Forster on December 5th, 1991 to complain about the actions of his firm, and that there had been a conflict of interest and a breach of client confidentiality.

“I don’t believe you and I have met, Mr Inglis,” was Forster’s sole response. Mr Inglis subsequently took the matter to the Law Society, then finding no satisfaction there, to the Scottish Legal Services Ombudsman in 1997, SIX YEARS after his original complaint.

The Ombudsman examined how the Law Society had handled the complaint, and on September 23rd 1998 concluded that “I am not satisfied that the reporter or the Complaints Committee examined the conduct complaint in the appropriate terms.”

The Ombudsman returned the case to the Complaints Committee “for further consideration”, having no powers to compel the Law Society to alter its procedures.

The Law Society then re-examined their original decision to absolve Forster of blame, taking another year to find him guilty, on two counts, of the minor charge of ‘unprofessional conduct’. Forster continued to practice unchecked until he ‘retired’ and was rumbled by the Gazette.
David Inglis feels betrayed and let down by the system, and feels that without the intervention of The Galloway Gazette, nothing would ever have happened. “From the early 1990’s we knew he was crooked, my solicitor knew he was crooked, but nothing was happening. I felt I was powerless, banging my head against a brick wall. We got £250 ‘compensation’ from Carl Crone for ‘expenses’ incurred which was a joke. Our complaint was never against Carl Crone in the first place,” he said.

Joe Platt, President of the Law Society, denied that it was more than coincidence that the Society had handed the case over to the Crown Office almost immediately after The Gazette had broken the story, saying it was merely “routine” for a case to be transferred for possible criminal proceedings when there were suspicions of dishonesty.

But previous attempts to force a change in procedures have been refused by The Law Society, Ombudsman Linda Costelloe Baker told The Gazette. “If we decide that its conclusions are inappropriate, or if a decision is perverse, then we can ask the Law Society to reconsider, but they can easily say ‘no we won’t’. I can really understand why complainants get fed up,” she said.

“The Law Society will fail in its obligations to the public if they refuse to look at a series of complaints against a solicitor or firm of solicitors, but until now they have adamantly refused to change tack,” she added.

But Mr. Platt disagreed that previous history of complaints is always disregarded, despite the society receiving 12 complaints about Ferguson and Forster between 1995 and 2000.

He said: “In misconduct cases if a firm has had a substantial number of complaints, then the committee might take the view it is indicative of a course of conduct.”

“The Society has, at all times, worked to protect the interests of the clients of John Kennedy Forster. His conduct was disgraceful and that is why he can no longer practice as a solicitor in Scotland. Any client who can prove that they have suffered loss as a result of his dishonesty will be or already has been reimbursed under the professional indemnity scheme.”

“After our routine faculty visit last week it’s clear local solicitors feel badly let down. They are very down about it. I think they feel they have been tarnished by what he has done. I know lawyers are perceived as sticking together but that’s not the case,” he added.

But many legal practitioners remain unconvinced that action was taken in time. “When exactly did Forster go to them with his hands up?” asked one prominent local solicitor. “They should have been put on their guard a lot earlier and should have come down on him like a ton of bricks.”

Suggesting even now that Forster was being less than forthcoming about money secreted away he added: “The criminal authorities are still burrowing away to get more money out of him – so at this time the Law Society is particularly anxious not to rock the boat.”

Currently the Society represents its own members facing formal complaints from clients, while claiming to serve the best interests of the public. Under pressure from the Scottish Parliament’s Justice 1 Committee, the Society increased the lay
representation on its Professional Conduct Committee to 50 percent in September last year. Further changes could be in the pipeline.

John Kennedy Forster is now serving 6-and-a-half years at HM Prison Barlinnie for embezzling £667,000 from dozens of people between 1996 and 2000.

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Also another disturbing case of crook Andrew Drummond who stole from a woman on her death bed

http://news.bbc.co.uk/2/hi/uk_news/scotland/904624.stm

Thursday, 31 August, 2000, 11:30 GMT 12:30 UK

Seven years for ex-solicitor

Drummond was sentenced at the High Court in Edinburgh

A former chairman and secretary of Dundee Football Club has been jailed for seven years for stealing thousands of pounds from a dying centenarian. Solicitor Andrew Drummond, 39, was supposed to be looking after the trust fund which paid Violet Cuthbert's nursing home bills. But instead he used his law firm's access to her bank accounts to siphon off £48,000 for his own purposes. Even when the old lady was virtually on her death bed in a Newport-on-Tay nursing home, Drummond was still taking her cash. The money was part of a total of nearly £84,000 which Drummond took from clients of Drummond, Robbie and Gibson, the law firm he ran from offices in Meadow Place Buildings in Dundee between March 1993 and June 1995.

Drummond took clients' money
Appealing for leniency, defence advocate Neil Murray QC told the High Court in Edinburgh that Drummond - who was struck off the Law Society's list of solicitors in November 1994 - was now a broken man. "This was a situation where money was being taken to finance a life-style high on the hog," he said. "He is an individual who has fallen - prior to today's appearance - from professional grace. "He has fallen a seriously long way ... and to all intents and purposes, as far as his profession is concerned, there is no way he will ever be re-admitted into the profession to which he devoted himself and which he trained for for many years."
But Lord Penrose said: "Clearly you are well aware I have no alternative but to impose a significant custodial sentence on you." Referring to Drummond's attempts to dodge embezzlement charges by producing bogus letters and loan documents, the judge said he would be "well
entitled" to add to the sentence - but considered that to be unduly harsh.
An earlier trial heard how Drummond used some of Mrs Cuthbert's trust money
to pay off massive rent arrears on his then boyfriend's debt-ridden gift shop.
Drummond also used the old lady's cash to complete a pay-off to a former
partner who had retired from the law firm.
He was previously convicted of illegal sharedealing and related to his
involvement with Dundee FC. He was fined £1,500.
He bought a 30% stake in the Dens Park club from a millionaire property
But Drummond used companies he controlled to try to disguise the size of his
holding and avoid a legal responsibility to make a cash offer to other
shareholders.
The offence also resulted in an £8,000 fine by the Scottish Solicitors' Discipline
Tribunal for professional misconduct.

and another case reported in the Mail on Sunday 29 May 2005 which showed
crooked solicitor Gerard McMahon
who stole over $430,000 from clients and the Law Society of Scotland have done
nothing to ensure the people he stole from are compensated for the enormous
harm done by crooked lawyers such as McMahon.

Article attached with this email.

These horrific stories are only the tip of a very big iceberg as I am in touch with
many people who have been preyed on by the crooks operating within the legal
system in Scotland.
My own and my daughters case have been given wide spread publicity in a
number of national newspapers despite the hold the Law Society of Scotland has
over our national press and tv. So much so that some journalists have been
threatened with the sack for EXPOSING their corrupt practices. Some have
already lost their jobs.

The legal services ombudsman Ms Costelloe Baker is NO BETTER, as despite
having taken a number of complaints to her on my complaints against solicitors
exploiting and extorting money from us, she did NOTHING and fully supported
the position of the Law Society of Scotland. Her sound bites in the press do
nothing for her own continued failures to address cases such as Kennedy
Forsters which she must have known about as did the Law Society of Scotland.

Until the Scottish Executive take seriously and with the urgency it requires the
fact that most of the Scottish civil legal system operates in utter corruption more
lives will be destroyed by a system were senior figures operating within it are
members of secret society cults like freemasons and the notorious Speculative
Society who were heavily involved in the cover up of the abuse and deaths of
children at Dunblane and particularly the Queen Victoria School.(see attached
articles and links)
http://www.scottish.parliament.uk/business/committees/standards/inquiries/moi/
st04-mol-f-02-shields2.pdf
This submission gives notice to those on the Scottish Executive of their responsibilities under the Human rights Act 1998 that Scottish courts are aiding and abetting the theft of children, land, business and properties by the utter corruption in which our legal system presently operates.

The following legal firms have ALL been involved in a ten year persecution campaign against my family and have used the most devious means to undermine its stability while I recovered from cancer.

Union St Greenock
West Blackhall St Greenock
Edinburgh
Frederick St Edinburgh

All of these legal firms have taken actions which are completely illegal (see attached national newspapers articles) and have obtained legal aid to harrass and persecute my family over the last 10 years. Please have my case fully investigated in this consultation to EXPOSE the corruption that has allowed legal aid to be made available for over 10 years to the above legal firms. This does not include other legal firms who have at some point also aided the threats from other sources that includes

acting for the Bank of Scotland

of Greenock who refused to act for me yet was attempting to forcibly sell my home at well below market value

DUNCAIN SHIELDS

Fri 3 Feb 2006

Plan to end lawyers' courtroom monopoly draws warning of a slide in standards

MICHAEL HOWIE

ENDING the exclusive right of lawyers to represent clients in Scotland's courts could seriously damage the service provided to the public, politicians warned last night.

A Scottish Executive inquiry into competition in legal services will recommend that paid advocacy rights be granted to people who are not members of the Law Society of Scotland or the Faculty of Advocates.

The move, which will break with centuries of tradition, has already led to fears that legal services will become less well regulated, to the cost of clients.
Currently, lay representation is allowed only in the small claims court and for summary cause civil cases in the sheriff court.

Campaigners in favour of the move argue that it will make access to justice easier and cheaper for the less well-off. Depending on the level of expertise hired, members of the public can have to pay hundreds of pounds an hour. Critics claim the virtual monopoly enjoyed by the two main professional bodies has pushed rates upwards.

A working group commissioned by the Executive has agreed to recommend the enactment of legislation aimed at freeing up the advocacy market that has lain dormant on the statute book for 16 years.

Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) 1990 Act abolished the ban on non-lawyers applying for rights of audience in Scottish courts and, in 1990, ministers said they would not implement the clauses until other reforms, such as the introduction of solicitor-advocates, had been given time to settle.

Legal services in England and Wales do not operate under a "closed shop", and campaigners, such as the Scottish Consumer Council, believe these rights should be extended north of the Border.

Minutes from the working group's final meeting confirm the group will recommend commencement of sections 25 to 29, subject to regulatory safeguards.

The final decision on whether to introduce such a move in Scotland will rest with Cathy Jamieson, the justice minister.

Kenny MacAskill, MSP, the SNP's justice spokesman and a former practising solicitor, said he was "yet to be convinced that the move would benefit the legal service, rather than make the situation worse".

He said: "There are good reasons for having a monopoly-regulated profession; otherwise, how do you regulate those not part of the organisation?"

"If I watch a football match, I want the referee to be SFA-standard, not Joe Smith from off the street."

Margaret Mitchell, MSP, the Tories' justice spokeswoman, also urged caution. She said: "There may be a concern that people won't be properly represented in court or getting the best legal advice."

But the Faculty of Advocates and Law Society are relaxed about the ending of their monopoly, provided non-members allowed to represent are subject to the same regulatory safeguards.

A faculty spokesman said: "We are confident our members will be able to compete in the new market. We support the move with the appropriate safeguards in place."

A spokeswoman for the Law Society said: "We are happy for other people to represent clients, provided the public is not put at risk."

This article:

http://www.scotsman.com/?id=171612008
THE PEOPLE OF THE STATE OF NEW YORK:
by ELIOT SPITZER, Attorney General of the State of New York:
Plaintiff, COMPLAINT
-against- Index No.
MARSH & McLENNAN COMPANIES, INC.
AND MARSH INC., Defendants:

PARTIES

1. Plaintiff, the People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York (“Attorney General”), complaining of the above-named defendants, alleges upon information and belief, that:

2. This action is brought by the Attorney General on behalf of the People of the State of New York based upon his authority under Articles 22 and 23-A of the General Business Law, § 63(12) of the Executive Law, and the common law of the State of New York.

3. Defendant Marsh & McLennan Companies, Inc. (“MMC”) is a Delaware corporation with its principal place of business in New York County, New York.

4. Defendant Marsh Inc. (together with MMC, “Marsh”) is a Delaware corporation and is a wholly owned subsidiary of MMC, with its principal place of business in New York County, New York.

PRELIMINARY STATEMENT

5. Marsh is the largest provider of insurance brokerage and consulting services in the world. It holds itself out to its clients as a trusted expert in the analysis and placement of insurance policies. Businesses and individuals who need insurance retain Marsh to help them design an insurance plan and negotiate with insurance companies to get the best mix of coverage, service, financial security and price.

6. According to Marsh, “Our guiding principle is to consider our client’s best interest in all placements.” It boasts, “We are our clients’ advocates, and we represent them in negotiations. We don’t represent the [insurance companies].” [Marsh-NY 32815]

7. The facts show otherwise. Since at least the late 1990s, Marsh has designed and executed a business plan under which insurance companies have agreed to pay
Marsh more than a billion dollars in so-called “contingent commissions” to steer them business
and shield them from competition. Styled as payments for nebulous “services,” the agreements
to pay these commissions were called “placement service agreements,” (“PSAs”) and, most
recently, “market services agreements” (“MSAs”), by Marsh.
8. Whatever the agreements were named, they created an improper incentive for Marsh. As one Marsh executive told his subordinates, the size of the contingent commission
payments to Marsh determines “who [we] are steering business to and who we are steering
business from.” [Marsh-NY 17870] In another instance, during discussions with an insurance
company president seeking to expand her firm’s sales, a Marsh executive did not advise her to
provide a better product to Marsh’s clients; instead, he told her that she would need to enter into
3
a contingent commission agreement paying Marsh an amount that was “above market.”
9. At times, Marsh’s plans to maximize the profits it received from contingent commission agreements went even further: it designated winners. Marsh solicited --
and obtained -- fictitious high quotes from insurance companies in order to deceiving its clients
into believing that true competition had taken place. It promised to protect insurance companies
from competition, and did so. And it threatened to hurt the business of those who thought of
truly competing for particular pieces of business.
10. This business plan was phenomenally profitable. For example, it has been reported that in 2003 alone, approximately $800 million of Marsh’s earnings were attributable to
contingent commission payments. That year, Marsh overall reported approximately $1.5 billion
in net income. Marsh, however, has never disclosed to its shareholders how contingent
commissions constitute the lifeblood of its business. Jeffrey Greenberg, the Chief Executive
Officer of Marsh, has stated: “We don’t break out contingent commissions. That is not
separately enumerated because it is part of our business model . . . .” [July 28, 2004 Analyst
Conference Call Transcript]
11. The losers in all of this, of course, are Marsh’s clients and the marketplace for insurance, which Marsh has corrupted by distorting and elevating the price of insurance for
every policyholder. Other victims here are Marsh’s own shareholders, who have never been told that hundreds of millions of dollars of Marsh’s profits derive from illegal activities.

JURISDICTION
12. The State of New York has an interest in the economic health and wellbeing of those who reside or transact business within its borders. The State also has an interest in ensuring the presence of an honest marketplace in which economic activity is conducted in a competitive manner, without fraud, deception or collusion, for the benefit of marketplace participants. In addition, the State has an interest in ensuring that the marketplace for the trading of securities functions fairly with respect to all who participate or consider participating in it. The State also has an interest in upholding the rule of law generally. Marsh’s conduct injured these interests.

13. Thus, the State of New York sues in its sovereign and quasi-sovereign capacities, as parens patriae, and pursuant to Executive Law § 63(12), General Business Law §§ 340 et seq. (the Donnelly Act) and General Business Law §§ 352 et seq. (the Martin Act). The State sues to redress injury to the State, and to its general economy and residents, as well as on behalf of: (1) persons who purchased insurance brokerage services from Marsh; and (2) persons who purchased, sold or held shares of Marsh during the period in which the cited acts occurred. The State seeks disgorgement, restitution, damages including punitive damages, costs, and equitable relief with respect to defendants’ fraudulent, anti-competitive and otherwise unlawful conduct.

FACTUAL ALLEGATIONS
A. The structure of the insurance industry
14. There are basically three types of entities in the insurance market. First, there are clients: companies and individuals seeking to purchase insurance for their businesses, employees or themselves. Second, there are brokers and independent agents (collectively “brokers”), hired by clients to advise them as to needed coverage and to find insurance
companies offering that coverage. Brokers represent the client, obtain price quotes, present the quotes to the client, and make recommendations to the client that include factors other than price, such as differences in coverage, an insurance company’s financial security, or an insurance company’s reputation for service or claims payment. Third, there are insurance companies. They submit quotes to the brokers and, if selected by the client, enter into a contract to provide insurance for that client’s risk.

15. In this structure, the client makes two types of payments: (1) it pays its broker an advisory fee or a commission for locating the best insurer, and (2) it pays the chosen insurance company premiums for the coverage itself. When the client pays a commission this is usually accomplished in one check to the broker, with the broker deducting the commission and forwarding the premium to the insurance company. Sometimes clients -- particularly large commercial clients -- break out the broker’s fee and pay it directly to the broker.

16. In addition to the first commission payment described above, brokers sometimes receive another kind of payment, as well, but not one from the clients. These are called contingent commissions and come from insurance companies pursuant to arrangements generally known as contingent commission agreements. The precise terms of these agreements vary, but they commonly require the insurance company to pay the broker based on one or more of the following: (1) how much business the broker’s clients place with the insurance company; (2) how many of the broker’s clients renew policies with the insurance company; and (3) the profitability of the business placed by the broker.

17. In the late 1990s, Marsh began to call these agreements “Placement Service Agreements” or “PSAs.” After recent public scrutiny, it has renamed them “Market

B. Marsh falsely tells its clients that it is their “advocate” and that its
“guiding principle” is “our client’s best interest.”
18. Marsh’s insurance brokerage business alone has approximately 42,000 employees in 410 offices located in over 100 countries. Marsh cites its size and sophistication as a primary reason to hire the company. Marsh holds itself out as a trusted advisor that can help its clients assess their insurance needs and locate the best available insurance. At least in performing this function, Marsh acts as an agent and fiduciary for its clients. 19. Marsh emphasizes that it works for its client, not for the insurance companies. For example, in a document created to assist employees in responding to client questions, Marsh has written: “Our guiding principle is to consider our client’s best interest in all placements. We are our clients’ advocates and we represent them in negotiations. We don’t represent the [insurance companies].” [Marsh-NY 32815] This purported “guiding principle” figures prominently in Marsh’s marketing materials. For example, in Marsh’s “Response to RFP” for the Greenville County School District in South Carolina -- where Marsh’s steering and bid manipulation was plainly evident -- Marsh provided a graphic titled, “Client Loyalty Pyramid.” The document states that its “approach to client service begins with establishing credibility and trust. . . .” Marsh also refers to itself in these materials as Greenville County’s “trusted business partner” and “not simply an insurance agent.” [Response to RFP for Greenville County School District]

20. In fact, a central part of Marsh’s business plan is to promote the interests of insurance companies with whom they have contingent commission agreements. When Marsh steers business to the favored insurance companies, those insurance companies, in turn, pay Marsh higher fees. When Marsh helps favored insurance companies retain their existing business at renewal time, those insurance companies pay Marsh higher fees. When Marsh steers more profitable business (policies with low claims ratios) to favored insurance companies, those insurance companies pay Marsh higher fees. And when the clients pay higher premiums, volume and profitability rise -- again increasing Marsh’s fees. 21. So Marsh does not, as it contends, always “consider their client’s best interest.” Nor is Marsh truly its clients’ disinterested “advocate.” To the contrary, Marsh
primarily represents its own interests and those of its favored insurance companies. Both the 
insurance companies and Marsh profit because of their common interest, a common interest 
created by the contingent commission agreement.
22. Marsh further instructs its employees to describe the company as an 
advisor and honest conduit for information, but one that leaves the final 
decision to the client:
“In fact, Clients are the only ones who have the authority to make the 
decisions on the terms and 
conditions of a program and the [insurance companies] selected to handle the program. . . . In all 
cases, clients make the final decision on the [insurance company] chosen to 
handle their 
business.” [Marsh-NY 32815]
23. In many instances, however, the client is making a misinformed “final 
decision” on insurance coverage. As set forth below, Marsh has repeatedly 
provided clients with 
false and inflated quotes. It frequently designates a winner, and then solicits 
inflated bids from 
other insurance companies, who provide such bids, knowing that later they 
themselves will have 
a turn to get business without meaningful competition. A choice made by a 
client under these 
circumstances has been made under false pretenses created by both Marsh 
and the complicit 
insurance companies.
24. Apparently aware of the patent conflict of interest posed by an agent 
taking payments from vendors (the insurance companies) seeking to sell a 
service to its master 
(the client), Marsh asserts that it has erected an information barrier to prevent 
contingent 
commission agreements from influencing its recommendations: “Our Client 
Executives and 
advisory staff is [sic] unaware of our specific [contingent commission 
agreements], thereby 
further removing their ability to have these arrangements influence their 
recommendations.” 
[Marsh-NY 32815]
25. As set forth below, the information barrier that Marsh describes simply 
does not exist. To the contrary, steering business to contingent commission-
paying insurance 
companies is fundamental to Marsh’s business plan.
C. Marsh’s “disclosure” of its contingent commission agreements is false 
and misleading.
26. While Marsh has disclosed the existence of contingent commission 
agreements since at least 1998, it has consistently concealed their true 
nature. Marsh describes
contingent commission agreements (recently renamed “MSAs”) to its clients and the public as follows:

Market Services Agreements (MSAs) are agreements that cover payment for the value brokers provide to insurance carriers and are based primarily on premium volume or growth. Brokers principally provide insurers with distribution networks, which facilitate the delivery of business, and are also uniquely positioned to provide insurers with intellectual capital, product development, technology, and other administrative and information services. These capabilities make the overall marketplace more efficient and competitive, which, in turn, benefits Marsh’s clients.

[“Market Service Agreements” at www.msa.marsh.com]

These “services” are illusory. The “distribution” Marsh cites is not a “service” but rather a necessary concomitant of Marsh going to the market on behalf of its clients, something that Marsh is duty bound to do as its clients’ agent and fiduciary -- and for which Marsh is compensated by legitimate fees and commissions from the client. The fact that Marsh’s clients ultimately buy from the insurers creates no additional “service” by Marsh to the insurers. Nor do the other vague “services” mentioned (such as “intellectual capital”) justify any of the $800 million that Marsh received last year in contingent commissions.

27. In fact, the “service” that Marsh provides pursuant to its contingent commission agreements is to steer business to the insurance carriers. As explained below, contingent commissions have an enormous impact on where Marsh places business on behalf of its clients. Yet Marsh’s disclosure is silent as to the actual purpose and effect of its contingent commission agreements.

28. Marsh’s disclosure to investors is no better. Marsh has never revealed to the investing public the true nature of contingent commissions or the huge role they play in Marsh’s earnings. This is illustrated by CEO Greenberg’s answer to a question about the role of contingent commissions in Marsh’s earnings:

We don’t break out contingent commissions. That is not separately enumerated because it is part of our business model and so I can’t really help you there.

10

When asked about the impact on Marsh of a possible “drastic change” in how it receives contingent commissions, Mr. Greenberg said:

We think that the most important issue and I have said this before is that
we provide services for which we expect to be compensated and there are various ways that one can be compensated. The way in which we handle it today is [contingent commissions] but if we found that we needed to change the method of compensation, we would do so. The principal being that we are going to be compensated for our services. [July 28, 2004 Analyst Conference Call Transcript]

D. Marsh’s business plan has been to increase its contingent commission income by steering clients to favored insurance companies.

29. According to Marsh’s public filings, in 2003 it had profits of over $1.5 billion. Marsh does not disclose how much of that amount was generated through fees paid by clients and how much was generated by insurance company contingent commission payments. A Marsh official has stated to this office that, in 2003, contingent fees paid by insurance companies amounted to approximately $800 million. These payments, for which there is little or no overhead, are extremely profitable.

30. The enormous size of these profits is not happenstance, but the result of careful planning. Marsh reconfigured its brokerage business, centralizing power in a group based in Manhattan. Marsh created lists of those insurance companies whose products its employees were to sell more vigorously to clients, lists based not on price or service, but on the amount of money the insurance companies would pay Marsh. It rewarded those employees who sold clients more insurance from these complicit insurance companies, and it chastised those who did not.

31. By way of brief background, during the 1980s and 1990s, the insurance brokerage industry underwent a period of consolidation. Through acquisition and internal growth, Marsh became one of the world’s dominant insurance brokers. Until the late 1990s, each of Marsh’s numerous branch offices throughout the United States signed its own separate contingent commission agreements with insurance carriers.

32. Beginning in the late 1990s, Marsh centralized its organization and assumed greater control over both business placement and contingent commission agreements. Marsh created an office in Manhattan that came to be called Marsh Global Broking, which oversaw policy placement decisions in Marsh’s major business lines. These included Excess Casualty, Healthcare, FinPro (Financial Products) and Middle Market (businesses paying less
than one million dollars in annual insurance premiums). Global Broking (also known as MMGB and MGB) was given authority over all of Marsh’s contingent commission agreements and began to replace smaller local and regional contingent agreements with large national ones, called Placement Service Agreements, or “PSAs.”

33. In addition, Marsh began internally rating the insurance companies based on how much they paid Marsh pursuant to their contingent commission agreements. In February 2002, a Marsh Global Broking managing director in the Healthcare group provided nine of his colleagues with a list of the insurance companies that were paying Marsh pursuant to contingent commission agreements. He cautioned, however, that “Some [contingent commission agreements] are better than others,” and said that soon Marsh would formally “tier” the insurance companies. Then, he said, “I will give you clear direction on who [we] are steering business to and who we are steering business from.” [Marsh-NY 17870]

34. A “tiering report” was later circulated to Global Broking executives, listing insurance companies as belonging to tiers depending on how advantageous their contingent commission agreement was to Marsh. The instructions to the managers who received the list included a direction that they were to “monitor premium placements” to assure that Marsh obtained “maximum concentration with Tier A & B” insurance companies, those with contingent commission agreements most favorable to Marsh. [Marsh-NY 14216-17] In a September 2003 email, a Global Broking executive was even more direct: “We need to place our business in 2004 with those that have superior financials, broad coverage and pay us the most.” [Marsh-NY 17328] (emphasis added)

35. Marsh executives have issued directions about specific companies as well. For example, in April 2001, a Global Broking managing director in the Excess Casualty group in New York wrote to the heads of regional centers. She asked for “twenty accounts that you can move from an incumbent [insurance company]” to a company that had just extended its contingent commission agreement. She warned, however, “You must make sure that you are not
moving business from key [contingent commission companies].” Highlighting the incentive represented by her directive, she concluded, “This could mean a fantastic increase in our revenue.” [Marsh-NY 27138]

36. The benefit of the steering system to the paying insurance companies was clear. In July 2000, an executive in Marsh Global Broking wrote to four of her colleagues to discuss “BUSINESS DEVELOPMENT STRATEGIES” with a particular “preferred” insurance company that had signed a contingent commission agreement with Marsh. In describing what Marsh had done for that company, she wrote, “They have gotten the ‘lions [sic] share’ of our Environmental business PLUS they get an unfair ‘competitive advantage[.]’ as our preferred [sic]

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[insurance company].”

37. Marsh has been explicit with insurance companies about how contingent commission agreements more favorable to Marsh would result in Marsh selling more of their policies. For example, a Global Broking executive recounted in an email dated November 7, 2003 how he told the president of a major insurance company, ACE USA, that she could meet her firm’s sales goals by agreeing to a fatter contingent commission agreement: “I made it clear that if ACE wants us to meet significant premium growth targets then ACE will have to pay ‘above market’ for such [a] stretch. . . .” [Marsh-NY 17012] In addition to carrots, Marsh also used sticks. The notes of one insurance company executive record that Marsh threatened to “kill” the company if it did not “get to [the] right number” on the contingent commission agreement. [AIG 12142]

38. Marsh has recognized and rewarded employees who “moved” clients to insurance companies with contingent commission agreements. For example, in February 2003, a Marsh senior vice president in the Global Broking Healthcare group nominated a subordinate to become a vice president. On the nomination form, under the heading “Financial Success,” he noted that the nominee had increased Marsh’s revenue “by moving” a renewing client to an insurance company with a contingent commission agreement. He concluded: “Neighborhood Health Partnership Estimated Revenue - $390,000.” [Marsh-NY 32784] That nominee’s 2002
performance review, similarly noted that the nominee “was responsible for the renewal of a large HMO in Miami and was successful with placing of this account with a [contingent commission insurance company] - increased revenue from $120,000 to $360,000 (estimated).” [Marsh-NY 32780] A 2003 self appraisal form by that same nominee -- now a vice president -- stated:

14 “Renewed large account with [contingent commission insurance company] to demonstrate our willingness to continue our relationship. Moved a number of accounts to [contingent commission agreement carriers] for the sole reason to demonstrate partnership.” [Marsh-NY 62406] Other employees were similarly praised in performance evaluations for increasing Marsh’s contingent commission income from insurance companies “by achieving budgeted tiering goals.” [Marsh-NY 83796-97]

39. In the same vein, Marsh employees have been criticized for bucking the system. Initially, when Marsh began signing national contingent commission agreements, Global Broking not only negotiated all of the agreements but also kept all of the revenue. Many of Marsh’s local and regional offices, which had previously had their own contingent commission agreements with insurance carriers, resented the loss of revenue to the central Global Broking office and refused to have Global Broking pass on all of their placements. Eventually, Global Broking initiated a “revenue repatriation” program under which some of Global Broking’s national contingent commissions were shared with local and regional offices. In June 2003, the head of Global Broking’s Excess Casualty group wrote to an employee in Marsh’s Seattle office to chastise her for placing insurance directly with a carrier on behalf of a client, thus denying a contingent commission to Global Broking: “The GB repatriation dollars are no small component of your office’s budget. You have lowered that amount with this placement. You may want to consider this in the future.” [Marsh-NY 50455]

40. Marsh rewards to employees for steering -- and its admonitions to employees who failed to steer -- put the lie to Marsh’s statement that a barrier prevents Global Broking from influencing placement decisions.
41. Marsh also has entered into contingent commission agreements that create incentives to favor the incumbent carrier when a policy came up for renewal. At the time of a renewal, Marsh’s clients expect it to give unbiased advice on whether to stay with the incumbent or sign with a new carrier. Meanwhile incumbent insurance companies have paid Marsh to recommend their own renewals. For example, a 2003 contingent commission agreement with AIG Risk Management, Inc. (“AIG”) provided Marsh with a bonus of 1% of all renewal premiums if its clients renewed with AIG at a rate of 85% or higher. If the renewal rate was 90% or higher, Marsh received 2% of the renewal premium, and if the rate was 95% or higher, Marsh received 3%. [Marsh-NY 13031] Marsh even negotiated (though it ultimately did not enter into) a $1 million “no shopping” agreement whereby Marsh would have recommended to its top individual clients who had bought personal insurance policies from Chubb that they renew those policies -- a paid abdication of Marsh’s duty to its clients. [CHUBB-28368]

42. Marsh’s steering harms its clients in at least two ways. First, Marsh specializes in complex insurance placements where all things are rarely equal, and where subjective judgment calls have to be made among competitors with varying coverages, financial security and price. A client relies on Marsh to make these calls strictly based on the client’s best interest, without the corrupting influence of incentive payments. Clients who have been steered have not received the service they paid for. Second, insurance carriers pass the cost of contingent commissions directly on to the clients in the form of higher premiums. Munich American Risk Partners (“Munich”), a division of American Reinsurance, for example, maintains a separate schedule of higher prices for Marsh clients because of the contingent commissions it pays. Effectively, Marsh is secretly raising the price of insurance for its clients and putting at least some of the increase in its own pocket.

43. A cast of the world’s largest insurance companies have participated in a bidrigging scheme with Marsh.
Marsh’s steering scheme. They have paid hundreds of millions of dollars for
Marsh to steer
business their way. At times, the insurance companies have gone much
further, colluding with
Marsh to rig bids and submit false quotes to unwitting clients throughout New
York and across
the United States.

1. AIG

44. American International Group (“AIG”) is a publicly traded company with
approximately 86,000 employees and over $81 billion in annual revenues.
Among its insurance
lines is excess insurance which covers losses over and above the amounts
covered by the
insured’s primary insurance policies. Beginning in or around 2001 until at least
the summer of
2004, Marsh Global Broking’s Excess Casualty Group and AIG’s American
Home Excess
Casualty division (AIG’s principal provider of commercial umbrella or excess
liability and
excess worker’s compensations insurance) engaged in systematic bid
manipulation.

45. When AIG was the incumbent carrier and a policy was up for renewal,
Marsh solicited what was called an “A Quote” from AIG, whereby Marsh
provided AIG with a
target premium and the policy terms for the quote. If AIG agreed to quote the
target provided by
Marsh, AIG kept the business, regardless of whether it could have quoted
more favorable terms
or premium.

46. In situations where another carrier was the incumbent, Marsh asked AIG
for what was variously referred to as a “backup quote,” “protective quote” or
“B Quote,” telling
AIG that it would not get the business. In many instances, Marsh provided
AIG with a target
premium and the policy terms for these quotes. In these cases, it was
understood that the target
premium set by Marsh was higher than the quote provided by the incumbent,
and that AIG
should not bid below the Marsh-supplied target. For example, in October
2003, an underwriter at
AIG described a particular quote that he had provided thusly: “This was not a
real opportunity.
Incumbent Zurich did what they needed to do at renewal. We were just there
in case they
defaulted. Broker . . . said Zurich came in around $750K & wanted us to quote
around $900K.”

[Undated AIG email] Even when AIG could have quoted a premium lower than
the target, it
rarely did so. Instead, AIG provided a quote consistent with the target premium set by Marsh, thereby throwing the bid.

47. In other instances, Marsh asked AIG to provide B Quotes where AIG was not supposed to get the business, but Marsh did not set a particular premium target. In these instances, AIG looked at the expiring policy terms and premium and provided a quote high enough to ensure that (1) the quote would not be a winner, and (2) in the rare case where AIG did get the business, it would make a comfortable profit.

48. In B Quote situations, AIG did not do a complete underwriting analysis. In those few situations when AIG inadvertently won B Quote business (because the incumbent was not able or willing to meet Marsh’s target), AIG personnel would “back fill” the underwriting work on the file -- that is, prepare the necessary analysis after the fact.

49. Finally, Marsh came to AIG for a “C Quote” when there was no incumbent carrier to protect. Although Marsh often provided premium targets in these situations, it was understood that there was the possibility of real competition.

50. The “A, B, C” quote system was strictly enforced by Marsh through William Gilman, Executive Director of Marketing at Marsh Global Broking and a Managing Director. Gilman refused to allow AIG to put in competitive quotes in B Quote situations, and, on more than one occasion, warned that AIG would lose its entire book of business with Marsh if it did not provide B Quotes. Gilman likewise advised AIG of the benefits of the system. As he put it: Marsh “protected AIG’s ass” when it was the incumbent carrier, and it expected AIG to help Marsh “protect” other incumbents by providing B Quotes.

2. ACE

51. ACE Ltd. is a Bermuda corporation that trades on the New York Stock Exchange. ACE USA (“ACE”) is part of a group of subsidiaries that forms the ACE Insurance North America business division of ACE Ltd. In 2002, ACE decided to enter the excess casualty market by creating a separate division, called the Casualty Risk Department. ACE signed a contingent commission agreement in order to gain access to the business Marsh controlled. ACE also repeatedly provided the same type of B Quotes that AIG provided.

52. The B Quotes given to Marsh were often in amounts requested by Marsh, even though a lower quote would have been justified by an underwriting analysis. As ACE’s
President of Casualty Risk summarized:
Marsh is consistently asking us to provide what they refer to as “B” quotes for a risk. They openly acknowledge we will not bind these “B” quotes in the layers we are be [sic] asked to quote but that they ‘will work us into the program’ at another attachment point. So for example if we are asked for a “B” quote for a lead umbrella then they provide us with pricing targets for that “B” quote. It has been inferred that the ‘pricing targets’ provided are designed to ensure underwriters ‘do not do anything stupid’ as respects pricing. [ACEINA-01909]

In this same email, the Casualty Risk president wrote that he “support[ed]” Marsh’s business model, which he described as “unique.”

53. An example of the operation of this system is evident in the bidding for the excess casualty insurance business of Fortune Brands, Inc., a holding company engaged in the manufacture and sale of home products, office products, golf products, and distilled spirits and wine. On December 17, 2002, an ACE assistant vice president of underwriting sent a fax to Greg Doherty, a senior vice president in Marsh Global Broking’s Excess Casualty division, quoting an annual premium of $990,000 for the policy. [ACE-INA-005754] Later that day, ACE revised its bid upward to $1,100,000. On the fax cover sheet with the revised bid, ACE’s assistant vice president wrote: “Per our conversation attached is revised confirmation. All terms & conditions remain unchanged.” [ACE-INA-005755-6]. An email the next day from the assistant vice president to an ACE vice president of underwriting explained the revision as follows: “Original quote $990,000 . . . . We were more competitive than AIG in price and terms. MMGB requested we increase premium to $1.1M to be less competitive, so AIG does not loose [sic] the business. . . .” [ACE-INA-005757]

54. This arrangement inured not only to Marsh’s benefit, but also to ACE’s. As Doherty wrote in a June 20, 2003 email to the same ACE vice president: “Currently, we have about $6M in new business [with ACE] which is the best in Marsh Global Broking so I do not want to hear that you are not doing ‘B’ quotes or we will not bind anything.” [ACE-INA-005781]

55. The bidding process for excess casualty insurance for Brambles, USA, a
manufacturer of commercial industrial pallets and containers (among other products), further
demonstrates the bid-rigging scheme. In June of 2003, ACE learned that Brambles was unhappy
with the incumbent carrier. Despite this, Marsh asked ACE to refrain from submitting a
competitive bid because Marsh wanted the incumbent, AIG, to keep the business. An ACE vice
president of underwriting wrote to the ACE President of Risk and Casualty:
Our rating has a risk at $890,000 and I advised MMGB NY that we could
get to $850,000 if needed. Doherty gave me a song & dance that game
plan is for AIG at $850,000 and to not commit our ability in writing.

ACE continued to provide Marsh with inflated quotes into 2004.

3. Hartford

57. Marsh did not limit its bid rigging practices to its large corporate clients. It also engaged in such conduct with The Hartford Financial Services Group
(“Hartford”) -- a provider of life group benefits, auto, home ownership and business insurance
-- with respect to Marsh's “Middle Market” and small business clients.

58. Middle Market insurance provides coverage for companies where the annual premium ranges from tens of thousands of dollars to around $1 million. Hartford became
a “partner market” -- meaning it agreed to pay contingent commissions -- with Marsh's so-called
Advantage America program in July 2003. The Advantage America program
was developed by Marsh to fold its small commercial property/casualty business into its Middle
Market group.

With annual premiums in the range of $25,000 to $200,000 dollars, this program provided
coverage to small businesses. Marsh centralized all of this small business insurance placement in

an office in Lake Mary, Florida, near Tampa.

59. Hartford was given the advantage of office space in Marsh's Lake Mary facilities. On numerous occasions during 2003 and 2004, Marsh employees asked the two
Hartford underwriters assigned to this facility, either in person or by telephone, to provide an
inflated quote or “indication” (non-binding proposed price) for insurance coverage for a small
business. Typically, Hartford’s underwriters were told to price the quote or
indication 25% above a particular number, and that by doing so Hartford need not worry that it would get the
business. Hartford colluded in the scheme.

60. Marsh did not restrict its bid rigging in the Middle Market to small
businesses. Marsh’s Los Angeles area Global Broking office handled larger Middle Market risks with annual premiums reaching $1 million. The Marsh Los Angeles office is in the same office building as Hartford’s. Starting as far back as 2000, Marsh employees, on virtually a daily basis, asked Hartford for inflated quotes or indications in a manner similar to the process described above for the Florida facility. In Los Angeles, however, Marsh often provided Hartford with a spreadsheet showing the accounts for which it wanted Hartford to provide a losing quote or indication, along with other insurers’ quotes. It instructed Hartford to quote some percentage, typically 25%, above the other insurers’ quotes on the spreadsheet to ensure that Hartford would not get the business. These were referred to as “Throwaway Quotes.” Hartford provided the inflated quotes.

61. On even larger risks in Southern California, those of over $1 million of annual premium, Marsh similarly asked for inflated quotes or indications, also providing spreadsheets containing other insurers’ quotes to Hartford. Hartford provided these quotes as well. Hartford provided these quotes and indications because Marsh was its biggest broker, and it felt that Marsh would limit its business opportunities if it refused.

4. Munich-American Risk Partners

62. As of 2001, Munich had entered into separate contingent commission agreements with Marsh’s Excess Casualty, Property, FINPRO (Financial Products) and Health Spectrum Groups. Munich adjusted its rates to pass the costs of these agreements on to its clients. When pricing Marsh business, Munich determined the base premium for the policy, added a percentage to reflect the expected contingent commission and sent the quote to Marsh.

63. In 2000, Munich disclosed the existence of its contingent commission agreement with Marsh to a significant client to explain the contingent commissions that were being passed on to the client. Marsh was furious, and chastised Munich. A senior vice-president at Munich, apologized to Marsh in an email: “We acknowledge that this was inappropriate behavior . . . .” He told Marsh that Munich would: “do the necessary to eliminate all documentation, electronic or otherwise, that references or otherwise alludes to the [contingent
commissions]. I apologize for the consternation that this has caused within the Marsh organization.” [MARP 1226]
64. Throughout 2001 and early 2002, the Marsh Global Broking Excess Casualty Group repeatedly requested that Munich provide “favors” designed to assist Marsh in its bid rigging process. The panoply of market-manipulative “favors” that Marsh requested from Munich included:
• Requests to submit “false quotes” to allow Marsh to manipulate market pricing and present other carriers’ quotes in a more favorable light [MARP 596];

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• A request on a particular account that Munich either decline the risk altogether or submit a quote higher than the incumbent quote [December 18, 2001 email from a Marsh senior vice president to a Munich regional manager];
• Requests that Munich not bid on a renewal because Marsh owed the incumbent a favor and didn’t want Munich to come in with a lower quote [December 6, 2001 email from Marsh senior vice president to a Munich regional manager]; and
• A request for an artificially inflated initial quote so that Marsh could look good to the client when it “negotiated” the quote down [MARP 637].
65. Throughout 2001, Marsh also asked Munich to act as “back-up or wait in the wings” at several client presentations. [MARP 581, 562] That is, Marsh asked Munich to attend presentations for prospective clients with whom Munich was already out of the running.
One Munich regional manager characterized these presentations as mere “Drive bys.” [MARP 562] For example, in 2001 Marsh sent Munich an email request explaining that it “needed to introduce competition” at a prospective client presentation and needed Munich to send a “live body.” [MARP 2198, 2199] Frustrated with Marsh’s continuous requests for “live bodies,” one Munich regional manager responded, “WE DON’T HAVE THE STAFF TO ATTEND MEETINGS JUST FOR THE SAKE OF BEING A ‘BODY.’ WHILE YOU MAY NEED ‘A LIVE BODY,’ WE NEED A ‘LIVE OPPORTUNITY.’” [MARP 2198]
66. These business practices were known to Munich management. In preparing for an April 2001 meeting with Marsh, a senior vice-president solicited reactions from his regional managers regarding their experiences with Marsh Global Broking. [MARP 557-563] He then cut and pasted the managers’ comments into a single document and circulated it to them
for discussion. Complaints and reactions from the Munich regional managers included:

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I am not some Goody Two Shoes who believes that truth is absolute but I do feel I have a pretty strict ethical code about being truthful and honest with people. And when I told [sic] I have to say certain things I know to be untrue to people I respect and have known for a long time, it is not what I feel I should be asked to do of [sic] what this company stands for. Yet it has already happened several times and I have either had to dodge the client and broker on the issue, which won’t always work, or risk making GB [Global Broking] angry by telling a carefully edited version of the truth, which was more than they wanted out but less than satisfying to the client or broker. [MARP 560]

This idea of “throwing the quote” by quoting artificially high numbers in some predetermined arrangement for us to lose is repugnant to me, not so much because I hate to lose, but because it is basically dishonest. And I basically agree with the comments of others that it comes awfully close to collusion or price fixing. [MARP 560]

WHAT ARE THE RULES ON PRICING - ARE WE TO QUOTE OUR NUMBERS OR WHAT MGB [MARSH GLOBAL BROKING] WANTS US TO QUOTE - HOW DOES THEIR INTERNAL PREFERRED MARKET THING WORK? [MARP 562]

F. The Greenville County School Project

67. Marsh’s involvement with the Greenville, South Carolina Public School District illustrates how Marsh both abused its fiduciary role in an attempt to secure a contingent commission agreement with an insurance company and rigged the bidding process.

68. In the 1990’s, Greenville County, South Carolina experienced unanticipated student growth beyond the capacity of then existing facilities for the 62,000 school children in the district. In addition, many of the existing schools needed extensive renovations. The school district, through a non-profit corporation named BEST (Building Equity Sooner for Tomorrow), raised $800 million by selling bonds to fund the renovation, expansion, and new construction of fifty-five school facilities (the “Greenville project”). BEST hired Institutional Resources, LLC, as the program manager and procurement agent for the project. As part of its responsibilities, Institutional Resources had to procure insurance coverage for the project.

69. Lacking expertise in insurance, Institutional Resources hired Marsh after conducting a search and evaluating broker proposals. In Marsh’s application materials provided
to Institutional Resources, it pledged its loyalty to its clients, going so far as to include a section devoted to Marsh’s role as a “trusted business advisor.” [Response to RFP for Greenville County School District] For its role in the Greenville project, Marsh was to be paid approximately $1.5 million.

70. During the bidding process, there were two serious bidders who competed for the business: Zurich North America (“Zurich”) and ACE. Unbeknownst to Greenville, however, while this bidding process was ongoing Marsh held out the Greenville project as a “carrot” in its effort to entice Zurich to sign a contingent commission agreement. In a December 12, 2002 email, Joan Schneider, a Marsh Global Broking executive, explained to Zurich:

[Y]ou are currently in the running on Greenville Country [sic] School System (FIX cost near 3MM) .... neck and neck with ACE who we have a PSA with ....... Will bind most likely after the first of the year ...... where are we on the [contingent commission] agreement ..... Left messages but haven’t heard from you ...... hint hint. [Marsh-NY 14619-20]

71. Between the December 12, 2002 email and the award of the contract on January 3, 2003, the contingent commission negotiations progressed and the project was awarded to Zurich. Although Zurich and Marsh never entered a contingent commission agreement, Marsh made clear its view of the linkage:

[p]er our conversation today, (sorry to call you during your vacation) the good news is that we are binding Greenville County School with you today!!!!!!! We worked hard to get this to you and as we discussed expect it to be part of the [contingent commission]

26 agreement. On your return Monday, I hope you and your regional folks can get this ironed out ...... this is a great start to the New Year and would like to keep it going. [Id.]

72. As part of its vigorous effort to steer the Greenville contract to Zurich, Marsh sought a false bid from a competing insurer and then, despite that insurer’s refusal, submitted a wholly fictitious bid on that insurer’s behalf. On December 16, 2002, Glenn R. Bosshardt, the Global Broking vice-president assigned to the project and Joan Schneider’s subordinate, contacted an assistant vice-president of underwriting at CNA, an individual with whom he had previously worked and who had already told Bosshardt that CNA had no interest in bidding on the Greenville project. In an email Bosshardt stated:

[P]er my voicemail, we need to show a CNA proposal. I will
outline below the leading programs (ACE & Zurich). I want to present a CNA program that is reasonably competitive, but will not be a winner. [ Marsh-NY 89930] (emphasis added)

Bosshardt proceeded to reveal the ACE and Zurich quotes on the project and then proposed numbers that CNA should quote in order to lose the bid but still appear to have been competitive. Although CNA never authorized Marsh to submit this bid, it was submitted to Institutional Resources as a legitimate competing bid. [Marsh-NY 89630-31]

73. Notably, Marsh -- at a time when the prospect for a contingent commission agreement with Zurich remained real -- advised Institutional Resources that Zurich was a superior company and should be awarded the bid. Marsh did not disclose to Institutional Resources either that it was seeking a contingent commission agreement from Zurich, or that it had falsely submitted a bid under CNA’s name. Institutional Resources followed Marsh’s recommendation and awarded the project to Zurich.

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74. Even though Zurich and Marsh never entered into the [contingent commission] agreement, in his 2003 performance review, Bosshardt was praised for having “assist[ed] in the implementation of MMGB’s excess liability strategy to maximize contingent commission revenue.” [2003 Balance Scorecard]

CONCLUSION

75. Marsh’s conduct had the purpose or effect, or the tendency or capacity, unreasonably to restrain trade and to injure competition and purchasers, both in New York and in interstate commerce, by, among other things:
(a) Limiting the number of insurers competing to sell insurance to persons seeking such insurance;
(b) Allocating the market for the sale of insurance; and
(c) Using inflated bids, prices and other terms of sale with respect to insurance to mask the absence of free and open competition by insurers for the sale of such insurance.

76. In consequence, competition in the sale of insurance from or in New York State and elsewhere was substantially reduced and otherwise unlawfully restrained.

77. In addition, defendants, by failing to disclose material information about their business conduct and activities to purchasers, sellers and holders of Marsh stock, committed a fraud.

78. Finally, defendants’ actions as set forth above were gross, wanton and
wilful; were aimed at the public generally; and involved a high degree of moral culpability.

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FIRST CAUSE OF ACTION
(Fraudulent business practice – Executive Law §63(12))
79. The acts and practices alleged herein constitute conduct proscribed by §63(12) of the Executive Law, in that defendants engaged in repeated fraudulent or illegal acts or otherwise demonstrated persistent fraud or illegality in the carrying on, conducting on transaction or a business.

SECOND CAUSE OF ACTION
(Antitrust - Gen. Bus. Law §340 et seq.)
80. Beginning at least in or about 2001 and continuing through in or about 2004, Marsh, together with AIG, ACE, Hartford and others conspired unreasonably to restrain trade and commerce in violation of the Donnelly Act, Gen. Bus. L. § 340 et seq., by, among other things: (1) providing persons seeking to purchase primary insurance with collusive, fictitious or otherwise non-competitive bids or other terms of sale; (2) allocating the opportunity to sell, and the sale of, insurance to clients; and (3) creating a scheme to pay Marsh to implement the unlawful conspiracy.
81. As a result of this conspiracy, clients purchased insurance at prices higher than they would have paid, and on terms less favorable than would have been available, in a competitive market.
82. Marsh’s acts are a per se violation of the Donnelly Act. Alternatively, Marsh’s acts violate the Donnelly Act under a rule of reason analysis.

83. Various persons, not named as defendants, participated as co-conspirators in the violations alleged, and performed acts and made statements in furtherance of that conspiracy.

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THIRD CAUSE OF ACTION
(Securities Fraud - Gen. Bus Law §352-c)
84. The acts and practices of the defendants alleged herein violated Article 23- A of the General Business Law, in that they involved the use or employment of a fraud, deception, concealment, suppression, or false pretense, engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of securities.
FOURTH CAUSE OF ACTION  
(Securities - Gen. Bus. Law §352-c)  
85. The acts and practices of the defendants alleged herein violated Article 23-A of the General Business Law, in that defendants engaged in an artifice, agreement, device or scheme to obtain money, profit or property by a means prohibited by § 352-c of the General Business Law.

FIFTH CAUSE OF ACTION  
(Unjust Enrichment)  
86. By engaging in the acts and conduct described above, defendants unjustly enriched themselves and deprived their clients and the investing public of a fair market place.

SIXTH CAUSE OF ACTION  
(Common Law Fraud)  
87. The acts and practices of Marsh alleged herein constitute actual and/or constructive fraud under the common law of the State of New York. WHEREFORE, plaintiff demands judgment against the defendants as follows:  
A. Enjoining and restraining Marsh, its affiliates, assignees, subsidiaries, successors and transferees, their officers, directors, partners, agents and employees, and all other persons acting or claiming to act on their behalf or in concert with them, from engaging in any conduct, conspiracy, contract, agreement, arrangement or combination, and from adopting or following any practice, plan, program, scheme, artifice or device similar to, or having a purpose and effect similar to, the conduct complained of above.  
B. Directing that Marsh, pursuant to Articles 22 and 23-A of the General Business Law, § 63(12) of the Executive Law and the common law of the State of New York, disgorge all profits obtained, including fees collected, and pay all restitution, and damages caused, directly or indirectly by the fraudulent and deceptive acts complained of herein;  
C. Directing that Marsh pay plaintiff’s costs, including attorneys’ fees as provided by law;  
D. Awarding punitive damages against Marsh;  
E. Directing such other equitable relief as may be necessary to redress Marsh’s violations of New York law; and  

F. Granting such other and further relief as may be just and proper.

Dated: New York, New York  
October 14, 2004  
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Melvin L. Goldberg
Assistant Attorneys General
Watchdog’s calls on access to lawyers ignored by ministers

SCOTLAND’S legal watchdog is demanding to know why ministers have failed – after six months – to take any action over people being unable to obtain proper access to justice.

Linda Costelloe Baker, the Scottish legal services ombudsman, recommended last July that the Scottish Executive carry out “robust research” into why some people cannot find a lawyer to act for them even though they can pay for one.

She is particularly concerned about people failing to find a solicitor when they want to sue another solicitor, arousing suspicions of lawyers “protecting their own”.

However, more than six months on, Cathy Jamieson, the justice minister, has yet to “reply to or acknowledge” the recommendation.

The ombudsman this week wrote to Ms Jamieson to find out what action, if any, the executive plans to take.

Access to justice is a long-standing concern of bodies ranging from the Office of Fair Trading (OFT) to the Scottish Consumer Council.

Some critics have alleged that lawyers will not take up negligence cases against other lawyers because, if they win, this will push up the profession’s indemnity insurance premiums.

Last year, the OFT published a report which said there was evidence that some Scottish consumers have found difficulty in finding another solicitor in such circumstances.

The agency said it did not have enough evidence to prove an “alleged mutual interest” in avoiding such claims inhibited client representation.

But the OFT added: “In the absence of such evidence, we consider that the difficulties experienced by some clients ought to be considered as an access to justice issue.”

The Law Society of Scotland has consistently rebutted any suggestion of collusion.

The ombudsman has identified three groups which believe they cannot obtain legal representation: consumers who may have approached several legal firms who state there is no case to take forward; cases where people want to sue their former solicitors; and cases where complainers have a “known” record of complaining about lawyers.
Girl (15) evicted in divorce battle

Possessions dumped in the garden

By Fiona Miller

A SCHOOLGIRL who is bidding to sue the First Minister over a custody battle has been evicted from her home.

Sheriff officers acting for 15-year-old Jacqueline Shields' mother served the order on her father, Duncan, because he refused to sell the family home.

The sale was ordered in 2001 as part of his divorce from his wife, June.

Police and sheriff officers turned up at the £110,000 house in Grearock on Monday, using a locksmith to gain entry.

Broke down

Jacqueline was at school but Duncan (56) said, "I had only 10 minutes to get out. They broke down the door and have changed the locks."

"Luckily Jacqueline was at school otherwise it would have been even worse for her."

Jacqueline said, "I was left with just the school uniform I was wearing and a few books. It's devastating. None of my friends can believe what has happened."

Her parents split in 1994 and she was placed in her mother's custody, despite insisting she wanted to stay with her father.

She ran away from her mother's home in Grearock several times, and Duncan says there was court action almost weekly for eight years as he and his wife argued over issues such as access.

He was awarded custody two years ago, after Jacqueline petitioned the Scottish Parliament arguing that the views of children should be taken into account by courts.

Last year she launched a bid for £10 million in damages against Jack McConnell, alleging he had failed in his duty to ensure the protection of a minor.

She claims the custody fight showed he hadn't safeguarded her "basic civil right to peace and stability".

That case is on hold after a sheriff decided in March that a court-appointed lawyer should speak to Jacqueline to establish whether she is able to bring such a complicated action and if her father, whom she wants to represent her, is acting in her best interests.

Meanwhile, father and daughter need somewhere to live. A few days after the eviction they found many of their belongings outside the house in bin bags. When Duncan and his daughter arrived there was a police presence.

He said, "All our stuff had just been dumped outside. Jacqueline is staying with her heavily pregnant sister while I am staying with a friend. We have been offered a flat by a friend but there is no furniture in it, and it needs work."

We contacted June Shields' solicitors but they were unable to provide us with a comment.
I wish to be considered, as a victim of this system, to give oral evidence to the committee. Can you please respond that have you have received both emails and my right to give evidence is seriously considered?

I also believe there is a lay observer acting in this gathering of evidence who has a conflict of interest and had previously supplied evidence to the legal profession inquiry?

DUNCAN SHIELDS
CHRISTMAS DAY AND NEW YEAR’S DAY TRADING (SCOTLAND) BILL

SIMON WAKEFIELD

The Christmas Day and New Year’s Day Trading (Scotland) Bill was introduced in the Parliament on 20 March 2006 by Karen Whitefield MSP. The Bill would prohibit most large shops from opening on both Christmas Day and New Year’s Day for the purpose of making retail sales. This briefing reviews the key arguments for and against the proposals and identifies some of the underlying evidence.

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SUMMARY OF THE BILL
This bill is not a complex one. With the exception of a number of exempted categories the Bill would prohibit large shops from opening on both Christmas Day and New Year’s Day for the purpose of making retail sales.

Exemptions include the following:

- **Cafes, pubs, takeaways** - Trade or business ‘mainly or wholly’ relating to meals, refreshments, or alcohol for consumption on the premises or prepared for order for consumption off the premises
- **Registered pharmacies** – that are open solely for dispensing prescriptions
- **Transport related shops** – in ports, railways stations, airports, and motorway service stations
- **Petrol stations** – wholly or mainly for the sale of fuel for motor vehicles

**Penalty for allowing a shop to trade** – The occupier and shop manager would be prosecuted by summary criminal procedure and subject to a fine not exceeding **£50,000**

**The definition of large shop** – The Bill specifies a relevant floor area of 280 sq m (compared to 260 sq m for a standard doubles tennis court, 203 sq m for Committee Room 2 and 666 sq m for the Parliament’s chamber). ‘Relevant’ means the floor area used for making retail sales or display of goods

Both the above levels replicate the Christmas Day (Trading) Act 2004 (chapter 26) now applying in England and Wales, which in turn took its definitions from the Sunday Trading Act 1994 (chapter 20)

**Aims of the Bill** - By taking these measures it is hoped the Bill will contribute to the following policy objectives:

- To allow retail workers a day off on Christmas Day and New Year’s Day
- To maintain the special nature of those days

Behind the Bill is a fear that if legislation is not put in place now it could become more common for large stores to open on Christmas Day and New Year’s Day. If one large store decides to open others may be forced to follow suit it is argued (a so called ‘domino effect’), resulting, it is suggested, in no additional economic benefit for the stores and the erosion of these two days being treated as national holidays.

Further details can be found as follows

- Christmas Day and New Year’s Day Trading in Scotland [Bill], [Explanatory Notes] and [Policy Memorandum]
- Christmas and New Year’s Day Trading in Scotland – [Consultation], and [Consultation Summary and Conclusions]
SUMMARY OF ARGUMENTS FOR AND AGAINST THE BILL

The following table summarises some of the main arguments made by various individuals and organisations for and against the proposals in the Bill. Further details are provided later in the briefing.

<table>
<thead>
<tr>
<th>Arguments For</th>
<th>Arguments Against</th>
</tr>
</thead>
<tbody>
<tr>
<td>Helps keep Christmas Day and New Year’s Day ‘special’</td>
<td>The Bill runs counter to the principles of freedom of choice, both for employees and for consumers</td>
</tr>
<tr>
<td>Enables retail workers to spend time with their families and take a break during a very busy period</td>
<td>Not everyone in Scotland is a member of a conventional ‘family’; not everyone considers Christmas to be ‘special’, a concept which has evolved over the years and will continue to evolve</td>
</tr>
<tr>
<td>Supports ‘family life’</td>
<td>Retail is an important sector of the economy; to grow the economy restrictions on operations should be removed rather than added to</td>
</tr>
<tr>
<td>Without safeguards the ‘choice’ of whether to work or not will be illusory. Pressure will be brought to bear to ensure that stores are staffed on these days.</td>
<td>There may be a significant specific impact on the economy. For some this is particularly the case with the proposed New Year’s Day restrictions, which are thought likely to have a negative impact on tourism associated with the Hogmanay celebrations</td>
</tr>
<tr>
<td>A voluntary code amongst large shops, or general convention, is not likely to hold. Once one retailer breaks ranks others would be forced to follow, with the effect of simply spreading the same level of spend slightly more thinly</td>
<td>Employees may lose out on opportunities to work, at times when they might be earning premium overtime payments</td>
</tr>
<tr>
<td>Large stores opening would increase the need for other services to operate including ancillary retail services (wholesale, distribution etc), public transport and health services</td>
<td></td>
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</tbody>
</table>

LEVEL OF SUPPORT

Some 81 of the 91 responses to the Member’s consultation (Whitefield 2005) expressed support for the proposals whilst 4 were against them entirely. 3 respondents took no position on Christmas Day but opposed New Year’s Day restrictions, and the remaining 3 actively supported the Bill in relation to Christmas Day but not New Year’s Day.

The Bill had [33 MSP supporters](#) one month from the date it was lodged (1 December 2004). This included 27 Labour MSPs, 1 Independent, 2 Scottish Socialist Party, 2 Scottish National Party and 1 Liberal Democrat.

A petition ([PE 700](#)) on the proposed measures, which was presented to the Parliament on 8 January 2004, attracted 13,797 signatures. The Public Petitions Committee discussed the
petition on 21 January 2004 and agreed by division to support the general principles of the petition (For 6, Against 0, Abstentions 2), and to write to the Executive seeking its views on the issues raised in the petition, together with an indication of whether it would be minded to support the proposed Members’ Bill on the topic.

The Executive’s response (Scottish Parliament March 2004) stated that the Executive appreciated the concerns of staff who are or may be required to work on Christmas and New Year’s Day. The response also stated that the Executive was aware that;

“(a) to regulate shop trading hours on Christmas and New Year’s Day would set a regulatory precedent in this area and add to the burdens on business; (b) the Scottish Retail Consortium reported that none of its members actually opened on Christmas Day 2003: and (c) a prohibition on trading by large shops on New Year’s Day would have a negative impact on tourism”

The Executive stated it wished to reserve its position until the outcome of the Member’s consultation was known.

ALTERNATIVES TO THE BILL

The following alternative means of achieving similar policy goals have been discussed by consultees to the Bill, and in debate on a similar measure applying to England and Wales (now the Christmas Day (Trading) Act 2004).

VOLUNTARY CODE OR LEGISLATION

If restrictions are needed some have argued that a voluntary code amongst large retailers would be appropriate. The summary of consultation responses (2005) states:

“The introduction of a voluntary code, rather than legislation, was mentioned by 7 respondents. Those who support the proposals took the view that such a code would not be sufficient to protect workers as they felt that employers would not abide by it. The Scottish Retail Consortium on the other hand indicated that they would like to see their members being given the opportunity to see if a voluntary code to protect staff with no desire to work on New Year’s Day would work. They said their members had already agreed that if their stores opened on New Year’s Day in the future, they would sign an agreement to ensure staff do not feel obliged to work on New Year’s Day”.

The Department for Trade and Industry’s previous consultation on Christmas Day Trading proposals for England and Wales (2003a) stated:

“The Government would have liked to address the issue of Christmas Day opening without recourse to new regulation. But consideration of alternative approaches produced no viable options. Although some form of voluntary consensus on the part of retailers might have delivered the desired result in theory, in practice such a consensus would have contravened Competition Law”

WIDENING THE FOCUS BEYOND RETAIL TRADE

It has been argued by some that protecting workers (and so also their families) may be more logically served by changes to wider reaching employment law (a reserved area) rather than by restricting ‘trade’ in the retail sector. This has been an argument used most conspicuously by
those opposing the proposals and seeking to point out inconsistencies, rather than as a proposition for increased employment protection.

For example the Scottish Retail Consortium (consultation responses 2005) highlights what it sees as the inconsistencies of the Bill. It asks:

“Why is the proposal only targeted at the retail sector? If there is a principle that employees should not feel under pressure to work on New Year’s Day, surely this should apply to all people in Scotland, not just employees of one sector.”

The SRC continues:

“Whilst it is recognised that the Scottish Parliament does not have the powers to regulate employment practices and only trading practices, this means that although shops would be prevented from trading by this proposal, staff could still be working, so the proposed legislation would not have the desired impact. For instance, larger stores are prevented from trading on Easter Sunday in England and Wales, but there are often staff working behind closed doors in order to get the store ready for the following day. The proposal also means that retail support staff such as delivery and logistics staff, internet site support staff and telesales staff would potentially be working on Christmas day and New Year’s Day. SRC members who are electrical retailers have reported that Christmas Day is one of the busiest days of the year for telephone support staff who deal with enquiries from members of the public who have received electrical equipment as gifts”.

DEBATE ON THE PRINCIPLES OF THE BILL

This section highlights some of the evidence, arguments and wider debate on the principles of the Bill.

FREEDOM OF CHOICE

It has been suggested that the decision as to whether to work or to shop on Christmas Day or New Year’s Day should be one for the individual, not for the state. Tesco Stores Ltd states (Consultation responses 2005) that the current framework of self regulation presents no foreseeable problems for staff.

“It must be noted that if there is a demand for shopping on Christmas Day and New Year’s day and staff are willing to work, a ban would be removing the individual right to choose, irrespective of the individual’s personal needs. As an organisation, we have a diverse workforce including many individuals who would choose to work, on the above dates, if given the choice in exchange for being allowed to take time off for other events and festivals they celebrate, that may occur at other times during the year. Furthermore should there be a demand for stores to open at these times, but the law restricts trading, then ultimately the customers and many employees are all at a loss.”

However the Scottish Trades Union Congress (Consultation responses 2005) suggests that the voluntary nature of such choice would be illusory

“It can be anticipated that the offer from employers wishing to open on these days would be that staff attendance would be purely voluntary and well remunerated. In reality there tends to be a variety of pressures on workers in such situations varying from direct pressure from the unscrupulous employer to more implicit pressure derived from workplace expectations and peer pressure. An example of this would be the significant
proportion of individual workers who agree to sign away their rights under the EU Working Time Directive despite the wish to work less than 48 hours per week”

SOCIAL IMPACT

The ‘special’ nature of Christmas Day

The Policy Memorandum to the Bill cites numerous shared cultural references to the ‘special’ nature of Christmas including films such as ‘It's a Wonderful Life’ and books such as Dickens’ ‘A Christmas Carol’. The First Minister also recently alluded to the special nature of Christmas for Scottish families and the sacrifice of those who work on Christmas Day in his 2005 Christmas message (Scottish Executive 2005)

“As we gather with our families and friends this Christmas, we should remember others.

“Those who give up their time at Christmas to work in the service of others. Doctors, nurses, policewomen and men, paramedics, and the thousands of others who provide care services to the elderly and vulnerable. People who put public service first and foremost. Scotland needs and values their contribution.”

Numerous consultees emphasised their view that Christmas is indeed ‘special’ and should not become a normal working day. One retail worker made her point as follows:

“The nature of Christmas is to enjoy the festive season. For people in retail there would be no reply to the question ‘How was your holiday?’”

Such cultural references and perceptions are not necessarily uniformly shared however. Scottish Liberal Democrat MP Malcolm Bruce presented an alternative view of Christmas during a Commons debate in 2004:

“People choose to shop on Christmas day, and some shops are open. Although many people do not want to work on Christmas day – I am one of them; I want to be at home with my family – I know of people who loathe and detest Christmas day. They want to be out and about with people and would prefer to work. The Bill would deny them that right. The extent of freedom of choice is at the heart of whether we need the Bill”

(House of Commons 18 June 2004, column 984)

Historically the original date of ‘Yule’ in the Julian Calendar was placed on 5 January (Livingstone 1997). There were riots when the calendar was altered and many people refused to hold Christmas on the new date of 25 December. After the Reformation attempts were made to ban the celebration of Yule. No holiday was permitted. This ruling was upheld by the General Assembly of the Church of Scotland, and although defied by many people, led to Christmas Day being a working day in Scotland up until the 1960s.

The ‘special’ nature of New Year’s Day

The General Assembly of the Church of Scotland stated in their consultation response (2005):

“New Year’s Day has no religious background, but actually has in Scotland a longer tradition of being a day without commerce and without work for as many as possible”

“We believe that to allow larger stores to open, as if these days were like any other, would be to chip away even more at Scotland’s traditional and religious heritage.”

providing research and information services to the Scottish Parliament
“…It is in our view a sad thing that it is even necessary to legislate to protect Christmas Day and New Year’s Day. Such a step provides evidence of a flattening of our lives, a process where every day becomes the same – with no high days or holy days, no rest, no play, no reflection; only commerce, a life in which we relate to one another primarily through the exchange of money.”

However a number of those opposed to the Bill have objected most strongly to restrictions on trading on New Year’s Day. The Scottish Retail Consortium (consultation response 2005) for example took no position with regards to Christmas Day trading but reports that its members are very concerned about the proposals in relation to New Year’s Day.

“There is no doubt that New Year’s Day is special and that is why high numbers of tourists visit the country and key cities in Scotland at this time of year. This opportunity should not be missed by the retail sector, in the interests of the economy”

The SRC (2005b) emphasised this point in a more recent press release

“Whilst the SRC has no issue with asking retailers to close on Christmas Day, it is New Year's Day that is the problem.”

“Scotland has a global reputation as one of the places to be over the New Year, particularly with the Hogmanay festival, and a ban on shops opening at this important time on the world’s stage would only irreversibly harm Scotland's reputation. SRC Director, Fiona Moriarty, says: "We are dismayed that Karen Whitefield is calling for a ban on trading on New Year's Day. This ban would have a significant effect on Scotland's tourism industry and its reputation as a world class destination.”

Families and Christmas/New Year

One of the policy objectives of the Bill is to protect the special nature of the two days as times when family and friends can spend time together. The ‘families’ theme was reflected in several of the consultation responses. The Baptist Union of Scotland stated

“We believe very much in the value of the family and feel that there are already great pressures on family life. Therefore we are keen that Christmas and New Year’s Day should be given the proposed protection”

The following two comments were typical of those from retail workers in the consultation:

“I feel that Christmas is a special day and should remain this way. Many families work all year and should be allowed one day a year off to celebrate with their families”

“Whether it is for religious reasons or because it is traditionally regarded as a holiday time, I strongly believe that all workers should have this time off. Retail workers seldom have the chance of a weekend off to plan family gatherings and such like so it isn’t much to ask for a couple of special days a year to do so.”

The response to the consultation from the Mothers’ Union also stressed the relevance of the legislation to family life:

“The Mothers’ Union believes it is vital to balance formal work with other aspects of life, such as family responsibilities, voluntary activities and leisure pursuits. This is for the
benefit of individuals, their families, employers and the wider community. Traditional and religious holidays are mechanisms that society has established to make each aspect of life universally viable and in particular to provide an opportunity for families to spend time together. Most large retailers already forbid their staff from taking any holiday on the run-up to the Christmas and New Year period and, if trading does increase on Christmas and New Year’s Day, the special nature of these days would not only be lost for workers in the retail industry but also for society as a whole. The constant demands for more availability and flexibility of commerce must not be adhered to when they are detrimental to the needs of family and community life”

EQUAL OPPORTUNITIES ISSUES

Impact on women

The Mothers’ Union also stated in their consultation response that:

“Women would particularly benefit from such legislation, as it is women who make up the majority of employees in the retail industry. It has been shown that women, the traditional primary carer within the family, still do the majority of domestic work even when both partners work. Legislation would therefore mean that women would not be expected to provide their families with a traditional Christmas or New Year on top of a day at work. In addition, it would ensure that not only managers but lower paid staff, who are also more likely to be women than men, would be entitled to some holiday over the winter season”

As Figure 1 below indicates two thirds of employment in the retail sector is accounted for by female workers (Nomisweb; Annual Business Inquiry 2003). Therefore the Bill is likely to have a proportionately greater direct impact on women.

Figure 1; Employees in Scotland in Retail trade 2003
Impact on ethnic/religious groups
The Bill’s Policy Memorandum raises the issue as to whether the celebration of a Christian festival might discriminate against those of non–Christian faiths. The Policy Memorandum notes however that the Scottish Interfaith Council took soundings on the issue in 2003 and received some ‘positive reactions’ from several of those contacted.

The degree to which Scotland remains a Christian society has been the subject of much debate. The ‘Faith Survey’ for BBC News 24 (2005) measured religious belief across the UK, including Scotland. Figure 2 below for example illustrates attitudes towards Christianity in Scotland, indicating that 78% of Scots think it is quite or very important that British society continues to be based on ‘Christian values’.

Figure 3 “How important is it that British society continues to be based on Christian values?” (% responding)

ECONOMIC AND FINANCIAL ISSUES

Are large shops likely to open on Christmas and New Year’s Days in the future?
One issue raised by respondents is whether the Bill aims to solve a ‘non-problem’; particularly that it is inconceivable that shops would ever wish to trade on Christmas Day. The Scottish Retail Consortium (Consultation responses 2005) takes ‘no position’ on the proposal regarding Christmas Day and states:

“Some retailers have trialled opening larger stores on Christmas Day in areas with large non-Christian communities, but these trials were deemed unsuccessful, so none of our members intend to open on Christmas Day in the future”

The CBI response to the consultation went further
“We have no objection in principle to controls on Christmas Day opening, but it is our belief that no large retailer is ever likely to seriously consider opening on Christmas Day, so there appears to be no real need to introduce legislation prohibiting it.”

In relation to New Year’s Day the SRC consultation response states

“Some SRC members have now opened on New Year’s Day in Scotland, and have found a viable and growing consumer demand for this. In fact, Debenhams found a queue of 10 customers waiting outside their Perth store when they opened, and despite torrential rain, sleet and snowfall in Edinburgh their store was extremely busy.”

The Union of Shop, Distributive and Allied workers (USDAW) have however stated in their response to the consultation that:

“Scottish shop workers are very concerned about the possibility of Christmas Day and New Year’s Day trading. Not least because in recent years a number of retail companies have experimented with Christmas Day trading. Also, this year and last, for the first time one company, Debenhams opened some of its large stores on New Year’s Day.”

“Scottish shop workers believe that these recent development make the need for legislation to protect Christmas Day and New Year’s Day absolutely necessary. Many shop workers believe that, at sometime in the future, they will be forced to work on these two days if legislation is not passed to stop large stores from opening. Whilst employers may start by asking for volunteers, the truth is that they will not get enough and that is when they will start compelling people to work in order to open the stores.”

The Trades Union Congress (2003a) has previously estimated the numbers of workers across all occupations working on winter holidays. Based on the Labour Force Survey, the TUC estimates are below:

**Table 1; Numbers estimated to be working in Scotland on winter bank holidays**
(all occupations)

<table>
<thead>
<tr>
<th>Holiday</th>
<th>Estimated Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Christmas Day 1999</td>
<td>104,000</td>
</tr>
<tr>
<td>Boxing Day 2000</td>
<td>167,000</td>
</tr>
<tr>
<td>New Year’s Day 2001</td>
<td>121,000</td>
</tr>
<tr>
<td>Hogmanay (2001)</td>
<td>207,000</td>
</tr>
</tbody>
</table>

(TUC 2003a)

**Impact on key economic sectors**

**The Scottish Retail Sector**

There are some 26,000 shops in Scotland. 160 of these have more than 250 employees and account for 28% of sales. Total sales for 2004 stood at just over £20 billion, with one quarter of all sales accounted for by Glasgow and Edinburgh (Scottish Retail Consortium 2005c).

Just over 250,000 people are employed in the Scottish retail sector. Approximately 100,000 of these are employed on a full time basis and 150,000 on a part time basis (NOMISweb, Annual Business Inquiry 2003).
Figures from the Scottish Retail Consortium (2005a) highlight the current importance of the Christmas and New Year period for retail sales.

“Christmas is the most significant trading period of the year for retailers in Scotland, with approximately 40% – 60% of many larger retailers’ turnover being made between November and January – ‘the Golden Triangle’.”

“In Scotland the focus is on Christmas and Hogmanay which leads to the festive period extending over a longer time frame than England and Wales. This sees increased levels of consumer spending between Christmas day through to early January, particularly on food and drink”

The DTI reports that the England and Wales Christmas Day trading proposals were subjected to the Office for Fair Trading’s ‘competition filter’ which assesses the impact of regulations on competition (DTI 2003). The nine questions in the filter assess the market structure and potential impact of the regulations. According to the DTI in all cases the nine questions registered a “no” answer and therefore there was no need therefore to proceed to a more detailed “competition assessment” as is done in cases when significant competition issues are raised.

Others indicated that the impact on Scotland of the Scottish proposals would be detrimental to the economy overall. Debenhams (Consultation responses 2005), who had previously trialled the opening of two of their stores on New Year’s Day indicated that the proposals would restrict customer choice and would

“…make the business environment more difficult for major employers and those seeking to satisfy customer demand.”

Ancillary retail

The United Road Transport Union, representing ‘nearly one thousand drivers employed in Scotland” argues that (consultation response 2005) ancillary workers should also be covered by the legislation.

“Shelves would still need to be stacked and stores replenished. Any legislation that seeks to prohibit the opening of stores needs to be carefully drafted to encompass not only the stores opening part, but also safeguards need to be put in place to ensure that other workers, ancillary to actual shop workers, are also caught by the legislation”

Tourism

Research by VisitScotland highlights the importance of retail for tourism with 61% of overseas tourists citing shopping as a main activity of a holiday to Scotland and almost half of UK visitors following suit (Scottish Retail Consortium 2005c). The same research indicated that a “combined 80%” of foreign tourists buy either Scottish whisky or woollen goods during their holiday. Perhaps less obviously in tourism terms the ‘continued success’ of the Braehead retail development in Glasgow in attracting visitors from Northern Ireland is also highlighted.

The potential negative impact on city tourism has been highlighted by Edinburgh councillor Donald Anderson (Scottish Retail Consortium 2004)

‘Edinburgh is one of the best places in the world to spend Hogmanay and we have worked extremely hard to achieve this. On January 1, when most cities traditionally close
their doors and nurse their hangovers, the capital is vibrant and entertaining thousands of residents and visitors. This is a huge asset, both economically and socially, to Edinburgh and Scotland.

‘I do not want to see the clock turned back and for the city to become a sleepy deserted no mans' land. These proposals have the potential to do just that. We should be promoting Scotland as a modern forward-thinking country, yet these proposals send out the opposite message to all who live, visit and do business here.

Lesley Sawers, Chief Executive of Glasgow Chamber of Commerce, stated further (Scottish Retail Consortium 2004)

‘Recent research indicates that 60% of visitors state the main reason for visiting Glasgow was for shopping, so to prohibit stores from opening on New Year’s Day is a backward step that would impact severely on the retail tourism that is so vital to the city's economic prosperity. Opening hours should be driven by consumer demand, and operational issues left for stores to resolve.”

The Member in charge of the Bill (Policy Memorandum paragraph 77) offers a number of counter-arguments to the view that tourism would be detrimentally affected by the Bill. This includes the “reality that hardly any large shops are open on 1st January at present”, that tourists’ decisions to come to Scotland, and in particular Edinburgh, at New Year are most influenced by the scale and quality of the celebrations, and that the loss of a single day’s shopping on 1 January is unlikely to dampen enthusiasm for retail spending. The Member also highlights the view that an extra day’s spending will not increase total revenue but will result in the spread or ‘cannibalisation’ of existing spend over the entire seasonal period.

Analysis for Edinburgh City Council (2005) of the economic impact of Edinburgh’s “winter festivals” in 2004/05 revealed the following assessment of the contribution to the local and Scottish economies (Table 2 below). The £35.9m of output generated by the winter festivals compared to estimates of £69.9m for the Festival Fringe, £23.3m for the Military Tattoo, £19.3m for the Edinburgh International Festival and £13.9m for all other summer festivals.

Table 2; Economic impact of Edinburgh’s winter festivals

<table>
<thead>
<tr>
<th></th>
<th>Output (£m)</th>
<th>Income (£m)</th>
<th>Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Edinburgh’s Capital Christmas</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Edinburgh</td>
<td>11.5</td>
<td>2.7</td>
<td>196</td>
</tr>
<tr>
<td>The Lothians</td>
<td>0.9</td>
<td>0.3</td>
<td>27</td>
</tr>
<tr>
<td>Scotland</td>
<td>0.4</td>
<td>0.1</td>
<td>42</td>
</tr>
<tr>
<td>Total</td>
<td>12.8</td>
<td>3.1</td>
<td>265</td>
</tr>
<tr>
<td><strong>Edinburgh’s Hogmanay</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Edinburgh</td>
<td>24.4</td>
<td>5.7</td>
<td>439</td>
</tr>
<tr>
<td>The Lothians</td>
<td>2.2</td>
<td>0.8</td>
<td>65</td>
</tr>
<tr>
<td>Scotland</td>
<td>5.0</td>
<td>1.7</td>
<td>161</td>
</tr>
<tr>
<td>Total</td>
<td>31.6</td>
<td>8.2</td>
<td>665</td>
</tr>
<tr>
<td><strong>Edinburgh’s Winter Festivals</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Edinburgh</td>
<td>35.9</td>
<td>8.3</td>
<td>635</td>
</tr>
<tr>
<td>The Lothians</td>
<td>3.1</td>
<td>1.2</td>
<td>92</td>
</tr>
<tr>
<td>Scotland</td>
<td>5.4</td>
<td>1.8</td>
<td>203</td>
</tr>
<tr>
<td>Total</td>
<td>44.4</td>
<td>11.3</td>
<td>930</td>
</tr>
</tbody>
</table>
Impact on public finances

The Financial Memorandum within the Explanatory Notes identifies zero costs for the Scottish Administration, zero costs for local authorities and “absolutely minimal” costs for the police. If large shops do open on the two days the Financial Memorandum identifies potential additional costs, for example in terms of emergency public services and transport services.

Scotmid retail group’s consultation response suggested that “any organisation choosing to open on both dates should be levied for the cost of any public services which would be necessary to support their operations”.

DEBATE ON DETAILS OF THE BILL

Comparison of England/Wales legislation with Scottish proposals

The Christmas Day (Trading) Act 2004 applicable in England and Wales provides an obvious point of comparison for the Scottish proposals. Table 3 below compares the 2004 Act with the proposals in the Scottish Bill. The Christmas Day (Trading) Act followed many of the detailed provisions of the Sunday Trading Act 1994. The list of exempted shops was debated in the Commons, and consideration was also given to the possibility of including other categories such as toy shops, shops where a local need or demand could be demonstrated, and shops with all non-Christian employees.

The Scottish Bill parallels the England/Wales legislation in many respects. There are however a number of differences in the exempted categories of shops. In England and Wales for example shops selling motor or cycle supplies, farm shops, off licences and exhibition stands are all excluded. The England/Wales legislation does not specifically exempt cafes, restaurants and takeaways as is the case in Scotland. Some of these distinctions reflect policy choices whilst others are more technical in nature.
## Table 3 (a) Comparison of the England/Wales Act and the Scottish Bill

<table>
<thead>
<tr>
<th>Christmas Day (Trading) Act 2004</th>
<th>Christmas Day and New Year’s Day Trading (Scotland) Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Main Exemptions</strong></td>
<td>The trade or business carried on consists wholly or mainly of the sale of— meals, refreshments or alcohol for consumption on the premises on which they are sold; or meals or refreshments prepared to order for consumption off those premises.</td>
</tr>
<tr>
<td>Any shop where the trade or business carried on consists wholly or mainly of the sale of intoxicating liquor.</td>
<td></td>
</tr>
<tr>
<td>Any shop which is a registered pharmacy, and is not open for the retail sale of any goods other than medicinal products and medical and surgical appliances.</td>
<td>It is a registered pharmacy and is open solely for the purpose of the dispensing of drugs, medicines or appliances on prescription;</td>
</tr>
<tr>
<td>Any shop at a designated airport, which is situated in a part of the airport. Any shop in a railway station. Any shop which is not open for the retail sale of any goods other than food, stores or other necessaries required by any person for a vessel or aircraft on its arrival at, or immediately before its departure from, a port, harbour or airport.</td>
<td>It is within a port, railway station or commercial airport;</td>
</tr>
<tr>
<td>Any shop at a service area within the meaning of the <strong>Highways Act 1980</strong>.</td>
<td>It is at a motorway service area</td>
</tr>
<tr>
<td>Any petrol filling station.</td>
<td>The trade or business carried on consists wholly or mainly of the sale of fuel for motor vehicles.</td>
</tr>
<tr>
<td>Any shop where the trade or business carried on consists wholly or mainly of the sale of any one or more of the following: motor or cycle supplies and accessories.</td>
<td></td>
</tr>
<tr>
<td>Any farm where the trade or business carried on consists wholly or mainly of the sale of produce from that farm.</td>
<td></td>
</tr>
<tr>
<td>Any stand used for the retail sale of goods during the course of an exhibition.</td>
<td></td>
</tr>
</tbody>
</table>
Table 3 (b) Comparison of legislation affecting England/Wales and Scottish proposals

<table>
<thead>
<tr>
<th>Christmas Day (Trading) Act 2004</th>
<th>Christmas Day and New Year’s Day Trading (Scotland) Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Enforcement</strong></td>
<td></td>
</tr>
<tr>
<td>Under section 3 local authorities are under a duty to enforce the prohibition of opening by large stores on Christmas Day and to appoint inspectors for this purpose. These inspectors may be the same persons as those appointed by the local authority to enforce Sunday trading legislation. Inspectors have the same powers as those appointed under the Sunday Trading Act 1994 (i.e. rights of entry).</td>
<td>Criminal offence for a large shop to open for the purpose of making retail sales on the specified days. Thus it falls to the police to take action if a shop breaks the prohibition. This is in the context of no existing Sunday Trading inspectorate regime as was the case in England and Wales. Fine of up to £50,000</td>
</tr>
<tr>
<td>Fine of up to £50,000</td>
<td></td>
</tr>
<tr>
<td><strong>Loading and unloading</strong></td>
<td></td>
</tr>
<tr>
<td>Prohibits large shops located in an area designated by a local authority as a loading control area from loading and unloading before 9.00 a.m. on Christmas Day unless, (a) the relevant authority has granted consent, and (b) any loading or unloading is carried out in accordance with any conditions attached to that consent</td>
<td></td>
</tr>
<tr>
<td><strong>Definition of a large shop</strong></td>
<td></td>
</tr>
<tr>
<td>A relevant floor area exceeding 280 square metres (3,000 square feet)</td>
<td>A relevant floor area exceeding 280 square metres (3,000 square feet)</td>
</tr>
<tr>
<td><strong>Days applicable</strong></td>
<td></td>
</tr>
<tr>
<td>Christmas Day</td>
<td>Christmas Day and New Year’s Day</td>
</tr>
</tbody>
</table>

Some consultation respondents raised points about specific details within the Bill, including the definition of a large shop and the maximum level of the fine.

**Definition of a large shop at over 280 square metres**

Tesco Stores states that the definition does not truly reflect a large store in today’s market.

“We believe that a large store should be anything over 25,000 square feet as any store smaller than this, will not have a full range of products available for our customers”

Tesco Stores also point out that
“Different employment rights would apply to our staff depending on the type of store in which they are employed. This approach is likely to be deemed unfair to our people”

Setting the fine at a maximum of £50,000

The Bill proposes a maximum fine of £50,000 for those convicted of breaching the legislation. This amount mirrors that in the Christmas Day (Trading) Act 2004 applying in England and Wales. Scotmid retail group suggested that the financial penalty should be higher than proposed:

“It is believed there should be significant financial fines for breach of Christmas/New Year’s Day opening, certainly in excess of the £50,000 under the Sunday Trading Act. This coupled with ‘public service levies’ may serve as a deterrent.”

Table 4 below (Mintel 2005) provides some context for the level of the fine, providing basic corporate financial data for the UK’s top 10 retailers in 2003. The final column involves simply dividing the annual sales per outlet figures by 365 to get a mean average sales per day.

Table 4; The UK’s “top ten” retailers

<table>
<thead>
<tr>
<th>Company name</th>
<th>Accounts to year end</th>
<th>Sales 2003/04 (£'000)</th>
<th>Operating profit 2003/04 (£'000)</th>
<th>Outlets</th>
<th>Sales per outlet (£'000)</th>
<th>Average Sales per outlet per day (£'000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tesco (UK)</td>
<td>Feb</td>
<td>24,760,000</td>
<td>1,526,000</td>
<td>1,878</td>
<td>12,836</td>
<td>35.167</td>
</tr>
<tr>
<td>J Sainsbury (UK)</td>
<td>Mar</td>
<td>14,220,000</td>
<td>564,000</td>
<td>583</td>
<td>26,333</td>
<td>72.145</td>
</tr>
<tr>
<td>Wm Morrison Group</td>
<td>Jan</td>
<td>13,194,060</td>
<td>na</td>
<td>604</td>
<td>21,917</td>
<td>60.047</td>
</tr>
<tr>
<td>ASDA Stores</td>
<td>Dec</td>
<td>13,097,590</td>
<td>338,167</td>
<td>267</td>
<td>49,991</td>
<td>136.962</td>
</tr>
<tr>
<td>Marks &amp; Spencer (UK)</td>
<td>Mar</td>
<td>7,159,800</td>
<td>728,100</td>
<td>390</td>
<td>19,670</td>
<td>53.890</td>
</tr>
<tr>
<td>GUS – includes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Argos</td>
<td>Mar</td>
<td>3,384,000</td>
<td>297,400</td>
<td>556</td>
<td>6,278</td>
<td>17.200</td>
</tr>
<tr>
<td>• Homebase</td>
<td>Feb</td>
<td>1,400,107</td>
<td>55,963</td>
<td>281</td>
<td>5,055</td>
<td>13.849</td>
</tr>
<tr>
<td>Boots Group – includes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Boots the Chemists</td>
<td>Mar</td>
<td>4,475,700</td>
<td>568,400</td>
<td>1,426</td>
<td>3,196</td>
<td>8.756</td>
</tr>
<tr>
<td>Dixons Group (UK)</td>
<td>Apr</td>
<td>4,697,900</td>
<td>254,200</td>
<td>1,119</td>
<td>4,187</td>
<td>11.471</td>
</tr>
<tr>
<td>Somerfield</td>
<td>Apr</td>
<td>4,521,200</td>
<td>45,500</td>
<td>1,268</td>
<td>3,566</td>
<td>9.770</td>
</tr>
<tr>
<td>John Lewis Partnership</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• John Lewis</td>
<td>Jan</td>
<td>2,019,800</td>
<td>111,000</td>
<td>26</td>
<td>77,685</td>
<td>212.836</td>
</tr>
<tr>
<td>• Waitrose</td>
<td>Feb</td>
<td>2,547,900</td>
<td>104,200</td>
<td>144</td>
<td>17,943</td>
<td>49.159</td>
</tr>
</tbody>
</table>

Figures taken direct from Mintel (2005), not calculated from columns 3 and 5 in Table 4.
SOURCES

http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/14_11_05_bbc_faih.pdf


Trades Union Congress (2003a) news release; *All I want for Christmas is my two weeks leave* London http://www.tuc.org.uk/work_life/tuc-6025-f0.cfm

Trades Union Congress (2003b) news release 20 December 2003; *‘Three million get no Christmas holiday pay from ‘Scrooge bosses’*, TUC London. Available at http://www.tuc.org.uk/economy/tuc-7441-f0.cfm


SUMMARY OF RESPONSES AND CONCLUSIONS

CHRISTMAS AND NEW YEARS DAY TRADING CONSULTATION

General

In total, 91 parties responded to the Member’s consultation. Overall, 81 responses were in favour of the prohibition of trading on Christmas Day and New Year’s Day; 3 were opposed to prohibition on New Year’s Day, but supported Christmas Day closure; days; 3 were opposed to prohibition on New Year’s Day and took no position on Christmas Day; and 4 were opposed to the proposals for both.

<table>
<thead>
<tr>
<th>Support Christmas Day / Against prohibition on New Year’s Day</th>
<th>Against No position on Christmas Day / Against prohibition on New Year’s Day</th>
<th>Support Christmas Day / Against prohibition on New Year’s Day</th>
</tr>
</thead>
<tbody>
<tr>
<td>81 (89%)</td>
<td>4 (4.4%)</td>
<td>3 (3.3%)</td>
</tr>
<tr>
<td>3 (3.3%)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The 91 respondents were made up of the following groups and organisations:

18 Political (4 MSPs; 14 Councillors responding in a personal capacity, and the SNP Group at Glasgow City Council)

49 individuals, of whom 34 said that they were employed in the retail trade.

13 Retailers (including Tesco, Debenhams, Habitat, Scotmid, Nith Valley Co-op, the Ceilidh Place (Ullapool), Falls of Shin Visitor Centre, and Oldrid and Co Ltd (Lincolnshire))

2 Business organisations (CBI, Glasgow Chamber of Commerce)

2 Retail organisations (including the Scottish Retail Consortium)

3 religious organisations (General Assembly of the Church of Scotland, Baptist Union of Scotland, Evangelical Alliance)

3 Trade Unions (STUC, USDAW, United Road Transport Union)

1 voluntary organisation (The Mother's Union)

Of the 10 respondents who were opposed to the proposals as a whole or in part, 3 were individuals (including one Councillor who responded in a personal capacity), 4 were retailers (including Tesco and Debenhams), the Scottish Retail Consortium, Glasgow Chamber of Commerce and the CBI.
Retailers who supported the proposals included Habitat, Scotmid, Nith Valley Co-op, the Ceilidh Place (Ullapool) and Oldrid and Co Ltd, Boston, Lincolnshire.

The 3 religious groups and 3 trade unions who responded, supported the proposals, as did the Mother’s Union.

Of the 91 responses received, 73 respondents used the Member’s consultation form; 8 used a similar form which was supplied by USDAW; 3 were e-mails and 7 were letters. 19 respondents did not wish to disclose their personal details, preferring to remain anonymous. 2 respondents did not wish to make their submissions public.

Around 30% of responses received offered little by way of supporting comment, however the majority did provide substantive replies which means it has been possible to extract a good amount of relevant qualitative information to help inform the following analysis.

The analysis addresses the response to each question in the Member’s Consultation Document and other responses received, and sets out the arguments put forward. This is followed by a summary of conclusions under each question.

**Question 1: Do you agree in principle with maintaining the special nature of Christmas Day and New Year’s Day.**

There is overwhelming support for maintaining the special nature of Christmas Day and New Year’s Day. Only 1 respondent indicated that they did not agree with this statement.

Debenhams, the Scottish Retail Consortium (SRC) and Glasgow City Chamber of Commerce acknowledged the special nature of New Year’s Day and the large number of tourists who visit Scotland then. They consider that this is an opportunity that should not be missed by the retail sector “in the interest of the Scottish economy”. They added that “under SRC proposals, retail staff who want to celebrate the special nature of New Year’s Day by not working would be in a position to do so”.

The importance of the family was referred to by almost half of respondents (42%) as the main reason for maintaining the special nature of these days. According to some, these are the only 2 days of the year when whole families have an opportunity to be together on the basis that schools, shops and businesses were all closed. “It is vital to balance work and family life” said one respondent. Another said “working on these days runs contrary to the introduction of work-life balances and family friendly policies in the work place”.


Question 2: Do you believe that large stores should be prohibited by law from opening on Christmas Day and New Year’s Day, to protect the special nature of these days.

Apart from those who oppose the proposal in whole or in part, all other respondents felt that large stores should be prohibited from opening on both days.

7 respondents felt that employers, staff and the public needed a break on these days, with some mentioning that this particularly applied to retail staff who have to work longer hours in the run up to Christmas and New Year.

“It's only 2 days a year” said one respondent.

The introduction of a voluntary code, rather than legislation, was mentioned by 7 respondents. Those who support the proposals took the view that such a code would not be sufficient to protect workers as they felt that employers would not abide by it. The Scottish Retail Consortium on the other hand indicated that they would like to see their members being given the opportunity to see if a voluntary code to protect staff with no desire to work on New Year’s Day would work. They said their members had already agreed that if their stores opened on New Year’s Day in the future, they would sign an agreement to ensure staff do not feel obliged to work on New Year’s Day.

In the absence of legislation, a couple of respondents were concerned about the domino effect that could be caused by some stores opening on these days.

The Scottish Retail Consortium took no position on Christmas Day but argued that staff should be allowed to work on New Year’s Day if they choose to do so. Glasgow Chamber of Commerce and Debenhams agreed, having both submitted the same SRC response to the questionnaire. Debenhams did indicate separately however that the proposals overall would “make the business environment more difficult for major employers and those seeking to satisfy customer demand”. Tesco did not oppose the proposals for Christmas Day. The CBI said “We have no objection in principle to controls on Christmas Day opening, but it is our belief that no large retailer is ever likely to seriously consider opening on Christmas Day, so there appears to be no real need to introduce legislation prohibiting it”.

The SRC said that their members regard working on New Year’s Day as an “insignificant issue” and that there was a higher demand from staff, particularly seasonal staff who want to work on New Year’s Day in order to maximise their income. Tesco said that on New Year’s Day staff volunteer to work as they are glad of the extra money after Christmas. The CBI said that some retailers have trialed opening stores on New Year’s Day and found this successful, “so there is clearly demand from the public”.

4 respondents felt that the proposals would deny individual choice. Another suggested this was perhaps the thin end of the wedge and questioned
whether the proposals should be extended beyond the retail sector to cover the tourist and leisure industries too.

**Question 3: Please comment on whether the benefits of prohibiting large stores from opening on Christmas Day and New Year’s Day would outweigh any disadvantages.**

Apart from those who oppose the proposals as a whole or in part, respondents generally felt that the benefits of the proposals would outweigh any disadvantages.

Some respondents argued that the public is already used to stores being open 24/7 throughout the year, and that there was no benefit therefore in opening on Christmas and New Year’s Day. Some added that people plan ahead for these days and therefore tend to buy in their shopping in advance.

Other points made included:

- stores may find that they have morale problems if staff are forced to work on these days.
- the lack of public transport would make it difficult for those people without cars to get to the shops, which would impact on stores losing both custom and profits.
- shops make profits in the run up to Christmas anyway, so would not lose out overall.

Those not supporting the proposals (only 4% of respondents) expressed concern about the impact of closure on New Year’s Day given the busy tourist trade then. Some felt that closure may have an impact on reducing the number of tourists if Scotland is seen as being closed for business. The point was also made that the proposals fly in the face of efforts to market and promote Scotland as a destination at New Year, when it is a focus worldwide. Indeed, Tesco went further and said that Scotland’s international competitiveness would be harmed if retailers were prevented from responding to customer demand.

**Question 4: Is the definition of large shops – i.e. retail stores over 280 sq m / 3000 sq ft – an appropriate one? If not, please elaborate.**

There was a wide range of views expressed in response to this question, with no real consensus reached. This may be as a result of the technical nature of the question.

31% of respondents felt that the definition was appropriate but offered no supporting comment. 16% of respondents felt that the size definition was too large. Views on size ranged from 600 sq m to 25000 sq ft.
22% of respondents indicated that size was not an issue as all shops should be closed.

Tesco felt that the definition of 3000 sq m from the Sunday Trading Act “did not align itself to what constitutes a large store in today’s current market”. They considered anything over 25000 sq ft to be a large store.

USDAW considered that there was no hard and fast way to define a large store. They added that size was debated at length during the passage of the Sunday Trading Act 1994, and that 3,000 sq ft was arrived by way of a compromise between the competing viewpoints.

**Question 5: Are there any equality or religious issues arising from the proposal?**

43% of respondents said that no such issues should arise. 28% did not comment. Of the 29% who said that issues would arise, most of these were in relation to religion, with only 6% referring to equality issues.

13% of respondents referred to the impact of the legislation on other religions. Some argued that holidays should also be introduced on the religious days celebrated by other religions. Others argued that as a Christian country everyone should respect Christmas as the holy day of the majority of the population.

The STUC said “recognition of the full diversity of religious belief is a vital component in modern employment practice. Under the 2003 Regulations to comply with the EC Directive on Religious Discrimination in the workplace, employers may find that they indirectly discriminate against workers if they prevent them from taking holidays during their religious festivals without presenting a good business case for this.”

The Church Of Scotland, in supporting the proposals did make the point that “It is, in our view, a sad thing that it is even necessary to legislate to protect Christmas Day and New Year’s Day. Such a step provides evidence of a flattening out of our lives, a process where every day becomes the same – with no high days or holy days, no rest, no play, no reflection: only commerce, a life in which we relate to one another primarily through the exchange of money”.

Equality issues mentioned by respondents included:

- the legislation is discriminatory as it would give retail staff more rights than workers in any other sector; and
- it would discriminate within the retail sector against those who work in large stores by prohibiting them from working.
USDAW mentioned that two-thirds of shop workers are women, and that by protecting these days would be more advantageous to women than men.

Question 6: What are the possible financial implications of this proposal?

36% of respondents said that there would be no financial implications arising from the proposal. 14% offered no comment.

10% of respondents said that the costs of opening stores would outweigh any profit likely to be made that day. Around 5% of respondents felt that the motivation for opening on these days was greed, and that stores would open only to gain a competitive advantage. An equally small number felt that stores would secure their sales targets in any event on re-opening after Christmas and New Year, so there was little point in opening.

USDAW said that if there was no prohibition, then the situation could arise whereby retailers open large stores and run them at a loss simply because they do not want to lose customer loyalty to a competitor who may open.

It was also pointed out that emergency services would need to be in place at a cost to the taxpayer more generally.

Glasgow Chamber of Commerce, the Scottish Retail Consortium, Debenhams and Tesco all argued that the proposals for New Year's Day would prohibit meeting customer demand and limit employee income.

There was a wider concern of those generally opposed to the proposal about the impact on the Scottish economy and on the tourist industry at New Year were stores to be closed.

Question 7: Is enforcement under the criminal law appropriate? What penalties should apply for non-compliance?

In answer to the first part of the question, 71% of respondents did not express an opinion. 18% felt that enforcement under the criminal law is appropriate, with 11% arguing that it is not. The legalistic nature of the question may have been a factor in the low response rate to this particular question. Respondents may not have felt suitably knowledgeable about the application of the law to be able to answer it.

The Scottish Retail Consortium argued that if the proposal goes ahead, "enforcement under the criminal law would set a new precedent and would be totally out of line with the Enforcement Concordat".

In response to the second part of the question about penalties, 53% of respondents agreed that fines should apply for non-compliance. The majority of respondents however did not quantify fines, therefore there was no
consensus on what might be appropriate (£50,000 was mentioned the most – but only by 5 respondents). Around a third of those that suggested fines, took the view that “huge” or substantial” fines were necessary. It was suggested by some that financial penalties should outweigh profits made on any particular day, or that they should be large enough to “make a difference”.

Other penalties suggested included:

- Fines on the basis of a percentage of takings.
- Fines followed by a custodial sentence on a second offence.
- Fines to be publicised in order to name and shame.
- Closure of shops.
- Restrictions on license to trade.

Question 8: Do you have any other comments?

There were no general themes arising in answers to this question. Some observations included:

- “Unless there is legislation, workers believe that they will be forced to work on these days”.
- “If there is no legislation, employers will start experimenting more”
- “Clarity is needed for both employers and employees”.
- “Even if trading is banned, there will still be workers working behind the scenes to prepare the store for next day trading anyway”.
- “In a democracy, I am uncomfortable about forcing companies, whose employees are willing to work, to close “.
- “Proposal seems to be ideologically driven, and not in response to perceived or real injustice or malpractice”.

USDAW Consultation

9 respondents used a consultation form supplied by USDAW. This included some of the same questions that were included in the Member’s Consultation Document, however it did also ask the following additional questions:

*Do you think that without a change in the law you would be forced to work on Christmas Day and/or New Year’s Day?* In response to this 6 said Yes; 1 said not at the moment; and 2 did not comment.
Do you struggle to give your family the Christmas and Hogmanay celebration you would like them to have, due to your long working hours? In response, 5 said Yes; 2 said No; and 2 did not comment.

No general themes arose in respect of these questions, although a couple of responses did refer to the stressful nature of the run-up to Christmas and New Year, and that staff needed a break to recover.

Petition and Postcard Campaign

In addition to the Member’s consultation document, USDAW issued a petition and initiated a postcard campaign.

3675 signatures were attached to the petition which read “We the undersigned, call on the Scottish Parliament to take action to preserve the special nature of Christmas Day and New Year’s Day by stopping large stores from opening on these important days. We are concerned that without such action, shopworkers will be forced to work on Christmas Day and New Year’s Day”.

1382 postcards were received. These asked Q1: Should the special nature of Christmas Day and New Year’s Day be preserved? Yes/No. Q2: Should large stores be prohibited by law from opening on Christmas Day and New Year’s Day to protect the special nature of these days?

Summary

The following is a summary of conclusions reached in relation to each of the questions put by the Member in her consultation.

1. Maintaining the special nature of Christmas Day and New Year’s Day

There is overwhelming support to maintain the special nature of both days. Their “special nature” was generally deemed to be the opportunities they present for families to spend quality time together, rather than for religious or other reasons – only 4 respondents mentioned religion in relation to Christmas in their responses to this question.

It was argued however by those opposed to the proposals as a whole or in part that the traditional nature of New Year’s Day was why many tourists visited Scotland and that this should be capitalised upon by the retail sector in the interests of the economy.

2. Should large stores be prohibited by law from opening to protect the special nature of these days?

The overwhelming majority of individuals support legislation which would prohibit large stores from opening on both days, citing a voluntary code as
being open to abuse. Supporters of the proposal welcome the statutory protection it would afford staff.

Whilst only 1 individual expressed support for stores to open on Christmas Day, there was an argument put forward that the proposals deny the right to choose – whether to open for business, to be able to work or to shop.

Opponents of the proposal argue that there is demand from customers to open on New Year’s Day, and from their staff who want to work.

3. **Would the benefits of prohibiting opening outweigh the disadvantages?**

Those respondents who support the proposals felt the benefits of prohibiting opening would outweigh the disadvantages. Some argued that shops were open throughout the year anyway, many on a 24/7 basis, therefore there was no demand for opening on these days. There were concerns expressed also about the effect on staff morale if they became pressured into working on these days.

Concerns were expressed by those retailers and business organisations opposed to the proposals about closure on New Year’s Day given the demands of a busy tourist trade at that time of year. They also expressed wider concerns about the impact closure would have on Scotland’s competitiveness, and the ability to market the country as a tourist destination.

4. **Is the definition of large shops an appropriate one?**

About a third of respondents felt that 280 sq m / 3000 sq ft was an appropriate definition of a large store. Amongst all respondents, views on an appropriate size were varied ranging from 600 sq m to 25000 sq ft.

About a quarter of respondents felt that size was not an issue, and they took the opportunity to say that all shops should be closed on both days.

5. **Any religious or equality issues arising?**

Nearly half of all respondents did not think any religious or equality issues would arise from the proposal. About a quarter of respondents felt that there would be religious issues, with only 6% mentioning equality issues.

A number of respondents mentioned the impact of legislation in relation to employees of non-Christian faiths and the need for employers to recognise their holy days too. It may appear from EC Regulations that it would be discriminatory of employers not to.

In terms of equality, there may be a number of consequences of legislation – including giving retail staff more rights than employees in other sectors, and it may discriminate within the retail sector by prohibiting some staff from being able to work on specific days.
6. **Possible financial implications of the proposal?**

More than a third of respondents considered that there would be no financial implications arising from the proposals. There was a wide range of other views expressed, but little by way of consensus.

Those supporting the proposal argued that the cost of opening stores would outweigh any profits made, and that stores would only be opening to gain a competitive advantage over others. There was an argument that there may also be a cost to the public purse as emergency services would have to be provided as more people would be on the move because of stores being open.

Opponents to the proposals for New Year’s Day argued that closure would prohibit them from meeting customer demand, and employees would be prevented from supplementing their income. They also considered that there may be a wider impact on the Scottish economy if stores were unable to open for business.

7. **Is enforcement under the criminal law appropriate/what penalties should apply?**

The first part of the question attracted the least number of responses of all the questions asked in the Member’s consultation. This is perhaps due to the legalistic nature of the question. 71% of respondents did not express an opinion.

Of those who did, 18% felt that enforcement under the criminal law was appropriate, with 11% arguing that it is not.

Concern was expressed that enforcement under the criminal law would set a new precedent and would be out of line with the EC Enforcement Concordat.

In response to the second part of the question, over half of respondents agreed that fines should be imposed for non-compliance, however the majority of these did not suggest a figure, referring generally to “huge” or “substantial” fines. There was no consensus on the level of fine.

**Main arguments**

There are therefore some clear “for and against” arguments that have been put forward in relation to the proposal. These include:

**For**

- The importance of these 2 days for families.
• The opportunity to give retail staff a break at a busy time of year for them.

• Would give clarity to both employers and employees, ensuring everyone knows where they stand.

• 24/7 shopping is available throughout the year already, therefore there is no need to open stores on both these days.

• A voluntary code would be open to abuse, and would leave it open to retailers to “change the goalposts”.

• The cost of opening stores is likely to outweigh any profit likely to be made anyway.

Against

• The proposals would deny the right of choice: to open a business; to work; and to shop.

• The proposals would prohibit stores from meeting customer demand on New Year’s Day and would have an impact on tourism spend.

• There is demand from staff to work on New Year’s Day so that they can earn extra money after Christmas.

• The opportunity to open on New Year’s Day should not be missed by the retail sector in the interests of the Scottish economy.

• Proposal flies in the face of promoting Scotland as place to visit at New Year.

Issue meriting further consideration:

The question of whether New Year’s Day should continue to be included in the proposal arises given the concerns expressed by CBI Scotland, the Scottish Retail Consortium, Glasgow Chamber of Commerce, Debenhams, Tesco and others, who consider that there is demand from:

• the public who want to be able to shop;
• tourism; and
• shop staff who want to work and earn extra income.
ANNEX A

List of Respondents

Total respondents: 91

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11 May 2006

Our Ref: D17-3a/VES/MB

Ms. Tracey Hawe,
Committee Clerk,
The Justice 2 Committee,
The Scottish Parliament,
Edinburgh, EH99 1SP

Dear Ms. Hawe,

_Justice 2 Committee Tuesday 2 May 2006_

Thank you for your letter of 3 May. I note that you wish to have further information which I volunteered to provide to the Committee by Wednesday 24 May. I can tell you now that research in the Faculty’s files has shown that no one has been fined the maximum sum, that is £15,000.

As to the insurance arrangements the Treasurer of Faculty has written to the brokers and the insurers and I hope that they will be able to reply within the time limit.
The Convenor  
Justice Two Committee  
SP, Edinburgh EH99 1SP  
FAO: Ms A Walker  

15/5/2006  

Sir  

We are in receipt of your letter dated 11/5/2006. We would be most obliged if you would send us a copy of this letter by e-mail.

COMPLAINTS LEVY: You asked us to give you our further views on the Complaints levy as proposed in the Bill. Here they are:

As you are aware SACL is very much in favour of “The Polluter Pays” principle.

In principle therefore we have no objection to all 10,000 lawyers in Scotland being charged a general levy of £120 per annum. With regard to the Bill’s proposals on the specific levy being set at £300 per complaint on its estimate of 4000 complaints per annum we again have no objection.

More specifically our views in principle are as follows:

1 Where lawyers are found to have made a bona-fide mistakes which resulted in losses to their clients these lawyers should pay the specific levy of £300 to the Law Commission. This can be regarded as a rap over the knuckles to warn the lawyers in question to take more care in the future.

2 Where, however, lawyers are found to have acted with malice and bad faith towards their clients our view is that the levy should be doubled to £600, so as to make the distinction from the bona-fide cases.

3 Where a lawyer is completely exonerated and the complainant is found to have lodged a complaint which has no merit but which was lodged in good faith the complainant should be levied the £300 specific levy as a warning to be more careful about making unmeritorious complaints in the future.

4 Where however a complainant is found to have lodged a malicious complaint in bad faith against his/her lawyer this complainant should pay double the levy; again to make the distinction between a bona-fide complaint and a malicious one.
Notwithstanding the above we feel the Bill should make provision for the length of time each case takes. Inevitably some cases will be far larger and more burdensome than others. This will have to be catered for in the Bill. In this regard our views are as follows:

Complaints come in all shapes and sizes. This being the case every complaint received, investigated, determined and sanction issued by the Law Commission should be costed. Quite a few cases will inevitably cost the Commission more than £300. The Bill should make provision for the levy to be increased to cover the increased costs incurred by the Commission, but still subject to the four principles listed above.

MALICIOUS COMPLAINANT: With regard to your comment about what the sanction should be in the event of non-payment of the levy by a malicious complainant we would state the following:

Why do you refer only to a “malicious complainant” and not a “malicious lawyer” as well? Unlike your committee SACL is concerned about malicious behaviour by all involved in the Scottish Legal system; lawyer and complainant alike. As your letter was written on behalf of the J2 Committee it is apparent that your Committee is of the view that only malicious complainants should be considered, and not malicious lawyers. This is yet another example of your Committee favouring lawyers and showing gross bias against complainants. Please explain yourselves.

Despite your double standard in favour of lawyers (as always) we will answer your question as follows:

Provision should be made in the new Bill to force both malicious complainants and malicious lawyers, as above, to pay whatever levy has been costed to them. We suggest that those who refuse to pay should be incarcerated until they do pay the debt.

CONCLUSION: SACL believes the principle of a levy is sound on condition that the Polluter pays it. No lawyer or complainant who are found to be the innocent party should pay any levy. Our objective is to punish the transgressor only, not the innocent party. This is just plain common-sense. The way things are at present the exact opposite occurs.

On behalf of SACL

Stuart Usher (SACL Coordinator)
Dear Anne

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

I am writing in response to your two e-mails of 3 May which requested further information on behalf of Committee members.

I attach a short note which sets out in more detail the reasoning behind the split between services and conduct complaints contained in the Bill.

On the issue of appeals by complainers, I think that it may be worth setting out the position in a little detail.

- The Bill would give the Council of the Law Society a new power to adjudicate on allegations of unsatisfactory professional conduct against a solicitor (section 36). This currently provides for appeal to the Scottish Solicitors' Discipline Tribunal by the practitioner only. We are reflecting on whether to amend this provision to allow an appeal by the complainer against a decision not to award compensation, or not to award the amount the complainer considers appropriate. We do not think it is necessary to allow the complainer an appeal on issues other than compensation, as these do not directly affect him or her in the same way.

- Allegations of professional misconduct would continue to be prosecuted before the Scottish Solicitors' Discipline Tribunal. Section 54 of the Solicitors (Scotland) Act 1980 provides that “any person aggrieved by a decision of the Tribunal” may appeal to the Court of Session. We understand that in practice this has been narrowly interpreted as meaning the parties to the original case before the Tribunal (Council of the Law Society and practitioner). We are therefore also considering whether we should amend this section by introducing an express right of appeal for the complainer in matters relating to compensation.

- Services complaints would fall within the remit of the new Scottish Legal Complaints Commission under the Bill. Both parties would have the right to an internal appeal within the Commission - see Schedule 3, paragraph 1(g), but the Bill does not provide for either to have an external appeal on the merits (though judicial review would be a possibility for both).

On the proportion of upheld services complaints which result in an award of compensation, there are useful statistics contained on page 8 of the Annual Report of the Law Society’s Client Relations Office, which I attach. In 2005 673 complaints of inadequate professional services were upheld by
the relevant Law Society Committee, of which 452 resulted in awards of some level of compensation (about 67%). Page 9 of the report also shows that large numbers of complaints do not get as far as a formal determination by the committee. Some of those resolved by more informal conciliation may also have resulted in compensation payments.

At present the Scottish Solicitors’ Discipline Tribunal has no powers to award compensation in cases of professional misconduct (section 38 of the Bill would introduce this for the first time). There are therefore no relevant statistics here.

Turning to structure and staffing, the new Commission would have broad powers as an independent body to decide these issues for itself, subject to the provisions contained in the Bill, including the ministerial power in Schedule 1 paragraph 8(4) to give directions about number of staff and terms and conditions of employment. The estimates in the Financial Memorandum are based on forty case investigators carrying out first instance investigations, several more supporting the appeals process and five senior adjudicators (one of whom might also be supporting appeals). Schedule 1 paragraph 13 would permit the Commission to delegate decision-making functions, and we envisage that most first instance decisions on complaints would be taken by case investigators or senior adjudicators. However, we would also envisage some first instance decisions being taken by Commission member(s), because of the value or complexity of the case or because it had the potential to set an important precedent. Schedule 3 paragraph 1(f) provides for an internal appeal to an appeals committee consisting of at least three members of the Commission, the majority of whom would be non-lawyers, and none of whom would have had any previous involvement in the decision appealed against. It would be possible to convene a larger panel, for instance where the decision under appeal was taken by no relevant Commission members.

The Executive is not convinced that a separate category of complaints relating to negligence should be created. For the reasons already explained, the Bill confirms the existing categories of services and conduct complaints and creates a new sub-category of complaint in respect of unsatisfactory professional conduct. However, we are not persuaded that there is a need to create a third category, when both services and negligence complaints (up to the £20,000 limit) would be dealt with by the new Commission. There is a significant degree of overlap between inadequate professional services and negligence. While time spent on categorising complaints is required when the categorisation will determine who deals with the complaints, a further distinct category of negligence complaint could be unnecessarily burdensome in this context. The £20,000 upper limit for compensation is designed to deal with financial loss caused by negligence. We do not think there is a real risk of the Commission awarding large sums for inconvenience and distress which under existing complaints regimes are usually recognised by the award of no more than a few hundred pounds.

Finally, we are bearing in mind the need to update the Committee on the response to Lord Lester’s opinion, and will inform the Committee as soon as a decision has been made.

Yours sincerely

LOUISE MILLER
Bill co-ordinator
Reasons for the Distinction between Conduct and Services Complaints

- While consumer redress is something which is relatively straightforward to hive off from the other functions of the professional bodies, handling of conduct complaints is not.

- Investigating whether a practitioner has been guilty of misconduct is closely linked to key functions of the professional bodies such as setting professional conduct rules and standards, providing education and training, conducting audits and spot-checks to identify breaches of the rules and implementing disciplinary sanctions such as removal from the Roll.

- Not all breaches of professional conduct standards are obvious to the client, or would necessarily result in any complaint from a member of the public. Breaches of Accounts Rules are one example. Such matters may well be picked up by spot-checks carried out by the Law Society, rather than through a complaint from an affected client.

- Transfer of conduct complaints away from the professional bodies therefore affects much wider regulatory issues than the Bill is designed to cover. The focus of the Bill is on complaints handling, as this was identified as the single biggest issue which it was a priority to deal with.

- There is value in the professional body maintaining the leading role in conduct matters, subject to a reasonable degree of public oversight. This helps to maintain professional unity, discipline and commitment to taking public interest considerations into account. Without a substantial role in enforcing standards of conduct, the Law Society might turn into simply a trade union for solicitors. Again, this would raise wider regulatory issues.

- While the new Commission would not be able to take over handling of the merits of a conduct complaint, it would be able to review handling of such a complaint by a professional body and enforce its recommendations, including a recommendation that compensation should be paid because the complaint was mishandled. This would provide the necessary degree of public accountability. Non-lawyer representation on the Scottish Solicitors’ Discipline Tribunal would be increased to 50%.

- The new Commission would have jurisdiction over the merits of around 80% of complaints. Only about 20% of complaints currently relate purely to conduct matters. The Commission would be the lead body on consumer redress issues, with strong powers.

- There is no reason why the distinction between services and conduct cannot be operated satisfactorily. It is one the Law Society has been operating since 1988. Like most definitions, it does give rise to potential grey areas, but the Bill makes it clear that ultimately it is for the Commission to decide how a complaint should be categorised.

- Where the complaint is hybrid, the Commission and the professional body would have parallel powers to make awards and impose sanctions. The Executive will consider in the light of Stage 1 evidence whether there could be any clearer or simpler provision for handling hybrid complaints.
Report on the Financial Memorandum of the Legal Profession and Legal Aid (Scotland) Bill

The Committee reports to the Justice 2 Committee as follows—

Introduction

1. Under Standing Orders, Rule 9.6, the lead committee in relation to a bill must consider and report on the bill's financial memorandum at stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

2. This report sets out the views of the Finance Committee on the Financial Memorandum of the Legal Profession and Legal Aid (Scotland) Bill, for which the Justice 2 Committee has been designated by the Parliamentary Bureau as the lead committee at Stage 1.

3. The Committee agreed to adopt level 2 scrutiny in considering the Bill, which involved seeking written evidence from organisations financially affected by the Bill, then taking oral evidence from the Executive Bill Team.

4. The Committee took evidence from the Bill team on 25 April, which can be viewed by clicking here.

5. The Committee received submissions from the Faculty of Advocates, Scottish Legal Aid Board (SLAB), and The Law Society of Scotland. The Committee also received supplementary correspondence from the Scottish Executive and this evidence is set out in the Annexe to this report.

6. The Committee would like to express its thanks to all those who submitted their views.

Objectives and the Financial Memorandum

7. The Bill has two main functions: to create a Commission which will handle complaints made against the legal profession; and to reform the provision of legal aid and widen legal aid services.

8. The Bill seeks to create a Legal Services Complaints Commission, which will replace the Scottish Legal Services Ombudsman. This Commission will deal with complaints regarding the legal profession, and remain independent of the
profession. The Commission will be funded through two levies, an annual levy payable by all members of the legal profession, and a complaints levy, which will be payable by any member of the profession against whom a complaint is made. These levies will be consulted on by the Commission with the profession, for the forthcoming year along with its proposed budget.

9. In addition, the Bill also seeks to reform the provision of legal aid, and to enable the Scottish Legal Aid Board to oversee all applications for legal aid, and to provide a non-lawyer advice service.

10. The Financial Memorandum estimates that the costs will fall upon the Scottish Executive for the start up costs of the Commission, and recurring costs will be met by the legal profession through the levies. The Financial Memorandum does not anticipate substantial costs in relation to the legal aid reforms.

11. The Committee’s view was that the Financial Memorandum lacked detail in relation to the assumptions made when calculating costs. While the information given during evidence from Scottish Executive officials was appreciated, the Committee was disappointed that this was not given in the Financial Memorandum from the outset.

Summary of Evidence

Staffing

12. During the evidence session, the Committee sought clarification on the staffing of the proposed Commission, as sufficient detail was not provided in the Financial Memorandum. The Executive officials explained that while staffing would be an issue for the Commission, they envisaged that the Commission would employ 50 – 60 members of staff (including a chief executive). Executive officials explained that this would be made up of 44 adjudicators who the Executive believe would be paid at the same salary as the Executive B2 grade¹ (the salary scale for this grade is £21,292 - £28,520). There would also be approximately 5 senior adjudicators, perhaps paid between £60,000 - £70,000, and the Chief Executive. The remainder would be administrative staff. The Financial Memorandum estimates that staff salaries will cost £1,700,000 per annum, including the costs of pensions and national insurance, which is estimated elsewhere in the Financial Memorandum as 15%.

13. Officials explained that assumptions for staffing figures had been arrived at by assessing from figures for the number of complaints handled per year by adjudicators at the consumer complaints services at the Law Society for England and Wales. These adjudicators can handle 100 complaints a year. Based on 4000 complaints received by the Law Society of Scotland per year, the Executive believe that the Commission will need between 50 to 60 staff. However, as the Law Society of Scotland will continue to deal with cases relating to conduct, the Committee believes questions remain over the number of staff required.

14. The Committee remains concerned with the costs associated with staffing. From the figures provided in the Financial Memorandum, Table 1 calculates the

¹ West, Official Report, 25 April 2006, Col 3525
salary costs for the Commission, based the total figure in the Financial Memorandum and on pensions and national insurance contributions of 15%.

Table 1: staffing costs

<table>
<thead>
<tr>
<th>Assumption of 55 staff</th>
<th></th>
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<tbody>
<tr>
<td>Cost of Staff in Financial Memorandum</td>
<td>£1,700,000</td>
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<tr>
<td>- Cost of Chief Executive (assumed)</td>
<td>-£80,000</td>
</tr>
<tr>
<td>- 5 Senior Adjudicators £60,000</td>
<td>-£300,000</td>
</tr>
<tr>
<td>Sub-total</td>
<td>£1,320,000</td>
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<tr>
<td>Average salary per employee</td>
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<tr>
<td>Less 15% National Insurance and pension contribution</td>
<td>£4041</td>
</tr>
<tr>
<td>Total</td>
<td>£22,898</td>
</tr>
</tbody>
</table>

15. However, current guidance for civil service pensions recommends that 18.5% should be used to calculate pensions and this would make the salary even lower. In addition, the Committee also notes that the cost of an employee at B2 level, in the Financial Memorandum of the Adoption and Children (Scotland) Bill was estimated by the Scottish Executive to be £30,019 per annum².

16. In addition, should staff be transferred from the Law Society of Scotland or the Scottish Legal Services Ombudsman, the Commission could be subject to Transfer of Undertakings Protection of Employment (TUPE) requirements to preserve current salaries etc., and this could also impact on total staffing costs.

17. Whether existing staff move over would depend on where the Commission is located, and this has yet to be agreed by Scottish Ministers. The Committee is concerned that there are still a large number of unanswered questions with regard to the costs of staffing particularly as it is not known how many staff might transfer from existing organisations and recommends that the lead Committee pursues this further with the Minister.

18. The Committee was also concerned as to whether there would be any ministerial role in relation to the Commission and its budget and staffing. Primarily, the Committee wanted to know whether there could be ministerial intervention, should the Commission be overstaffed, or if its budget spiralled and levies become punitive. Executive officials explained that the intention was for the Commission to have the final decision on its budget, following consultation with the legal profession. Executive officials also highlighted that there was a provision in the Bill to enable ministerial intervention in relation to staffing numbers and costs of the Commission³.

19. In their submission to the Committee, the Law Society of Scotland raised concerns relating to staff turnover. The Law Society believed that staff turnover is likely to be greater than anticipated by the Financial Memorandum. During evidence, Executive officials explained that their assumption is based on the initial

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² Adoption and Children (Scotland) Bill (SP Bill 61-EN) Financial Memorandum, paragraph 376
³ Legal Profession and Legal Aid (Scotland) Bill (sp Bill 56) Schedule 1, Section 8(4)
phase of the Commission’s operation, however it was reasonable to consider that staff turnover would increase at a later stage⁴.

20. The Law Society of Scotland also highlighted concerns in relation to the costs associated with training of staff. The Law Society considered £40,000 stated in the Financial Memorandum to be optimistic. Officials explained that this figure was derived from the difference between £300 per annum per staff member spent by the Scottish Legal Services Ombudsman and the £1000 per annum per staff member spent by the consumer complaints service of the Law Society of England and Wales on training. Officials explained that the Executive attempted to “split the difference, but towards the more generous end of the scale. The figure is a bit of a guesstimate”⁵.

21. The Committee asked how the Executive had derived the figures in relation to the recruitment exercise for the new Commission. Officials responded that this was based on a previous exercise, for recruiting staff for the Scottish Legal Services Ombudsman, with two adverts in two national publications. The Officials explained that while these figures could potentially now be out of date, it would also be dependent upon how many staff transfer from the Law Society of Scotland and the Scottish Legal Services Ombudsman, and how much external recruitment would be required for staffing the new Commission.

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

**Location**

23. The Financial Memorandum estimates accommodation costs of £65,000 for the start up costs, £195,000 for the first year, and £260,000 per annum thereafter. However, the Financial Memorandum does not explain from where these figures were derived, and what assumption has been made in terms of location. Officials explained that the figures were based on the high end scale for property in Edinburgh. They explained that depending on the Ministerial decision, costs could be less than stated in the Financial Memorandum. However location could also impact on staffing costs. If the Commission is located in Edinburgh, staff from the Law Society of Scotland and the Scottish Legal Services Ombudsman may transfer. If the location is elsewhere, then they may not. **The Committee is disappointed that details relating to the assumptions made for location were not provided in the Financial Memorandum.**

**Complaints**

24. The Committee questioned whether the estimate of 4000 complaints per annum was high, as while this figure had been based on the Law Society of Scotland’s workload, it was recognised that this might be as a result of a surge of complaints in relation to endowment mis-selling. Executive officials explained that

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⁴ Miller, Official Report, 25 April 2006, Cols. 3533 - 3534
⁵ Miller, Official Report, 25 April 2006, Col 3532
while the Executive anticipates this figure will drop, they also expect that the creation of the Commission would generate new complaints and “inspire greater consumer confidence and people might be more forthcoming in complaining”.

25. The Committee asked what mechanism would be in place to protect the legal profession against frivolous complaints, as the profession will be expected to pay the complaint levy should a complaint be lodged against them. Officials explained that no levy would be payable in relation to vexatious complaints, and that there would be a mechanism to sift out these complaints. They further explained that even if a professional is exonerated, the levy would still be payable, as otherwise it could be considered that the Commission may have a financial interest in upholding complaints.

**Funding**

26. The Executive will fund the Commission for the initial start-up period. Following the creation of the Commission, it will be funded by the legal profession, through levies which will be set annually following consultation. Executive officials explained that the idea of consultation was based on the model used by the Financial Services Ombudsman.

27. Both the Law Society of Scotland and the Faculty of Advocates stated that they felt that the figures provided in the Financial Memorandum for operation of the Commission were optimistic. The Executive stated that the figures were estimates, as it would be for the Commission to decide ultimately its operating budget. Executive officials also added that no alternative costs were provided in the evidence that was submitted by the Law Society of Scotland to the figures given in the Financial Memorandum. The Committee appreciates that alternative figures were not provided by the Law Society of Scotland, however, it would have been beneficial for both the Law Society and the Committee if the background to the Executive’s assumptions had been provided in the Financial Memorandum.

28. The Committee questioned whether the Commission could be partly funded by £400,000 savings made by the Executive following the abolition of the Scottish Legal Services Ombudsman.

29. The Executive explained that as legal professionals in the public sector would need to pay the annual levy, money from the public purse would flow, albeit indirectly, into the Commission. The Executive believed that the funding of the regulation of the profession should come from the profession itself, and not from the state. According to the Executive “In five or 10 years, people might ask why the Executive and the taxpayer were contributing to the costs of the commission to such a small extent and purely for historical reasons. Ministers have not reached a conclusive view on the matter but, for the time being, there is a general presumption against a contribution from the taxpayer via the Scottish Executive.”

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6 West, Official Report 25 April 2006, Col. 3524
7 West, Official Report 25 April 2006, Col 3527
Savings
30. The Committee asked what was meant by “significant savings” for legal bodies, as stated in paragraph 109 of the Financial Memorandum, as no figure was provided for this. In supplementary correspondence, officials explained that the Law Society currently spends around £2.1 million per annum on handling complaints, 70% of which are service complaints. Following the creation of the Commission which will take over handling these service complaints, the Executive believes that this will result in a 70% saving for the Law Society of Scotland. Officials further explained that as the Faculty of Advocates does not have staff dealing purely with complaints, their savings are likely to be marginal in comparison. This correspondence is provided in the annexe to this report.

Conclusion
31. The Committee is disappointed that the assumptions underpinning the costs which were detailed in the evidence session had not been included in the Financial Memorandum. For example, the Financial Memorandum fails to provide detail in relation to the grading structure or pay scales for staff, how the figures for complaints were arrived at, and in turn how this affects staff numbers, and the assumptions for location costs. The Committee feels that such information should have been included in the Financial Memorandum and that this would have assisted it in its consideration.

32. The Committee appreciates that most of the figures were best estimates and it will be for the Commission to determine staffing and budget, however the Committee would have appreciated a range of figures from best to worst case scenarios in relation to the costs. The Committee is particularly concerned that costs relating to staff may have been underestimated and that there are other factors which have not been taken into account. Given that staff costs account for the majority of costs in the Financial Memorandum and therefore impact on the levies on the legal profession, the Committee recommends to the lead Committee that these issues be raised with the Minister.
Annexe

Submission from the Faculty of Advocates

Introduction
1. The Faculty of Advocates is pleased to have the opportunity to submit observations on the Financial Memorandum accompanying the Legal Profession and Legal Aid (Scotland) Bill. The Bill has two main components: changes to the system for dealing with complaints against members of the legal professions, and secondly a number of changes to the delivery of publicly funded legal advice. The Faculty is in a position to comment on the financial implications of the first part but we do not feel able to offer any useful comment about the financial aspects of the second part.

2. Before responding to the specific questions posed in the Finance Committee’s letter of 14th March 2006, it may assist if we set out some factual background about the structure of the legal professions. In our view, this bears very directly on the way in which regulatory scheme proposed by the Bill will operate and where the costs of regulation will fall.

3. There are significant differences between the practice of advocacy on a self-employed referral basis and other forms of legal practice. These differences have regulatory implications which are reflected in the regulatory structures of the two branches of the legal profession. The work carried out by advocates differs from that done by solicitors. Advocates do not handle clients’ money and therefore do not require to have Accounts Rules or a Guarantee Fund. They function as an independent referral bar. They give advice and they appear in court. All advocates are self employed and so far as their professional instructions are concerned are in competition with each other. They are however part of a collegiate body. They are all members of the Faculty of Advocates and as such are subject to the code of conduct of that organisation, and individual advocates are the beneficiaries of the advice and guidance which has always been provided by members to each other. In particular senior members have a duty to assist junior members on questions of professional ethics. We would not be in favour of a system which allowed individual advocates to deal with complaints made about him or her directly with the client. All members of the Faculty of Advocates have an interest in maintaining standards and, through the office bearers, in knowing of all complaints. Members against whom a complaint is made take the matter very seriously. A finding against a member is important. Any decision that a member has been guilty of misconduct or has provided inadequate service will have serious consequences for him or her. It is essential that such decisions are made by people who are knowledgeable about the profession, and whose decisions command respect of both the person who is dissatisfied and the member of the profession.
4. The Faculty of Advocates operates in a significantly different way from the Bar in England and Wales. It is library based. There are no chambers. Entrance to the Faculty depends on appropriate qualification and completion of training and is not dependent on obtaining a seat in chambers. The cost of dealing with complaints is borne entirely by members. There is no cost to the taxpayer. The members of Faculty and lay members who make up the complaints committees do so at no cost, and all administrative costs are paid by the Faculty. The number of complaints against advocates is very small. In 2004 the Faculty received 52 complaints, of which 5 could not be taken forward. The remaining 47 were investigated and of those, 29 may be characterised as service complaints, 17 as conduct complaints and one as involving elements of both conduct and service. 32 of those complaints have been dismissed.

In 2005, the Faculty received 49 complaints, two of which could not be taken forward. The remaining 47 were investigated, of which 22 may be characterised as service complaints, 20 as conduct complaints and five as involving elements of both conduct and service. 28 of those complaints have been dismissed.

Questions
Qu 1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

5. The Faculty submitted a written response to the Executive’s consultation paper on changes to the system for dealing with complaints against members of the legal professions which preceded the Bill. That consultation paper had no specific financial assumptions section. The Faculty is also submitting a written memorandum to the Justice 2 Committee, which is the lead committee of the Scottish Parliament for the Bill. There has been no other separate pre-Bill consultation.

Qu 2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

6. This is not applicable for the reasons given in paragraph 6.

Qu 3. Did you have sufficient time to contribute to the consultation exercise?

7. This is not applicable for the reasons given in paragraph 6.

Qu 4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

8. Despite the Executive’s confident assertions at paragraph 109 of the Financial Memorandum, the Faculty does not anticipate any cost savings to the organisation as a body. On the other hand, there will be
financial consequences of the Bill for all practising members of the Faculty. For some of those practitioners, who are all self-employed sole practitioners, these may be significant.

9. We anticipate that there will be no cost saving to the Faculty for several reasons. First, as noted above, the members of Faculty and lay members who make up the existing complaints committees do so at no cost to the public. Secondly, the administrative support for the existing complaints process is provided by members of the Faculty secretariat, who are employed for a number of tasks, of which complaints administration is but one. Thirdly about half the complaints to the Faculty are conduct complaints, which will continue to be referred to the Faculty under the proposals in the Bill. There will, we anticipate, be additional costs in liaising between the Faculty and the Commission.

10. Individual practitioners will have the proposed levies imposed on them to fund the operation of the Scottish Legal Complaints Commission. According to the Law Society of Scotland Annual Report for 2005, there are 10,233 practising solicitors; while there are currently 461 practising advocates. As the Executive will not fund the Commission after the first year of operations (see paragraph 109 of the Financial Memorandum), that cost will be borne entirely by the professions. It is reasonable to expect that the cost will be passed on to the public in the form of increased fees – something which is not canvassed in the Financial Memorandum. We note the proposal that compensation of up to £20,000 may be awarded. All advocates have personal indemnity insurance for which they pay. The insurers have indicated that they will require to consider their position in providing cover in respect of the proposed arrangements. They may introduce an excess and they may increase premiums.

Qu 5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

11. For the reasons discussed in paragraph 9, we do not consider that there is any alteration in the costs to be borne by the Faculty as an organisation. However, for the reasons given in paragraph 10 there will be costs on individual members. We have elaborated on the consequences there.

Qu 6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

12. For the reasons discussed in paragraph 9, we do not consider that there is any alteration in the costs to be borne by the Faculty as an organisation. However, for the reasons given in paragraph 10 there will be costs on individual members. We have elaborated on the consequences there.
Qu 7. **If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?**

13. According to paragraph 2 of the Policy Memorandum accompanying the Bill, those elements of the Bill relating to legal aid form part of a larger policy initiative. We surmise that is a reference to the Strategic Review of the Delivery of Legal Aid, which reported to the Ministers in June 2004. The Faculty is not in a position to comment on the overall financial consequences of that policy.

Qu 8. **Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?**

14. There will almost certainly be additional costs associated with the complaints handling part of the Bill. As paragraph 112 of the Financial Memorandum makes clear, the figures set out in the Memorandum for the operating costs of the proposed scheme are estimates; and the structure and methods of working will be a matter for the Scottish Legal Complaints Commission, if it is established. Compared with the existing structure for regulation of advocates, the Faculty anticipates that the Commission will be less efficient, certainly in the initial years of its existence. Further, we consider it reasonable to regard the Scottish Ministers’ cost estimates as under-estimates. It is anticipated that there will be nine Commissioners with 50-60 employees. Under the present system, the work of investigating and determining complaints against advocates is currently carried out by the Dean, Complaints Committees, Investigating Committees and the Disciplinary Tribunal. The advocate members of these bodies provide their services free of charge. Administrative support is provided by two employees of the Faculty. As we understand it, much of the work of the Law Society in handling complaints against solicitors is likewise carried out by reporters and Client Relations Committees, the members of which are not remunerated. According to the report of the Law Society’s Client Relations Department for 2005, 38 staff are employed in that Department. Assuming that the Executive’s projections are correct, there will be more persons paid for handling complaints against lawyers than is the case at present. We would be surprised if the voluntary work which is currently put into the current system would be replaced by between 10 and 20 additional employees. Further, as we have observed above, we do not anticipate that the Faculty will save costs. Indeed there may be additional costs in liaison between the Faculty and the proposed Commission in connexion with cases where there is an issue as to whether or not the complaint involves a conduct element. There will therefore be a direct cost to practising members of Faculty, which it is reasonable to expect will be passed on to members of the public in the form of increased fees. It is not possible to quantify that increase directly.
15. Paragraph 140 suggests that the Commission may “disseminat[e] best practice on complaints handling etc by publication of leaflets and information packs.” The Faculty anticipates that such ‘best practice’ may well result in additional administrative burdens on individual members. That would lead to additional costs, in the form of inefficiency in the management of advocates’ individual businesses, and, to the extent that members of Faculty may require to retain secretarial or archival services, in a direct on-cost, which it again reasonable to expect will be passed on to members of the public in the form of increased fees. Again it is not possible to quantify that increase directly.

16. More generally, the Faculty does not accept that the proposal will be cost-neutral. It is likely that the arrangements will be more expensive than the aggregate costs of the present arrangements. One likely effect of the proposal is therefore to increase the cost of legal services in Scotland. The aggregate cost of the proposed system is likely to be greater than the aggregate cost of the present arrangements. If the cost is, as proposed, to be borne in the first instance by the legal profession, it is likely to be passed on to clients in the shape of higher fees.

17. It is anticipated that, in addition to nine Commissioners, the Commission will employ 50-60 members of staff. This is more than the number of employees currently employed in the Law Society Client Relations Department, to which one may add the two members of staff employed by the Faculty who are involved in the administration of complaints. Yet the Commission will only handle pure service complaints. The Faculty will require to maintain the present arrangements for misconduct complaints and one imagines that the Law Society will need to do likewise. The overall number of people involved in dealing with complaints against lawyers will increase. The additional administrative costs will require to be met. There will, further, be additional handling costs (both for the Commission and the professional bodies) in sorting out whether complaints are service complaints or conduct complaints and in liaison between the Commission and the professional bodies. These additional handling costs will also require to be met.
Submission from Scottish Legal Aid Board (SLAB)

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

SLAB responded to the consultation – ‘Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward’. There were no financial assumptions made. The consultation concerned policy matters only.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

N/A

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum. If not, please provide details.

4.1 The Scottish Executive sought views from SLAB on elements of the Bill and we gave comments. The costs we identified are not specifically included in the Financial Memorandum.

4.2 Legal Aid Fund - We agree with the Scottish Executive that in some areas it is very difficult to estimate the cost implications of the Bill, particularly in relation to registered advisers, as the likely number of advisers who will register and the likely volume of applications are both unknown. Any increase in costs to the legal aid fund will depend on the number of registered advisers and the volume of applications. In relation to the transfer of grants of solemn legal aid to the Board, it is difficult to be clear as to the impact the transfer will have on the legal aid fund. However, the ability for the Board to verify financial information provided in applications may lead to termination and possible recovery of legal aid where the information is found to be false.

4.2 Grant-in-Aid - The provisions relating to the creation and maintenance of a register of advisers and a Code of Practice will lead to administrative costs for SLAB. The costs will depend on the number of registered advisers and the approach to the Code of Practice, particularly how compliance is monitored. The range of costs is estimated to be £50,000 - £120,000. The transfer of grants of solemn legal aid will also lead to some administrative costs for the Board. The estimated grant-in-aid costs of the Bill provisions are detailed in Appendix 1 (Costs & savings table).
1.3 At paragraph 147, the Financial Memorandum explains the process of granting civil legal aid instead of civil advice and assistance. Under advice and assistance, if a solicitor wishes to carry out work beyond the authorised limit of expenditure, they must seek an increase in expenditure from the Board. Costs are controlled in this way.

1.4 In relation to complaints against the legal profession, the Board advised the Scottish Executive in our response to the consultation on the Regulation of the Legal Profession, that advice and assistance would be available for those wishing to pursue a complaint. Those wishing to judicially review a decision of the new body will be able to apply for civil legal aid. We do not expect any material financial impact as a result of such applications.

5. Are you content that your organisation can meet the financial costs associated with the Bill. If not, how do you think these costs should be met?

Additional grant-in-aid (which funds our administrative and staffing costs) will be required to meet the administrative costs associated with the provisions in the Bill. (See costs outlined in Appendix 1.) As the Legal Aid Fund is not cash limited, any increase in legal aid costs will be provided by the Scottish Executive.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

The effect on the Board’s grant-in-aid and the costs to the legal aid fund are dependent on the number of registered advisers and organisations willing to participate, the auditing requirements for the Code of Practice and the volume of applications.

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs area accurately reflected in the Financial Memorandum?

The Bill is part of a wider reform agenda but we are not aware of any other costs directly related to the Financial Memorandum.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

SLAB is not aware of other legal aid costs associated with this Bill.
## Appendix

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<tr>
<th>GRANT IN AID</th>
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<td><strong>TOTAL</strong></td>
<td><strong>£35,000</strong></td>
<td></td>
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</table>
Submission from the Law Society of Scotland

I refer to your letter of 14th March inviting the Law Society of Scotland to submit comments to a number of questions raised by the Finance Committee. Please find attached a Memorandum of Comments prepared by the Society which I trust you will find of assistance.

I also enclose a paper by Professor David McCrone which also deals with issues relating to the Financial Memorandum.

If you have any queries, please do not hesitate to contact me.

Yours sincerely,

Michael P. Clancy
Director

INTRODUCTION

The Law Society of Scotland (the Society) thanks the Finance Committee for the invitation to comment on the Financial Memorandum in relation to this Bill and has the following comments to make.

Consultation

Question 1 – Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Yes – a copy of the response to “Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland” is attached to this Memorandum. [The Appendices can be provided if required.]

Question 2 – Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

No. The Society does not believe that its comments have been accurately reflected as the Memorandum lacks any substantive detail or any proper calculation of the annual or specific levies which will fund the Scottish Legal Complaints Commission (SLCC). The Society also wishes to state that it sees no justification whatsoever for the State not inputting into this new organisation financially. By the Society’s computations the Executive will be saving approximately £400,000 per annum in decommissioning the office of the Scottish Legal Services Ombudsman and this is funding which should be applied directly to the new Commission covering amongst other things the cost and expenses of the Board which is to take over certain functions previously fulfilled by the Ombudsman. Whilst there may be some marginal justification for the Profession

* this is available from the clerks on request
bearing a general levy in case costs a good number of the fixed costs must lie with the State.

In paragraph 109 of the Memorandum the Executive estimates running costs of £2.4 million. On what conceivable basis?

The Memorandum talks about an annual levy from 10,000 practising legal practitioners. Leaving aside non-lawyers with rights of audience about to be introduced of which there are hardly likely to be many and the three independent Qualified Conveyancers which the Society regulates and leaving to one side the imposition on approximately 500 practising advocates the vast burden of expenditure in relation to this almost entirely unaccountable body is going to be met by Scotland’s 10,000 solicitors. The Society believes that there is a lack of understanding as to the nature of various categories of practising certificate holder and the status of solicitors on the roll. What consideration has been given in relation to the Memorandum as to whether or not the general levy should apply to every solicitor – trainees, assistants, associates, junior partners, senior partners and in particular the 2,700 or thereby lawyers who do not work in private practice?

The estimates of £120 for the general levy and £300 for the specific levy are accordingly meaningless and not based on any proper consideration of the structure of the legal profession in Scotland.

The specific levy, were it to be imposed in circumstances where a solicitor was exonerated may be illegal – a matter which the Society has already brought to the Executive’s attention – and accordingly it is entirely unsafe to calculate on this basis. The Society’s current expenditure in relation to the Client Relations Office is:

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006 Budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salaries</td>
<td>389,159</td>
<td>452,940</td>
<td>503,011</td>
<td>632,763</td>
<td>774,323</td>
<td>979,401</td>
<td>1,108,971</td>
</tr>
<tr>
<td>Overheads</td>
<td>97,715</td>
<td>123,471</td>
<td>130,682</td>
<td>166,543</td>
<td>175,484</td>
<td>254,644</td>
<td>255,063</td>
</tr>
<tr>
<td>Operational Costs</td>
<td>89,972</td>
<td>101,260</td>
<td>123,777</td>
<td>152,367</td>
<td>273,408</td>
<td>436,298</td>
<td>561,390</td>
</tr>
<tr>
<td>Prosecution Fees</td>
<td>225,709</td>
<td>103,174</td>
<td>165,392</td>
<td>149,426</td>
<td>109,589</td>
<td>177,362</td>
<td>126,000</td>
</tr>
<tr>
<td>Tribunal Costs</td>
<td>92,077</td>
<td>101,738</td>
<td>96,362</td>
<td>96,620</td>
<td>117,510</td>
<td>104,362</td>
<td>104,736</td>
</tr>
<tr>
<td>Recoveries</td>
<td>48,299</td>
<td>30,436</td>
<td>68,504</td>
<td>65,177</td>
<td>61,514</td>
<td>60,087</td>
<td>67,000</td>
</tr>
<tr>
<td>Total Costs</td>
<td>846,333</td>
<td>852,147</td>
<td>950,720</td>
<td>1,132,542</td>
<td>1,388,800</td>
<td>1,891,978</td>
<td>2,089,160</td>
</tr>
<tr>
<td>Percentage Increase</td>
<td>17%</td>
<td>1%</td>
<td>12%</td>
<td>19%</td>
<td>23%</td>
<td>36%</td>
<td>10%</td>
</tr>
</tbody>
</table>

This level of expenditure relates to approximately 36 members of staff in that office consisting of 20 professional and 16 support staff. The point however is that the bulk of the work done in relation to the Society’s handling of service complaints is carried out by 12 Client Relations Committees underpinned by 254 reporters of whom 168 are solicitors and 86 are non-solicitors. The Society has stressed in its response to the consultation that the decision-making in relation to service
complaints is that all stages of the operation are 50% solicitor and 50% lay. Those preparing reports and attending Committee meetings are paid a nominal fee but give their services on a voluntary basis. The new body will not be able to rely on a similar input.

The Society’s expenditure therefore of approximately £2.1 million per annum is understated by arguably a further £1 million by way of “goodwill subsidy”.

Until such time as the Executive makes it clear the operational modus of the new body it is difficult to see whether or not this system is to be replicated but there is no doubt that even if it were there may be no question of the profession inputting into a system voluntarily for the good of the profession and the public and accordingly the cost would rise considerably. Similarly if as anticipated by the Society the SLCC operates without Committees and purely on a Case Manager basis then there will be more direct salary cost.

**Question 3 – Did you have sufficient time to contribute to the consultation exercise?**

Yes.

**Question 4 – If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.**

The Society wishes to make it clear that there are two sets of implications here. Firstly, for the Society as an organisation: the implications are that there may be redundancies perhaps up to 12 if the Society is scaling down its Client Relations operation and concentrating on conduct work but it is impossible to say what scale those might be on until such time as more detail is known about the Commission and its proposed method of working. There have been some suggestions that TUPE may apply but until such time as the Executive tells us where the new organisation is to be situated this remains uncertain.

Secondly, the principle implications are for the practising profession. Whilst the Society has several philosophical difficulties with the Bill based on its ending of the independence of the legal profession and the danger that that presents the public in Scotland, this Memorandum is confined to the financial considerations. First of all it is entirely proper that the State should bear in their entirety the set up costs. The change in Scotland has not been predicated on the systemic failure of the client complaints system unlike its English counterpart. Whilst therefore it is not a matter of direct concern to the Society it does observe in passing that the estimates in relation to, for instance, recruitment and training do appear to be without any foundation and somewhat aspirational. In particular £40,000 for training for 50-60 staff with, in all probability, virtually no background in this area of work is, at best, hugely optimistic.

The Society is also not in a position to comment in any way on the accommodation costs. The cost of premises in Edinburgh or indeed Glasgow is likely to be exponential compared to other areas in which this Commission should more
properly be situated. That being so, until such time as the Society is told where the situation is to be it would require to reserve its position on this. Again the Society’s reservations in relation to the IT costs and publicity campaign expenditure and would reiterate its desire to engage meaningfully with the Executive when decisions have been made.

The Society therefore turns to the question of costs on the legal profession. In relation to recruitment the Society would strongly counsel the Executive to consider their premise that “no provision is made for recruitment costs in the immediate subsequent years”. This is a dangerous assumption. Working in the Society’s Client Relations Office is stressful characterised as it is by often having to deal with difficult complainers and indeed it must be said, difficult solicitors. Staff turnover is much higher than in any other area of Society function and it is likely that this experience will be replicated in the Commission perhaps more so when the Case Managers are the sole decision makers whereas as least the Case Managers have not only many years of experience collectively to draw on but the advantage of bearing the burden with reporters and Committees and Conveners. On what basis does the Executive consider that turnover will be marginal?

Estimated salary costs again are meaningless until such time as the Executive sets out the mode of operation although again we would counsel that the 15% allowance for National Insurance and Pension contributions does seem to be worryingly low. More specification is required on the breakdown of 50-60 staff and a note of the remuneration levels for the 9 Board members including the Chairman before the Society would be able to comment in any meaningful way whatsoever.

Again, on paragraph 135 the Society considers it optimistic to say the least that the organisation will be fully functional within three months of its inception and it is really not possible for the Society to comment on any of the assumptions made at paragraphs 136, 137, 138, 139 and 140 unless information of the Executive’s thinking and decision-making in this regard was made available.

Question 5 – Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

As indicated, the costs are not going to fall on the Society as a body but on the profession. The costs lack specification and foundation but that they are likely, particularly with what the Executive has styled a “polluter pays” system, to impact markedly on the high street of Scotland – the very area of practice which is under most financial pressure. The current proposals wrongly suggest “polluter pays” because solicitors will pay a case fee as the Bill stands to prove their innocence.

Question 6 – Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

No.

Question 7 – If the Bill is part of a wider policy initiative, do you believe that these associates costs are accurately reflected in the Financial Memorandum?
Question 8 – Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

The Society believes that there may be future costs. For example, the Bill provides Scottish Ministers with many additional powers to make substantive changes in the composition of the Board, the area of reach of this organisation and other matters all of which would have major cost implications. The Society also believes that at present the costs whilst they have been quantified as far as they possibly can by the Executive remain at best a “guesstimate”. It also appears that no consideration has been given to the costs that may be incurred at start-up of an ongoing nature in relation to obtaining legal advice for handling complaints or dealing with challenges before the Courts. These costs could be substantial yet are not mentioned other than a suggestion that £20,000 should be allowed for consultancy and the possibility of an in-house legal team. These omissions go to emphasise the vague and unspecific nature of the approach in the Memorandum.

The Society stresses its willingness to be involved in a more meaningful consultation when matters have been developed.

THE GOVERNANCE OF LAW:

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

This report is divided into six parts:

1. Why regulatory bodies (including ‘quangos’ and NDPBs) have become more numerous and salient in contemporary social and political life in Scotland;


3. An analysis of the report on written consultation responses to the Scottish Executive’s document ‘Reforming Complaints Handling: building consumer confidence’;

4. Observations on the Legal Profession and Legal Aid Bill;

5. A review of regulatory procedures with regard to comparator professions, viz., ICAS, GTC, GMC, and Financial Ombudsman Service;

6. General observations resulting from the analysis.

The report has been written and produced by Professor David McCrone, co-director of The Institute of Governance at Edinburgh University to whom all queries should be addressed.
1.0 REGULATORY BODIES

1.1 Recent years have seen a major growth in supervisory and regulatory bodies governing both public and private sectors. This in part reflects a process of de-regulation and privatisation of public bodies, while at the same time recognising that there is a need for public accountability and regulation in the public interest. Hence, there has been a growth in regulators and ombudsmen.

1.2 As a consequence, there has been awakened interest in ‘quangos’ and NDPBs (non-departmental public bodies), who gets appointed to them, and what their remit is. In his review of quangos in Scotland shortly after the Scottish parliament was established in 1999, Richard Parry observed:

‘Quangos represent a cluttering of the political landscape, with potentially redundant decision layers. These will be decreasingly acceptable now that a straightforward central government model of parliamentarians and ministers is available in Scotland. Delayering is all the fashion in private business, and structures that build in second-guessing or duplication of decisions are managerially dubious’ (Parry, 1999:25).

It is possible that Parry was too sanguine in his views of the impact of devolution, and in any case, the evidence in the UK as a whole, is that the ‘quango state’ is alive and all too well south of the border (Select Committee on Public Administration, Mapping the Quango State, HC 367, 2000-1). Coined by the Pliatsky Report on Non-Departmental Public Bodies in 1980, the Cabinet Office defined it in the following way:

‘A quango is officially defined as a body which has a role in the processes of national Government, but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm’s length fro ministers. More simply, this means a national or regional public body, operating independently of Ministers, but for which Ministers are ultimately responsible. Such bodies are formally classified as NDPBs – or non-departmental public bodies.’ (Cabinet Office, NDPBs: a Guide for Departments, 2000).

A matrix of NDPBs as they relate to Scotland is to be found at the end of this section (‘A Guide to NDPBs’).
1.3 In a Scottish context, the increasing number of regulators, commissioners and ‘tsars’ has drawn political and media attention. (The Conservative MSP Bill Aitken waspishly commented that Scotland now has more tsars than the Romanoff dynasty.) The Scottish Parliament’s Finance Committee recently (March 2006) announced its intention to carry out a review of such bodies, and whether they are value for money (‘Accountability and Governance Inquiry’). Regulatory bodies accountable to parliament include: Audit Scotland, Scottish Public Services Ombudsman, the Commissioner for Children and Young People, Commissioner for Public Appointments in Scotland. Those accountable to Scottish Ministers include: Scottish Information Commissioner, Office of the Scottish Charity Regulator, Scottish Commission of the Regulation of Care, and Standards Commission for Scotland.

1.4 The Better Regulation Task Force which was set up in 1997 estimated that the cost to the UK economy of regulation is between 10-12% of GDP, over £100bn, similar to annual income tax returns (Better Regulation, annual report, 2005). In its March 2005 report to the Prime Minister, ‘Regulation – Less is More’, BRTF identified ‘regulatory creep’ whereby over-zealous interpretation by government leads to red tape. BRTF argued for greater clarity, consistency and better communication. It commented: ‘One of the most unfortunate things about administrative burdens is that those imposing them often do not think about or cannot see the true costs which they are imposing on others.’ (BRTF, 2005, p.3) It commended to government the principle of ‘one in, one out’ whereby new regulations have to be matched by deregulatory measures. Its report had five recommendations to government:

• Government should be more proactive in seeking out proposals for simplification;
• It should adopt a ‘one in, one out’ approach to regulation;
• Departments and regulators should undertake more frequent and better post-implementation reviews of regulation;
• Government should set up effective and efficient mechanisms to deliver regulatory reform;
• Business and other stakeholders should also identify redundant or over-burdensome regulation.

1.4.1 In its evidence to the Clementi Commission (June 2004), BRTF rejected the setting up of an overarching regulator, the Legal Services Authority (LSA) on the grounds that professional responsibility would be undermined if the legal profession were entirely disengaged from the process of making the rules which govern it. It commended ‘model B+’ on the grounds that it would split regulatory and representative functions. In January 2006, BRTF became the Better Regulation Commission (BRC). It is committed to the ‘fit for purpose’ principle whereby regulatory devices should be appropriate to the task at hand, and should have built-in safeguards to prevent escalating costs.

1.4.2 The UK government cited the Better Regulation Action Plan of 2005 in support of its Legislative and Regulatory Reform Bill (January 2006) "to make it quicker and easier to tackle unnecessary and over-complicated regulation
and help bring about a risk-based approach to regulation’, and in the context of the Better Regulation Commission’s five principles of good regulation (Cabinet Office News Release, 11\textsuperscript{th} January 2006).

2.0 THE CLEMENTI REPORT AND THE WHITE PAPER (England and Wales)

2.1 Appointments:
2.1.1 Clementi argued that the appointment of Chairman and Chief Executive of the Legal Services Board (LSB) would lie between the Secretary of State for Constitutional Affairs and the Judiciary. On the one hand, the Board needs to be free from political influence; and on other, the Secretary of State is responsible to parliament for the conduct of legal services sector. Clementi concluded: ‘The proposal of this Review is that the appointment of the Chairman and Chief Executive should be made by the Secretary of State for Constitutional Affairs in consultation with a senior member of the judiciary [Clementi suggested the Master of Rolls]’ (p.83, para. 13).

2.1.2 The White Paper opted to have Secretary of State for Constitutional Affairs appoint the Chairman, as well as members of LSB ‘following consultation with the chair’ (p.32, 5.5). The LSB would appoint the chair of OLC ‘subject to the approval of the Secretary of State for Constitutional Affairs. Members of the OLC board would be appointed by LSB, without approval of the Secretary of State for Constitutional Affairs. Appointments to be subject to ‘Nolan’ rules (Office of the Commissioner for Public Appointments).

2.2 Costs:
2.2.1 Clementi employed Ernst and Young who argued that best estimate of cost of model B+ in a simplified system (England and Wales as much more complex than Scotland) at £50.5m, including additional cost of new legal services board at £4.5m. Costs would be covered by general levy across front-line regulatory bodies; and payments from those against whom complaint is upheld (‘polluter pays’ principle).

2.2.2 The White Paper argued that costs are borne by legal profession; by LSB charging FLRs (front-line regulators) for costs of regulation. Funding of OLC on 30% from general levy on profession, and 70% from ‘polluter pays’ mechanism.

2.3 The White Paper argued for high level salience of a Consumer Panel (its White Paper is called ‘The Future of Legal Services: Putting Consumers First’), with major sections given over to discussion of Alternative Business Structures (ABS) whereby multi-disciplinary partnerships including non-lawyers are involved. Clementi devoted a chapter to this but seemed less focused on this, as indeed does the Scottish draft bill.

2.4 Issue as to who controls Guarantee Fund and Master Policy: in the England and Wales White Paper, there is some discussion of their equivalents coming under the jurisdiction of Financial Ombudsman Service (FOS) which itself comes under FSA (Financial Services Agency). I noted that Law Society of Scotland (LSS) made this point too, arguing that it is already answerable in
this regard to FSA/FOS, and that there is no role for Scottish Legal Services Ombudsman in overseeing the Master Policy. Indeed, OFT investigated the Master Policy in 2004-5, and had no adverse comments to make.

3.0 REFORMING COMPLAINTS HANDLING, BUILDING CONSUMER CONFIDENCE: ANALYSIS OF WRITTEN CONSULTATION RESPONSES

3.1 The Scottish Executive was reportedly pleased (a) that 490 responses were received to this consultation, second in number only to its consultation proposing the ban on smoking in public places; and (b) that these appeared to support its stance on reforming complaints procedures.

3.2 The analysis and reporting of these responses conform to a recognisable genre for those familiar with similar consultation exercises, namely, taking each of the questions/headings in the original document, and sorting responses into these, normally adding them up in terms of being for and against (with percentages), supplemented by the use of selected quotations from written submissions. This descriptive exercise is usually described as ‘analysis’, but does not involve any or much data manipulation using quantitative or qualitative techniques.

3.3 The analysis here has been carried out by Linda Nicholson, described as The Research Shop, based in Peebles, possibly a one-person outfit, of which there are a few who take on this kind of consultancy work devoted to analysing consultation responses for government and the public sector. According to web searches, The Research Shop has carried out similar work in Scotland on, for example, dental services, NHS pharmacy services, family law, the Sentencing Commission, and organ and tissue donations. This kind of work is possibly best described as ‘cheap and cheerful’, which is not meant to be pejorative, but simply to indicate that it is not especially sophisticated or nuanced, if only because the budgets involved are quite modest and the time-scales very tight. There are some freelance consultants who make a living in this way by doing such work for the Scottish Executive.

3.4 In the case of this report, it has many of the deficits as well as some merits. One cannot say that it has skewed the findings, but one is left with doubts about the methodology which is largely superficial, and sometimes misleading. For example:

3.4.1 **Small numbers**: there is over-dependence on percentages, even where the Ns are very small. For example, see page 36, table 4: percentages are given for an N of 31, which means that every single person represents three percentage points. It is not sensible to do this.

3.4.2 **Base numbers**: Even where the Ns are of a reasonable size (100+), everything depends on the base, that is, what it is a percentage of. This can make all the difference to a conclusion. For example, much is made of the fact that 81% of members of the public support the government’s preferred option D. These number 417, the largest group of those responding to the consultation. It turns out, however, that only 107 members of the public
actually expressed a view on this, and of these 81% support option D. In other words, the 81% calculation is based on 107 cases, not 417. One might just as well have written: ‘Only 25% of members of the public supported the government’s preferred option D.’ One might, of course, be accused of choosing a statistic which fitted one’s case, but the far more important point is that we have to be careful and transparent about the figures percentages are calculated upon. To take another example: in the executive summary, in answer to question 1, bullet point one says: ‘The majority view (84%) was opposed to the legal professional bodies keeping their regulatory and representative functions undivided.’ Taken at face value, we might conclude that well over 8 out of 10 people making written submissions wanted the functions to be split. Not so. Turning to page 22, one discovers that ‘In total, 216 respondents (44%) provided a clear view on whether the regulation and representation functions of the Law Society of Scotland should remain undivided.’ In other words, it is 84% of this 44% who take this view, not 84% of members of the public responding, still less of the total number who sent in written submissions. In short, the headline statement on page 2 could well have been written as: ‘42% of members of the public were opposed to the legal professional bodies keeping their regulatory and representative functions undivided.’ If one wanted to be devious, one might point out that a clear majority (58%) were quite happy with these functions NOT being divided.

3.5 Let us examine the methodology more carefully. On page 15, the report says the following:

‘The majority of responses from members of the public were from people who had requested that the Law Society investigate their complaint against their solicitor. However, there were indications that a small minority of submissions from the public were from people who are currently, or have been involved in the complaints handling process, for example, as lay representatives on a Law Society Committee, or as reporters for the Law Society. Other people declared their interest, including retired police officers, expert witnesses, and previous Citizens Advice Bureaux staff.’ (p.16)

This is an important paragraph because it points to a significantly varied and diverse category of ‘the public’. From the first sentence, one assumes that the researcher has been able to identify complainants however narrowly or broadly. One might have expected her to analyse their responses in that context, setting aside those with perhaps other axes to grind. To treat, then, ‘members of the public’ as an undifferentiated whole – and it is the supposed weight of ‘public opinion’ which is mainly brought to bear in this report – is to miss a very important trick. To be sure, all such consultation exercises which invite responses have ‘bias’ built into them in the sense that they are not, and cannot be, surveys of public opinion tout court. They plainly comprise people who have been moved to respond to the consultation exercise, for whatever reason. That, plainly, is the nature of such exercises. For example, the overwhelming proportion of people who responded to the government’s consultation on banning smoking in public places were indubitably in favour of such a ban. One cannot, however, infer from this evidence that the public
as a whole is in favour of such a ban. It turns out, of course, that the public is in favour of a ban, but we can only tell that from properly representative surveys of public opinion. There are temptations to treat consultations as such; witness, here, the sentence following the above:
‘Thus, the overall experience of the members of the public who had responded to the consultation appeared to be broad with responses informed by a wide range of perspectives and involvement.’ (ibid.)

This statement may be true only insofar as it contains people who might be hostile, neutral as well as sympathetic to the Law Society and the legal profession/system, for example, but one can only analyse their responses in that context. What one cannot do is to treat these exercises as a quasi-random sample on an ‘as-if’ basis.

3.6 It is good professional practice in survey research, when one has a self-selected sample, to set its parameters such as age, gender, social class and so on against those of the population as a whole; in other words, to show that x% of respondents are over 50 years of age compared with y% of the population as a whole. In this way, the reader can judge how ‘representative’ or otherwise responses are. The researcher tries to deal with this crucial point thus:

‘The consultation attracted a sizeable volume of responses from a wide spectrum of respondents representing a variety of perspectives. Remote, rural and urban locations were also represented among respondents. It was interesting to note the relatively high percentage of responses to this consultation from members of the public compared with similar consultation exercises. Considering the encouragement given to solicitor firms to respond to the consultation, it could be argued that the number of submissions from solicitors and advocates was lower than could have been expected. In addition, a small number of equality issues were raised by respondents to the consultation, suggesting that another ‘gap’ in submissions may be responses from representative equality bodies.’ (p.16)

There are a number of dubious inferences contained therein.

3.6.1 The reader is unable to judge whether or nor the spectrum is indeed wide, because no data on respondents are given. We are left to accept or reject the author’s assertion. Although we are told that ‘locations’ are diverse, we are given nothing on which to judge that, and no other social characteristics such as age, gender, social class etc are mentioned.

3.6.2 We are unable to judge for ourselves the ‘relatively high percentage of responses to this consultation from members of the public compared with similar consultation exercises’. Compared to what, one might ask?

3.6.3 The point about the perceived lack of response from individual solicitors and advocates is unwarranted, especially if it infers that they don’t much care either way. In the first place, if one agrees with one’s professional
association, why write in saying so? And what number might the author 'have expected'?

3.6.4 The equality issue seems to be a red herring, or to alter the metaphor a little, to come from someone with a particular fish to fry. One cannot, surely, point out that solicitors have somehow been remiss in not replying, whereas 'equality bodies' have somehow been excluded from the exercise. There is chop logic involved here.

3.7 In defence, one might point out that the remit is to make sense of written submissions, rather than to carry out scientific surveys of public opinion. What, in other words, can one do? It is interesting to look at how the Review of the Regulatory Framework for Legal Services in England and Wales, by David Clementi, handled these issues. The report points out that 265 written responses were received (to play the numbers game for a moment, and for effect, just over half the number received by the Scottish Executive), and these are treated as background information. In order to gauge public opinion, Clementi commissioned quantitative and qualitative research from MORI, involving a sample size of 1838 adults in England and Wales, as well as 12 focus groups. Among other questions, the survey asked about people's views of the legal profession (mainly favourable, and well ahead of politicians and government ministers, but not as popular as teachers, doctors and nurses), their levels of knowledge of and involvement with law, when and why they consult lawyers, and their attitudes to legal services involving non-lawyers. In general terms, the survey work concluded that lawyers were not as well regarded as other professionals, less customer focused, approachable and transparent, but on the other hand, independent and providing a good quality service. The point about making this comparison between the reviews of regulatory frameworks for legal services north and south of the border is not to compare like with like, but to point to alternative ways of seeking and interpreting evidence, with a view to making policy changes in regulatory frameworks.

4.0 LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL: OBSERVATIONS

4.1 membership of SLCC:
4.1.2 all members including legal members are to be appointed by Scottish Ministers;
4.1.3 Scottish Ministers can remove a member from office;
4.1.4 there is no mention in the Bill itself of the Scottish Commissioner for Public Appointments, or of public appointments procedures, although these appear in the policy memorandum (p.6, para 26);
4.1.5 SLCC will have a Chief Executive to be appointed by the Commission, 'with the approval of Scottish Ministers'

4.2 Costs:
4.2.1 whereas start-up costs are estimated at £451k, the running costs of the Commission are estimated at £2.4m p.a. Given that the Bill estimates that the
Commission will have between 50 and 60 staff, one must ask how realistic this is;

4.2.2 Scottish Ministers can make grants to SLCC, not simply for start-up costs, but in the future, without any indication what these might be for;

4.2.3 the recurrent costs are to be met wholly by the legal profession whereas control is vested in the Commission and in Ministers. On the reverse principle that 'he who calls the tune forces the piper to pay', this has potential to be an open-ended and unpredictable commitment to be met by the profession;

4.2.4 complaints become much more expensive to handle. It might be helpful to give estimates for the unit costs of handling current complaints, versus future ones, given the significant fixed costs reflected in the Commission, which are to be carried by the profession, especially as there appears to be a ratchet effect as regards costs.

4.3 Interpreting the Consultation exercise: see Policy Memorandum:

4.3.1 para 15: this is a straight lift from the Report. It comments: ‘Thus, the overall experience of the members of the public who had responded to the consultation appeared to be broad with responses informed by a wide range of perspectives and involvement.’ See my comments on this in my analysis of this document. One cannot make this inference from the evidence given.

4.3.2 Para 31: ‘… overall the consultative response favoured option D…’ I have shown that this is technically incorrect insofar as a minority of ‘members of the public’ explicitly say so.

4.3.3 Para. 37: ‘… split between the public…’ (a) ‘the public’ per se did not respond to this; one is talking here of those who made submissions; (b) on its own admission, ‘members of the public’ who did so were differentiated into those who had been complainants and those who had not. The Report does not disaggregate these, even though it was possible to do so according to the evidence given.

5.0 COMPARATOR PROFESSIONS

5.1 Institute of Chartered Accountants of Scotland
5.1.1 ICAS has 15,000+ members, who are mainly (80%) employees rather than in private practice. Recently, there has been a significant increase in student members, especially located in England; thought to be due to quality of training and education provided by ICAS.

5.1.2 Not all accountants are members of ICAS; name ‘accountant’ is not legally protected. However, term ‘Chartered Accountant’ is reserved to members of ICAS, founded in 1854 by Royal Charter. ICAS is not ‘generally able to intervene in legal disputes between a client and their CA’ (ICAS, Complaints against Chartered Accountants, 2001: 5.18). ICAS requires practising

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8 This document is due to be updated soon.
members to take out Professional Indemnity Insurance (5.3). Fee Arbitration Service uses CA arbiters appointed to act as Auditors of Fees (7.1).

5.1.3 Where complaints cannot be resolved by conciliation, they are referred to the Investigation Committee (9.1), which is made up of CA and lay members. Having lay members began in late 1980s, when ICAS went to Scottish Consumer Council. In a committee of 20, around 7 are lay members. These are ‘people from other walks of life who ensure that the Committee deals fairly and even-handedly with every complaint’ (9.1). Adverts are placed in newspapers; lay members are paid a *per diem* fee. Discipline Committee also has a number of lay members, and functions similar to a court or tribunal. ICAS also advertises for lay members of Council; council members cannot sit on Investigations Committee or Discipline Committee.

5.1.4 Lay members mainly come from law and related professions (e.g. former police officers). ICAS looks for qualified lay members according to matrix of skills required e.g. of small businesses or whatever.

5.1.5 ICAS Response to Professional Oversight Board for Accountancy (POBA) report entitled ‘Complaints and Discipline Procedures Review’.

1. For 20 years, ICAS has had an arbitration scheme (Auditor of Fees); not independent, being administered by ICAS and featuring only ICAS members as arbiters; deals only with fee-related complaints.

2. The paper takes a robust attitude to ‘growing regulatory burden’, and its response to POBA recommendation is ‘underscored by the belief that the reparation or compensation culture (an important subsidiary of the ‘Complaints Industry’) that has rapidly permeated society militates against enterprise and has tipped the balance unfairly against professional of every kind.’

3. ICAS proposes three stages to Alternative Dispute Resolution (ADR): in-house conciliation; external mediation; and external arbitration (note that arbitration only follows mediation). It does not believe that ICAS has responsibility to resolve disputes where internal conciliation fails. It supports independent administration of mediation, away from ICAS, and at no cost to it. Arbiters therefore should not be given powers to compensate, and calculation of consequential loss should not fall within arbitration scheme; ‘There is no substitute for the Courts in this respect’.

4. ‘… any complaint that cannot be settled by secretariat conciliation in the first instance, must not be remitted to a mechanism that begins to erode the private law position of the member against the client. For that reason alone, members should not be compelled to remit disputes involving clients to arbitration. The mediation mechanism that ICAS proposes is the optimum from the point of view of keeping private law positions of member and client as equal as possible.’ (p.6)

5. ICAS is also concerned that POBA would prefer a single scheme in which all accountancy bodies are participants, and which would almost certainly be run
from London. ‘ICAS does not believe a dissatisfied client in Scotland would willingly cede authority for the conduct of his case by someone at so far a geographical remove ... In any event, contracts between clients and members which are performed in Scotland are therefore governed by Scots Law.’ (p.6)

5.1.6 General Observations:
1. in 2005, failure of proposed amalgamation of ICAEW and CIPFA, and opposition to ICAEW name-change to ICA (Jack McConnell also voiced opposition, as did Australian body)

2. ICAS: complaints about individual members (E & W complaints against firms; also has schedule of penalties; ICAS doesn't); ICAS does not have powers to compel witnesses to give evidence.

3. POBA gave ICAS a clean bill of health. Powers to suspend members are being beefed up at moment.

4. ICAS has no equivalent of Guarantee Fund.

5. ICAS does not have tribunals established by statute; it is inspected by DTI and Insolvency Service.

6. Decreasing number of complaints in recent years: from 239 in 1998 to 56 in 2005; thought largely to tightening up of professional standards.

7. New rules being negotiated via Privy Council (governed by Royal Charter slows things down); ‘polluter pays’ scheme being introduced. There will be an additional levy to pay for this. New joint disciplinary scheme with ICAEW.

8. Setting up of Accountancy Investigation and Disciplinary Board (AIDB), POBA successor to Review Board.

9. ICAS seems based on model of private professions who are largely self-regulating, but with lay members on committees; no suggestion of state regulation; autonomous and independent body from ICAEW (competitive?); jealous of independence; seems quick on its feet. It has managed to reduce significantly number of complaints against its members over the years, and to expedite these.

5.2 GENERAL TEACHING COUNCIL

5.2.1 An advisory NDPB, and statutory organisation; example of public sector professional body with registration and regulatory functions. Self-funding (subscriptions from registered teachers), and accepts government funds to carry out specific reviews by negotiation. It is a more powerful, and older (set up under Teaching Council (Scotland) Act 1965), body than its English equivalent. It confers registration on teachers; and gives advice to Scottish Ministers. It is deemed by itself and outside observers as an influential body with regard to government policy. It claims to have good relations with civil
servants and through them, with ministers. The Act does give ministers the power to overrule, but this has not happened. It also helps that SE does not employ teachers directly, which is done via Local Authorities and CoSLA – a useful buffer.

5.2.2 The formation of the General Teaching Council for Scotland in 1965 resulted from widespread concern that entry standards to the Scottish teaching profession had been lowered by government action since the time of the Second World War. In particular, the employment in schools of unqualified teachers in response to teacher shortage.

5.2.3 The Council’s main functions are:

1. To maintain a register of those entitled to teach in public sector schools and colleges in Scotland;
2. To determine whether, in any particular case under its registration and disciplinary powers, registration is to be refused or withdrawn on grounds of professional conduct;
3. To keep under review the standards of education, training and fitness to teach of persons entering the teaching profession in Scotland and to make recommendations to Scottish Ministers on this matter;
4. To make recommendations to Scottish Ministers on the supply of teachers;
5. To oversee the management of the probationary period for teachers;
6. To accredit all Chartered Teacher programmes and modules and award the Standard for Chartered Teacher;
7. To accredit all programmes and modules leading to the award of the Standard for Headship;
8. To make recommendations to Scottish Ministers on the continuing professional development and staff development review of teachers;
9. To keep itself informed of the education and professional preparation of teachers in teacher education institutions and to review the content and arrangement of teacher education courses.

5.2.4 The Council’s powers are to be extended (at a date to be announced) to enable it to determine whether registration is to be refused or withdrawn in cases relating to ill-health and competence. An extended range of disciplinary options short of withdrawal of registration will also become available to the Council at that time.

5.2.5 GTCS has around 76,000 members, each paying £20 p.a.; budget of c£1.5m (roughly doubled since 1998).

GTC has virtual 100% coverage in Scotland in public sector, and around 70% in independent schools, mainly bigger and old merchant company schools. In England, registration is not compulsory, reflected in weakness of GTCE. Nevertheless, GTCS operates ‘five nations’ arrangements with counterparts in E, W, NI and RoI.

GTC Council has 50 members; 26 elected by the membership, 18 appointed (including 3 Faculty Deans – used to be under elected members), and 6
nominated by Scottish Ministers (used to be Sec of State for Scotland). Nominations to Council are solicited via the press as set out in 1965 Act. Appointments use OCPAS route. GTC moved to present HQ in 1998, and now employs 57 staff (compared with 28 pre-1998).

5.2.6 Impact of ECHR, notably on equality and disability legislation, and on handling complaints – fair trial, etc. Usually, GTC lets law take its course, before deciding on discontinuing registration. On questions of proven illegality: issue is how relevant it is to professional activity. 2000 Act gives wider repertoire of powers. GTCS resists direct role in dismissal on grounds of competence before or unless teacher’s employer has taken decision to dismiss.

Where GTC is unable to satisfy complainant, cases can be referred on to Scottish Public Services Ombudsman. To date, only 2 (same person) have done so.

In 1999, Scottish Office instigated review of GTC, carried out by Deloitte and Touche. Another review is about to be announced. In their 1999 review, D & T used benchmarking with comparator bodies, e.g. LSS, GTCE, UKCC, General Dental Council, and two teachers boards, one in Canada and one in Australia. D&T decided on this, not GTC. The benchmarking data are available in the 1999 report, and while dated, might be of some relevance. Relevant comparative dimensions included: aims, functions, election methodology, membership, funding, role of competence, discipline, future changes.

5.2.7 Observations
Plainly, GTCS is a dealing with public sector professionals, and there is a longstanding separation from representative functions. It is interesting nonetheless that GTCS seems to have ear of senior politicians and administrators, and has managed to circumvent controversy at a time where considerable public and press interest in matters of care of children, and a few high-profile controversies. This is not to suggest GTCS is untouchable, but that it has Intelligence to know what is going on, especially re matters of professional regulation and risk management.

5.3 GENERAL MEDICAL COUNCIL

5.3.1 Role of the GMC (from their website: http://www.gmc-uk.org/).
The purpose of the General Medical Council (GMC) is to protect, promote and maintain the health and safety of the public by ensuring proper standards in the practice of medicine.
The law gives four main functions under the Medical Act 1983:
• keeping up-to-date registers of qualified doctors
• fostering good medical practice
• promoting high standards of medical education
• dealing firmly and fairly with doctors whose fitness to practise is in doubt.

5.3.2 Protecting the public
“We have strong and effective legal powers designed to maintain the standards the public have a right to expect of doctors. We are not here to protect the medical profession - their interests are protected by others. Our job is to protect patients. Where any doctor fails to meet those standards, we act to protect patients from harm - if necessary, by removing the doctor from the register and removing their right to practise medicine. The GMC is an independent body and represents a partnership between the public and the profession. This concept of ‘professionally-led regulation in partnership with the public’ enables the GMC to set a framework of standards and ethics that is owned by the profession while reflecting the views and expectations of the public. The values are embodied in the publication Good Medical Practice, which underpins all the GMC’s work.”

5.3.3 legal status
The General Medical Council (GMC) was established under the Medical Act of 1858.
also a registered charity (registration number 1089278).
The governing body, the Council, has 35 members:
• 19 doctors elected by the doctors on the register
• 14 members of the public appointed by the NHS Appointments Commission
• 2 academics appointed by educational bodies - the universities and medical royal college.

5.3.4 Developing Medical Regulation: a vision for the future (April 2005)
This was GMC’s submission to the Donaldson Enquiry – which was due for publication in Dec. 05 – still not published.

Key issues aimed at improving effectiveness of regulation over next 5 to 10 years:

1. more effective connections between different elements in regulatory environment.
2. Need for regulation. to develop more creative approach to engaging with patients and public.
3. Make register of medical practitioners more accessible and relevant to users
4. Risk-based approach to regulation: the need for regulation to be targeted towards areas of perceived risk. “We need to be fully conscious of the burden of regulation and ensure that it does not get in the way of good health care … we want to regulate with a light touch where the regulatory risk is low and with a greater scrutiny where it is higher.” (intro)
5. Making sense of complaints and fitness to practise: need to make clear distinction between dealing with questions of fitness to practise (which is for the regulator to do) and resolving complaints (which is for others).

Para. 15, p.6: models of professional regulation.
At one end: system based on deterrence, focused on wrong-doing and punishment: prescriptive, rule-bound, reactive, mistrust of those regulated.
“It is the regulator as policeman whose task is to catch miscreants.” (p.7
at other end: model based on compliance, where underlying assumption is integrity and competence of majority of regulated professionals; emphasis on being proactive and encouraging improvement through guidance rather than detailed and prescriptive regulations.

Para. 69: p.13: a ‘risk-based’ approach to regulation. GMC is committed to the principles of Better Regulation Task Force – proportionality, accountability, consistency, transparency and targeting. ‘Proportionality requires that policy solutions be proportionate to the perceived problem or risk.’ (p.13)

Para. 86, p.15: avoid the ‘complaints maze’ by creating a portal for complaints about health care in UK (in context of NHS, GMC etc) – presumption should be of local handling of complaint in first instance and only passed to GMC if that becomes justified by further, additional evidence.

Para. 159 ff. p.24: July 2003; number of members of Council (i.e. governing body of GMC) reduced from 104 to 35. Current policy of GMC is that majority should be elected medical members. Para. 165 comments: ‘Other professions are also reviewing the manner of their regulation, most notably the legal professions.’ [context of Clementi?] – but ‘the environments of within which medical and legal practice operates are very different.’ (para. 174: p.25)

Para. 164: in light of Dame Janet Smith’s fifth report on Shipman case (http://www.the-shipman-inquiry.org.uk/fifthreport.asp); query whether elected members have a conflict between interests of their electorate and the public interest (‘doctors regulating doctors’). ‘We accept that the election by doctors of a majority may give rise to the perception of a representative body and that in turn might have an impact upon public confidence.’ (para. 174: ‘adjudication could be completely separated from the GMC, as Dame Janet Smith recommended.’)

Para. 165: ‘Other professions are also reviewing the manner of their regulation, most notably the legal professions. It is also a matter being considered by the Better Regulation Task Force [now, Commission] and, most recently, the Independent Commission for Good Governance in Public Services.”

Para. 172: for 2004, percentage of successful appeals constituted 0.7%

Para. 178: regulation is a ‘reserved’ matter to Westminster, and thus accountability should be to WMP. Nevertheless, differing clinical governance exists in different parts of UK, thus office established in Edinburgh in 2004, and one in Cardiff in 2005.

Annex C: p.31; Report also cites Independent Commission for Good Governance in Public Service (by Langlands, 2005) http://www.opm.co.uk/ICGGPS/.

5.3.5 Issues re LSS:
1. high profile cases e.g. Bristol; Shipman – GMC under even more pressure re medical issues than perhaps lawyers are.

2. Issue of ‘doctors regulating doctors’ even where election to council; ‘just a cosy club’? (Professionally-led regulation in healthcare – just a cosy club?’, Social Market Foundation, Nov. 2004). Graeme Catto (President of GMC) comments: ‘I do not believe at all in self-regulating professions but I do believe very strongly in professionally-led regulation.’

3. Problem of external regulation seen as giving rise to ‘a rising mass of codified petty regulation, swollen by the need for rules to enforce rules and to counter their avoidance’ (by Fred Hirsch; quoted by Catto on p.16)

4. ‘You could have a lay body that had professional advice and ask it to regulate the profession, but it is likely to alienate those you most wish to regulate.’ (Catto, p.17)

5. Issues of ‘fit for purpose’ and ‘proportionality’; development of risk-based regulation (see Better Regulation Commission). GMC sees opportunities in a multi-tiered regulatory model (inculcating ‘individual consciousness’ and best practice for each doctor = self-regulation; through team-based regulation (‘the practice’); work-based regulation (e.g. hospital); up to national regulator e.g. GMC. GMC should not see all complaints (‘croutons in soup’ case – whereby a doctor was prosecuted for taking croutons ‘without paying for them’ in hospital canteen.) Also work with Royal Colleges to develop shared regulatory instruments.

6. Finance? While doctors pay a registration fee, they can set it against tax, so in that respect it becomes ‘public money’. Nothing wrong with doctors paying a license fee, like a taxi driver, thereby public get reassurance. Problem is costing of regulation set against proportionality; need for this to be accurately done, otherwise it becomes open-ended costs on practitioners.

7. Scottish/English differences? While some 15% of doctors have a Scottish registered address, about 8% of the UK medical workforce actually work in Scotland, but only 4% of complaints relate to doctors working in Scotland. This calculation can be made because the GMC is a UK-wide body, unlike their legal counterparts.

5.4 FINANCIAL OMBUDSMAN SERVICE

5.4.1 Financial Advisors are subject to stringent regulation by FSA, and specifically the Financial Ombudsman Service (FOS) which is responsible for resolving complaints about financial services quickly and with minimum formality. Under the Act, FOS comprises two jurisdictions: the compulsory jurisdiction covering firms which are required to participate in the FOS in respect of complaints about activities specified by FSA; and the voluntary jurisdiction covering financial services activities not included in the compulsory jurisdiction.

5.4.2 FSA has extensive handbooks, including regulatory processes and dispute resolution (http://fashandbook.info/FSA/html/handbook). The role of FOS it to settle disputes, as an alternative to the courts; it is not a regulator or a trade body or a consumer champion. Its main aim is to help settle individual disputes between consumers and financial firms. It covers a wide range of financial matters, from insurance and mortgages to savings and investments.
FOS is independent; complainants who are not satisfied are free to go to court instead, but if they accept the ombudsman’s decision, it is deemed binding on both complainant and the form. It aims to resolve cases within 6 months, except in complex cases such as those concerning mortgage endowments which represent some 250 complaints per day. FOS does not publish the names of firms or consumers whose cases it handles.

5.4.3 FOS is answerable to FSA which in turn is answerable to the UK parliament, via The Treasury. All directors are appointed by FSA, and the case of the Chairman, with the approval of Treasury. ‘In the appointment of Directors, the FSA will have regard to the need to achieve and maintain an appropriate balance in the composition of the Board and will take account of the views of the Chairman of FOS.’ (Memorandum of Understanding between DSA and FOS; para. 29) The board members of FOS are non-executive with no involvement in individual complaints. Their job is to ensure that FOS is properly resourced and is able to carry out its role effectively and independently.

5.4.4 According to Handbook Guide FISA 11 (Complaints), FOS collects complaints data to assist in the monitoring of firms and their regulatory compliance. Firms are required to report twice a year, six months pre- and post its accounting reference date.

5.4.5 FSA issued a consultation paper (no.30) in October 1999 on the regulation of professional forms. Chapter 12 set out its thinking on ‘financial’ versus ‘professional’ service complaints, as follows: ‘Complaints that relate purely to a form’s professional services with no element of activity captured by the compulsory jurisdiction of the FSO scheme will remain the responsibility of the relevant professional body.’ (para.12.5) FSA recognises, however, that many complaints will be hybrid, relating in part to financial services and to professional ones, and resolved to pass details of complaints concerning non-financial service activities of a firm to the relevant professional body. In particular, it gives examples of non-mainstream investment business activities carried on by professional firms including: a solicitor acting for executors arranging the sale of shares on instruction of executors and trustees; a solicitor doing matrimonial work who obtains IFA advice on unit trusts, pension and endowments in joint names; a solicitor acting for an estate or trust who holds unit trusts and share certificates; a lawyer performing residential conveyancing who makes arrangements for transfer of shares in a management company; and see appendix B.

6.0 GENERAL OBSERVATIONS

6.1 The proliferation of regulatory bodies in recent years is causing general concern. Such bodies often take on a life of their own, and in Fred Hirsch’s words, result in ‘a rising mass of codified petty regulation, swollen by the need for rules to enforce rules and to counter their avoidance.’ (quoted by Graeme Catto, President of the GMC). The scale and complexity of what ICAS refers to as ‘the Complaints Industry’ is here to stay. We hear little
these days about the need for a ‘bonfire’ of quangos, of non-departmental public bodies (NDPBs) being dismantled. There is now a regulatory industry with a relatively self-contained career structure such that individuals can move from one to the other, gathering up expertise, and applying it to a cognate area of regulation. This proliferation is recognised by the UK Better Regulation Commission (BTC) with its insistence upon the ‘one in, one out’ principle, although one might be sceptical that such a principle will ever apply.

6.2 As regards the legal profession in Scotland, the impact of the Clementi Report is very obvious. This seems to be a well-argued and astute document, and Clementi even took the precaution of having the system of regulation in England and Wales professionally costed. One might, however, be sceptical that these will remain within the bounds set by Ernst and Young for Clementi. There is also the powerful input of the Department of Constitutional Affairs which is a relatively new player in this regulatory game, and one, no doubt, keen to establish its presence.

6.3 This raises the issue as to whether or not Scotland should be doing things differently. On the one hand, the system is smaller and less complex, but on the other hand, it is not difficult to see the influence of Clementi in the proposals in the bill, and undoubtedly civil servants at least found it a useful benchmark. There is, however, a serious issue as to how these matters play in Scotland. If nothing else, there is a point to be made as the legislation goes through parliamentary committee that the political system should be very careful of landing the profession and their clients with an over-elaborate and costly system, something of a ‘hammer to crack a nut’. There may well be scope to set the number and type of legal complaints in context: have they increased or decreased over the years? Changed in type and impact? Are they proportionately more of less than south of the border (the GMC have made this point to show that Scotland is less subject to complaints).

6.4 There is little doubt that the analysis of the consultation exercise left a lot to be desired. It certainly conforms to the usual kind of Scottish Executive exercise in being quick and dirty, but it should not be allowed to become conventional wisdom. It contains some elementary howlers, and there might be scope in committee to raise this (one can hear some MSPs lazily reaching for it as incontrovertible evidence of public discontent). Some counter-analysis of the submissions would have probably helped to spike some guns, but possibly that moment has gone, and probably would now be seen as special pleading. It does not seem sensible, however, to let politicians get away with lazy nostrums based on half-baked evidence.

6.5 As regards comparator professions, lawyers are at some disadvantage. Plainly, the separation of representative and regulatory functions has been impacting on all professions for some time. Comparison with ICAS, for example, provides a good example of a robust defence of essentially a private sector organisation, although it has the advantage that it does not carry a Guarantee Fund, nor deal with ‘service’ complaints. The GTC is patently a public sector professional body which has, over 40 years, developed its professional and political standing, such that it does not
weaken its independence by dealing with government, even when pre-1997
government was frequently ideologically hostile to public sector
professionals. The GMC has had to deal with some very public controversies
(Bristol, Shipman etc) and in the course of these has had to take on the
accusation that it is a ‘cosy club for doctors regulating doctors’. Its president
Graeme Catto had a nice line: ‘I do not believe at all in self-regulating
professions but I do believe very strongly in professionally-led regulation’.
The Law Society may not, thankfully, have to deal quite so often in matters of
life and death, but there is much to be learned from the way the GMC has
gone about its business, seemingly one step ahead of the critics, or at least
well able to respond. Finally, the financial industry itself has developed far-
reaching mechanisms for regulation and complaints-management. There is
mileage in pointing out that while it distinguishes financial and professional
matters, it recognises that this is not always a clear-cut distinction, and one
imagines the legal profession agree with that. FSA/FOS regulation is well-
developed and fit for purpose.

6.6 My own reading of relevant documents is that the Law Society has two major
grounds for concern. Firstly, membership of the proposed regulatory body
seems too closely in the gift of government and politicians, even where this is
managed via OCPAS rules ensuring due process. It is proposed that a
majority of SLCC will be lay persons appointed by Scottish Ministers, unlike
the comparator professions examined where professionals are in the
majority. While one can trust OCPAS to ensure that due process is
observed, there is a prior issue as to how lay members emerge in the first
place, newspaper advertisements seeming to be the usual method. The task
is one of encouraging a wide and diverse range of people who do not have
particular axes to grind. Secondly, and possibly more dangerously, there
seems to be a serious lack of articulation between the system of regulating
the legal profession in Scotland, and how it is paid for. In other words, it
seems that the profession will pay for a system (minimally employing 50 to 60
people, and one imagines, a lot more than that; how was that figure
calculated?) but the regulatory system does not directly to raise its own
revenue. This is not to argue that the system should be publicly funded – this
has its own downsides, but that there are no obvious cost constraints. In
short, costs may inflate as the regulator finds more things to do. The Better
Regulation Commission is a strong advocate of two related principles: of
proportionality and fit-for-purpose. There must at least be a risk that the new
regulatory system for the legal profession in Scotland fails to meet those
principles.
Thank you for your letter dated 2 May, and for pointing me in the direction of the paragraph to which Mr Arbuckle was referring.

Paragraph 109 of the Financial Memorandum states that “The legal professional bodies will continue to deal with complaints about the conduct of their members, but will realise significant cost savings from the transfer of responsibility for service complaints to the Commission (which represent about 70% of their current workload)”.

The Law Society currently spends approximately £2.1 million on handling of complaints against solicitors, around 70% of which relates purely to complaints of inadequate professional services. I attach a copy of the Annual Report of their Client Relations Office, which contains useful graphs and statistics at pages 8 and 9. The Bill would transfer services complaints to the new Scottish Legal Complaints Commission. The Law Society’s annual expenditure on complaints handling should therefore reduce substantially. A proportionate reduction (70% of £2.1 million) would be £1.47 million, although the Society may well argue that it will need to retain more than 30% of current staff to handle conduct complaints. The new Commission is intended to be financed by the legal profession through the annual levy and complaints levy provided for in the Bill, however the client relations costs incurred by the Law Society will be reduced. The suggestion made by Mr Arbuckle at the time that what paragraph 109 refers to is a transferred cost is correct. The saving would be made by the professional body, but responsibility would be transferred to the new Commission, which would recover its costs from practising members of the profession.

The Faculty of Advocates receives far fewer complaints, and has no staff who deal with complaints handling on a full-time basis. While the savings to the Law Society will be substantial, savings to the Faculty are likely to be marginal.

I hope this is helpful.

Louise Miller
Bill Co-ordinator
Report on the Legal Profession and Legal Aid (Scotland) Bill at Stage 1

The Committee reports to the lead Committee as follows—

Introduction

1. At its meetings on 18 April and 9 May the Subordinate Legislation Committee considered the delegated powers provisions in the Legal Profession and Legal Aid (Scotland) Bill at Stage 1. The Committee submits this report to the Enterprise and Culture Committee, as the lead Committee for the Bill, under Rule 9.6.2 of Standing Orders.

2. The Executive provided the Parliament with a Delegated Powers Memorandum.

3. The Committee’s correspondence with the Executive is reproduced in Annexes 1 and 2.

Delegated Powers Provisions

4. The Committee considered each of the delegated powers provisions in the Bill. The Committee approves without further comment: sections 8(7), 17(1), 17(3), 31(1), 36(2), 38(1)(b), 38(2), 39(2), 45(7), 48(1) and 52(2).

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

5. The Committee 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.

6. In its response, the Executive gave a detailed explanation of the reasons for delegating powers and 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 the nature of the complaint. In some circumstances as

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1 Delegated Powers Memorandum
described in the response, it would 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.

7. The Committee found the Executive’s response a helpful elaboration of the purpose of the power in subsection (4)(b). It is content with the powers in subsections 4(b) and (8) and that they are subject to negative procedure.

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

8. The Committee noted 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.

9. The Executive was grateful to the Committee for highlighting this discrepancy and confirmed that the delegated powers memorandum reflects the policy intention rather than the Bill as introduced. It confirmed that it will bring forward an amendment at Stage 2 which will require consultation with regard to altering the maximum level of compensation.

10. The Committee welcomed the Executive’s response. It is content with the power and that it is subject to negative procedure.

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

11. The Committee asked the Executive to clarify the scope of the power and in particular whether it is intended for this to deal with the staff and property of the Ombudsman. The Committee also observed that the power could be insufficient for dealing with the staff and property of the Scottish Legal Services Ombudsman and that express provision might be necessary.

12. The Executive explained, in its response, that it funds and provides all the Ombudsman’s facilities - including property - and therefore no special provision is necessary to deal with this as taxpayers’ assets will revert to the Executive.

13. It also explained that in relation to staff, while incidental provisions may be required, it does not intend to make substantive provisions as regards transfer, but that Ministers would act as if TUPE applied in respect of the transfer of the staff of the Ombudsman to the Commission.

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

15. The Committee welcomed the helpful explanation from the Executive, and was content that no further provision was necessary in the light of this. It is content with the power and that it is subject to affirmative procedure.
**Section 23 (and schedule 3) – Duty of the Commission to make rules as to practice and procedure**

16. The Committee asked the Executive to clarify what matters are intended to be included in the rules. It noted that it appears that the matters covered by the rules might extend beyond matters of administration and therefore this might be more appropriately contained in a Statutory Instrument. The Committee also asked whether it is proposed that the Commission should be listed in Schedule 1 of the Tribunals and Inquiries Act 1992.

17. The Executive agreed that the matters covered by the rules extend beyond pure matters of administration. The Executive considered 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 did not wish to pre-empt the Commission by imposing rules upon it.

18. The Executive explained 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, it is considering possible stage 2 amendments to make the rules subject to parliamentary procedure with a resolution of the Scottish Parliament required before they could come into force.

19. The Executive indicated that it is 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.

20. The Executive confirmed that there is no present intention to list the Commission as a tribunal for the reasons set out in its response.

21. **The Committee welcomes the Executive’s commitment to consider Stage 2 amendments which would, amongst other things make the rules subject to Parliamentary procedure. It will consider the provision again in the light of any amendments.**

22. **The Committee draws the attention of the lead Committee to its correspondence with the Executive in Annexes 1 and 2 on this important and sensitive matter.**

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

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

24. In its response, the Executive explained 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 considered that it is more appropriate for detailed provision relating to individual named bodies to be contained in subordinate legislation.
25. **The Committee was content with the Executive’s response.**

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.

26. The Committee asked the Executive to provide further details of the intended content of instruments under these powers, as it was of the view that some of the powers being taken by these Regulations may be significant.

27. In its response, the Executive confirmed that it intends 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 indicated that these would be broadly in line with what is already provided for in section 42ZA (as inserted by section 36(2) of the Bill).

28. The Committee also asked the Executive to comment on whether the power in section 36(4) should be subject to super affirmative procedure.

29. As the Executive intends to bring forward appropriate stage 2 amendments, this issue no longer arises.

30. **The Committee welcomes the Executive’s intention to legislate by way of primary rather than secondary legislation in respect of these matters, and will consider the amendments at Stage 2.**

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

31. The Committee asked the Executive to provide further details of the intended content of instruments under these powers.

32. The Executive gave a full and helpful response and explained that 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.

33. The Committee had also noted that the power in section 45(6) which authorises the expenditure of public funds is currently subject to negative procedure and the initial view of the Committee was that this did not provide an adequate level of Parliamentary scrutiny.

34. The Executive explained in its response that negative procedure was consistent with the procedure already applied to exercise of similar powers the Legal Aid (Scotland) Act 1986.

35. **The Committee is content with the Executive’s response and that the powers should be delegated. It is also content that they are subject to negative procedure.**
Section 45(9) – new schedule 1A to the 1986 Act – further provisions in relation to the Register of advisers

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

37. The Executive explained, in its response, that in this provision it was aiming for consistency with Part IVA of the 1986 Act, which relates to the Criminal Legal Assistance Register. 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 Ministers and is not subject to any Parliamentary procedure.

38. 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 they argued that it is appropriate that they should also not be subject to any Parliamentary procedure.

39. The Committee is content with the Executive’s response. It is also content with the power and that it is not subject to Parliamentary procedure.

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

40. The Committee asked the Executive to provide further clarification of its intended use of the power in sub-paragraph (7)(d) of paragraph 2. It also asked for an explanation of the policy behind the proposed use of these powers as well as the reasons why the Executive considered that subordinate legislation was appropriate.

41. The Executive explained in its response its intention 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.

42. The Executive indicated that the purpose of the power to alter the number of members of the Commission is to provide flexibility in light of the actual experience of the Commission’s operations. It is intended that a review of the Commission’s membership would be conducted after two years.

43. The Committee welcomes the Executive’s intention to bring forward amendments at Stage 2 and will monitor these then.

44. The Committee also asked the Executive to explain why there is no requirement for prior consultation before an order altering the number of members of the Commission is made.

45. In its response, the Executive explained the policy intention. 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.
46. The Committee draws the attention of the lead Committee to the Executive's response. It is of the view that the connection made by the Executive with the consultation requirements of section 20(4) in respect of the Commission’s budget, was not relevant.

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

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

48. The Executive, in its response, explained that directions of this kind are frequently provided in relation to NDPBs and noted that Ministers have a general direction making power in relation to the Ombudsman. 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. It added that 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.

49. The Executive did recognise that the Commission is not a standard type of NDPB and that, as it stands, this provision may raise concerns about how the power might be used. It stated that it 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.

50. The Committee recognises that this provision is very sensitive and that it has ECHR implications. It welcomes the Executive’s consideration of whether the power could be refined any further and will monitor developments at Stage 2.

51. The Committee is concerned however, about whether it is appropriate for the Executive to give even general directions to the Commission on the exercise of its functions, and draws this concern to the attention of the lead Committee.
ANNEX 1

Correspondence between the Subordinate Legislation Committee and the Scottish Executive

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

1. 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.

2. 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

3. 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

4. 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

5. 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

6. 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

7. 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.

8. 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.

9. 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.

10. 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

11. 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**

12. 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.**

13. 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**

14. 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.**

**ANNEX 2**

**Response from the Scottish Executive**

1. Your letter of 18 April 2006 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**

2. 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.

3. 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.

4. 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

5. 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

6. 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.
7. 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.

8. 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.

9. 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

10. 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.

11. 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.

12. 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

13. 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.

14. 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

15. 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.

16. 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).

17. 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.

18. 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

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

20. 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.

21. 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.

22. 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

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

24. 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 or
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**

25. 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.

26. 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.

27. 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.

28. 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**

29. 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.
30. 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.

31. 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.

Legal Profession and Legal Aid (Scotland) Bill
POST COUNCIL REPORT ON THE JUSTICE AND HOME AFFAIRS COUNCIL OF EU MINISTERS, 27-28 APRIL 2006

Comments by the Executive

The UK was represented by Baroness Ashton of Upholland. The council reached a political agreement on a Regulation applicable to non-contractual obligations (Rome II). Discussion on the European Evidence Warrant resulted in deadlock. Also discussion on the Fight against Organised Crime, Certain Procedural Rights in Criminal Proceedings and Mutual recognition of Custodial Sentences.

AGENDA ITEMS

Civil Judicial Co-operation


Political Agreement was reached on the articles of the draft regulation on the law of applicable to non-contractual obligations. The Presidency tabled a final compromise package which was agreed by qualified majority as Latvia and Estonia continued to oppose on the grounds of Article 8A.

Criminal Judicial Co-operation

European Evidence Warrant

This draft framework decision is the Commission’s first step towards updating arrangements in the EU for mutual legal assistance in criminal matters. It will apply the principle of mutual recognition to obtaining certain types of evidence and as such will ultimately replace the relevant provisions in the 1959 Council of Europe Convention on Mutual Legal Assistance – although it is proposed that there will be a period of structured co-existence until the new measures are fully in place across the board. As it is a first step, there are limitations on the types of evidence covered e.g. obtaining evidence in real time and biometric material directly from the body are excluded.

A Scottish Executive official has attended Working Group meetings as part of the UK negotiating team. For Scotland, the Framework Decision when adopted will require primary legislation. Current provisions are to be found in the Crime (International) Co-operation Act 2003, which extends UK wide, but which was subject to the Sewel procedure for those elements which were in devolved competence.

Discussion at the Council continued on the definition of offences for which dual criminality is to be abolished.
Framework Decision on Fight Against Organised Crime

The Framework Decision proposes to repeal the 1998 EU Joint Action on Participation in a Criminal Organisation and seeks principally to provide for specific offences of directing a criminal organisation and membership of a criminal organisation. Having entered the working group in March 2005, negotiations to date have been very technical. The main issue for the UK is how the proposals in the draft would interface with domestic provisions on conspiracy to commit criminal acts. Early indications are that it will not be necessary to amend domestic legislation.

The Council reached a general approach on the text subject to parliamentary scrutiny.

Framework Decision on Certain Procedural rights in Criminal Proceedings

This proposal, which was submitted by the Commission in May 2004, has been in the working group for some time. The Presidency informed the Council about the state of play with regard to the negotiations. The Council agreed that an expert ad hoc working group, which had been set up to examine further the outstanding issues from the working group, should continue its work, and that it should have a broad remit.

Framework Decision on the Mutual Recognition of Custodial Sentences

Delegations were divided between those who believed that transfer of sentenced persons should not require the application of dual criminality and those who insisted on the possibility to apply dual criminality. It was agreed that this could be met by developing an option proposing the abolition of dual criminality for the listed offences but provided an opt-out for those that wished to maintain dual criminality. It was acknowledged that the scope of the opt-out would be the key to the solution. The Working Group would continue negotiations on that basis.

Framework Decision on Data Protection

The Presidency gave a short update on the progress of discussions to date. Main issues included several matters in relation to scope, such as whether it ought to be restricted to cross border transmission of information and whether it should cover both police and judicial co-operation. Other matters raised included the issue of transmission of information to third countries. The FD generally deals with the protection of personal data processed in the context of police and judicial co-operation in criminal matters.

Combating and Prevention Trafficking in Human Beings

Max-Peter Ratzel, Director of Europol, gave a presentation on Europol’s mandate, activities, sources and challenging regarding trafficking in human beings. He made the following recommendations to the Member States:

- Follow the EU Action Plan on Trafficking Human Beings (THB)
- Member States investigation teams should be aware of how to make use of Europol and “existing best practices”
- Member States should inform and request support from Europol, and
• Member States should exploit benefits of closer co-operation with international and non-governmental organisations.

Implementation of the action plan – state of play

The Presidency and Commission Vice President Franco Frattini informed the Council about ongoing implementation of the THB Action Plan. A joint Presidency/Commission conference is envisaged for June 2006 in order to comply with the THB Action Plan.

The Commission then informed the Council about its intention to present recommendations on child trafficking.

The meeting also agreed the draft Council Conclusion.

Police and Judicial Co-operation

Council Decision on Improvement of police co-operation

The Presidency noted that there was general agreement that police co-operation needed to be improved, but that it would be better in the context of the current negotiations to pause to consider next steps. It was agreed therefore that a new text should be developed with the objective of devising an effective instrument for improving both strategic and operational co-operation between Member States’ law enforcement authorities.

SIS II (Schengen Information System)

The Council was given a regular overview of the state of play of the SIS II and discussed its legal basis. The Council confirmed the use of biometrics for identification purposes in the SIS II as soon as it is technically possible.

On 31 May 2005, the Commission submitted legislative proposals setting out the legal basis for SIS II: two regulations to be adopted in co-decision procedure and one Council Decision. The discussions on these proposals have reached a crucial stage. In order to allow the SIS II to be operational in 2007 and consequently to lift the checks at the internal borders for the new Member States, the legislative instruments have to be adopted quickly.

SIS is a data system containing data issued a Member State on persons or property for the purposes of applying the immigration and law enforcement provisions of the Schengen acquis. The UK will participate in SIS II to the extent permitted by our partial application of the Schengen acquis.

Asylum and Immigration

Un High Level Dialogue on International Migration and Development p22

Mr Sutherland, Special Representative on the United Nations secretary General for Migration, informed the Council on the preparation by the UN of the High Level Dialogue on International Migration and Development to be held in New York on 14-15 September 2006.
List of Safe Countries

Commission Vice-President Frattini informed the Council about a forthcoming Commission proposal containing a list of safe countries of origin in the sense of the Directive on minimum standards for granting and withdrawing refugee status.

Article 29(1) of the Directive establishes that the Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries which shall be regarded by Member States as safe countries of origin.

Under Article 30 of the Directive, Member States may retain or introduce legislation that allows for the national designation of third countries, other than those appearing on the minimum common list, as safe countries of origin for the purpose of examining applications for asylum.

General

Common Application centres for Visas

The Commission’s proposals on common application centres for Visas were outlined by Commissioner Frattini. The proposal is expected to be adopted by the college no later than the end of May. The text would be submitted to the June Council.

Increase in Schengen Visa Fees

The Mixed Committee debate was summarised by the Presidency. Most Member States were in favour of the proposal, which was agreed.

Opening of N-Lex and Presentation of Eur-Lex

A presentation was given by the Office of Publication to the Council on N-Lex, a new electronic database containing the national legislation of Member States and Eur-Lex, the database that gives access to EU legal instruments.

EU Agreement with Norway and Iceland on a surrender procedure

The Council reached a general approach on the substance of the Agreement subject to Parliamentary scrutiny.

EU JHA Strategy Unit
16 May 2006