Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Justice Bill: Court Funds and Rights of Audience for Solicitors

3 February 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Lord Morrow (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Lord Browne
Mr Thomas Buchanan
Lord Empey
Mr Paul Givan
Mr Alban Maginness
Ms Carál Ní Chuilín
Mr John O'Dowd

Witnesses:

Mr Gareth Johnston	) Department of Justice
Mr Robert Crawford	) Northern Ireland Courts and Tribunals Service
Ms Maria Dougan	)
Ms Geraldine Fee	)
Mr Michael Kelly	)
Mr Richard Ronaldson	)
Mr Peter Campbell	) Law Society of Northern Ireland
Mr Alan Hunter	)

The Chairperson (Lord Morrow):

I welcome Mr Gareth Johnston, Ms Geraldine Fee, Mr Michael Kelly and Mr Richard Ronaldson.

I invite you to brief the Committee on amendments to funds in court legislation.

Lord Empey:

Will this session deal with the difference between the various courts and the fact that in one court people get paid, while in another court they do not? Will we look at that sort of issue?

The Chairperson:

I do not think so.

Ms Geraldine Fee (Northern Ireland Courts and Tribunals Service):

We had planned to start with court funds. That includes remuneration issues.

Lord Empey:

Will the issue that solicitors, for instance, are paid in the Court of Appeal, but not in the Magistrate's Courts, be discussed?

Ms Fee:

That will be part of the next session on solicitor advocates.

Lord Empey:

Thank you.

The Chairperson:

Lord Empey, I draw your attention to the briefing paper on amendments to funds in court legislation. We will hear from officials. Before I hand over to you, I just want to say that we have a fairly heavy schedule and agenda to get through. Therefore, you will have five minutes to outline key points, if that is acceptable. There will then be around 15 minutes for questions. If you are happy enough with that, we shall proceed.

Ms Fee:

As you have outlined, Chairman, the clauses relate to the handling of funds in court, whereby the County Court or High Court has ordered that money be paid to the court to be placed under its protective jurisdiction. That will occur, for example, when a minor has been awarded damages or

when a person is deemed to no longer have sufficient mental capacity to manage his or her own financial affairs. In such cases, money is paid over to the accountant general of the Court of Judicature. He or she manages those funds under the terms of the Judicature (Northern Ireland) Act 1978. The director of the Northern Ireland Courts and Tribunals Service is the accountant general. His functions are exercised daily through the Court Funds Office (CFO), which is part of the Northern Ireland Courts and Tribunals Service.

Funds may be invested, with judicial approval, in a variety of ways, which are set out in the 1978 Act. Those include being placed in deposit accounts and short-term and long-term investment accounts, and being invested in certain designated securities. For investments in securities, the Court Funds Office uses a stockbroker to advise on appropriate investments for all new funds placed in court and to review existing investments. In return, stockbrokers charge an annual management fee. Until recently, those management fees had been deducted directly from the funds of clients whose funds were the subject of that advice and management by stockbrokers. Legal advice obtained last year, however, suggests that there is doubt as to whether it is permissible to deduct stockbroker management charges directly from court funds without an express legislative power to do so.

It is important for the Court Funds Office to be able to use stockbrokers so that it can enhance clients' investment returns. Otherwise, the office would have little option but to place those funds in cash deposits. That would be to the detriment of the CFO's clients as they would not have the opportunity to enhance the return on their funds. In turn, stockbrokers have to be paid for their services. In principle, the cost should be met by those who avail themselves of those services, rather than directly from the public purse. In order to seek legal clarity, we intend to apply to the High Court for a declaration on that particular issue. Should the High Court find that sufficient authority already exists to deduct stockbrokers' fees from the relevant funds of CFO clients, it would allow the Court Funds Office to revert to previous practice. However, there is a possibility that the High Court may rule that there is no current authority for such deductions. In that case, we would require an amendment to the Judicature (Northern Ireland) Act 1978 to provide that authority. The Justice Bill provides us with the opportunity to make that provision.

Accordingly, we have prepared draft clauses that, subject to the Assembly's approval, would

authorise the deduction of stockbrokers' fees directly from Court Funds Office client funds, with court approval, where it is necessary and proportionate to do so. The court will also be provided with a power to remit the fees in whole or in part where it is in the interests of justice to do so. The Committee is aware that we have worked with the Attorney General in developing the proposals. It was not possible to resolve some issues in time for the Bill's introduction and, therefore, the Minister advised the Committee that he hoped to table the provisions by way of amendment at Consideration Stage. Although the Attorney General has yet to advise formally on the issue of competence, he has confirmed that he is content with the proposed clauses, and it is the Minister's view that they are within the competence of the Assembly.

We welcome the Committee's views on the draft clauses, and we are happy to answer any questions.

The Chairperson:

Members, you have heard what has been said. Are there any questions?

Mr O'Dowd:

I have a question on the broader process. How is the stockbroker appointed? Is it put out to bids?

Ms Fee:

Yes; a public procurement exercise was run on behalf of the Courts and Tribunals Service by central procurement division.

Mr O'Dowd:

What happens if the stockbroker makes bad investment choices and a person's money is lost?

Ms Fee:

There is always a risk with investments. However, the advice provided by the stockbroker is monitored on an ongoing basis. The court funds judicial liaison group is chaired by a High Court judge, and its members include other judicial representatives. The stockbrokers report into that group quarterly. Am I right, Richard?

Mr Richard Ronaldson (Northern Ireland Courts and Tribunals Service):

They report on a six-monthly basis.

Ms Fee:

The court keeps an eye on investments, as does the Court Funds Office, and matters can be brought back before the court if there is a concern that the investment is underperforming.

The Chairperson:

Who is liable for the advice in the event of the fund or the investment not performing? Will that be subject to scrutiny by the financial services?

Ms Fee:

I believe that stockbrokers will be regulated as in the ordinary course of events. I do not believe that there would be any liability for the underperformance of a particular investment, unless negligence were in play. Richard, is there anything else?

Mr Ronaldson:

I have nothing to add.

Ms Fee:

It is important to clarify that the stockbroker is very aware that the protection of the investment is paramount, and he or she would not adopt high-risk investment strategies; the strategies would be low-risk. The remit of those investments is set out in primary legislation. There is ongoing liaison with the court funds judicial liaison group, the Court Funds Office and the court on those matters. Any advice provided by the stockbrokers would also be discussed with the representatives of the minor or the person whose affairs are being managed by the court.

The Chairperson:

The risk strategy is always the difficult one. Once investors hear that their funds or investments have underperformed, they may want to take some action. It is only when investments do well that you do not hear from them. We have been through the whole concept of mis-selling in a million ways. Here, it primarily relates to funds being invested on behalf of a minor who will not

have access to them until he or she reaches the age of 18. From the age of one to 18, many things can happen. Will the investor and the guardian be satisfied that anything that they have invested will be subject to all the usual rules under financial services legislation and that there will, in fact, be a continual monitoring of the portfolio so that funds will be moved from one fund to another in the best interests of the client?

Ms Fee:

You have described the status quo as regards how funds in court are managed. This clause proposes to provide authority for us to pay from those funds the fees that the stockbrokers charge for providing advice on the investments. The ways in which the funds are managed and the investment strategies are deployed are not being disturbed by that. To give the Committee reassurance, there is ongoing monitoring of investments and the performance of stockbrokers by the court funds judicial liaison group and the Court Funds Office with the involvement of the judiciary.

The Chairperson:

It might be difficult to ascertain a minor's attitude towards risk. Some might want low-level risk, some might want middle-level risk and some might be happy enough with high-level risk. I do not know how you would ascertain that with a minor. I understand that someone who is two, three, four or five years of age would not be making that decision. However, they might be making that decision when they are 16 or 18.

Ms Fee:

Yes, but that is why the funds are placed under the protective jurisdiction of the court, because you would then have a range of judicial advice. Again, the stockbrokers are made very much aware that it is a low-risk investment strategy that they are adopting. As I said, the Judicature Act clearly outlines that only certain types of investments can be made.

Lord Empey:

I was thinking along the same lines as you, Chairperson. Obviously, we are looking at an authority to pay. That is the key issue. The questions at the back of our minds are not about that at all; they are about the wisdom or otherwise of some of these matters. If you are looking for

low-risk investments, you go for bonds. Once you move into the stock market, things are different. Most stockbrokers would have recommended having BP in your portfolio. There is no insurance; once you are involved in the stock market, you are in a high-risk environment. We are dealing with the narrow issue of authority to disburse funds as payment. So, to some extent, the questions that are at the back of all our minds are not really in front of us; only the issue of payment is. Although I, like you, have some issues about the wider picture, this is a policy issue as opposed to a legislative one.

Mr Gareth Johnston (Department of Justice):

It may be worth clarifying that investing funds in stocks and shares is just one of the options available to the Court Funds Office under the Judicature Act. At times, they will be placed in deposit accounts, and there could be short-term and long-term investment accounts. So, it is very much about the office deciding what is likely to generate the best return. If someone is 17 and the funds will be invested for only a year, you are probably not going to invest them in the stock market.

Lord Empey:

I understand that. In many respects, the types of investments that you want are those that you would have with a pension fund. We have organisations like the Northern Ireland Local Government Officers' Superannuation Committee (NILGOSC), which has immense experience and a very successful track record of managing local government officers' pensions. I just wonder why it would not be possible to piggyback on an organisation like that, which has a vast amount of experience.

The Chairperson:

Did you say piggyback or piggy bank?

Lord Empey:

I asked why we cannot piggyback on their expertise and advice, because, effectively, the state is paying twice. There is a major public sector pension organisation that has a long track record of dealing with the type of investment that we are talking about with tremendous expertise, yet we are inventing a separate system with A N Other, or whoever is successful in the procurement

exercise, investing for people. It might have made sense to have the funds linked in with that very successful public sector pension fund rather than invent a parallel system. That is not, strictly speaking, what we are talking about.

Ms Fee:

That does raise wider issues about the overall construct of the court funds regime.

Mr McCartney:

Your briefing paper states:

> "Legal advice suggests that there is a doubt".

How and when did that doubt come to light?

Ms Fee:

It came to light as a result of general work that was done in the area of court funds and other work that was done as part of the procurement process. There was an ongoing discussion with legal advisers about that, and I think that it was finally determined in February 2010. At that point, the deduction of stockbrokers' fees from court funds ceased. Payments for stockbrokers' advice is currently being paid by the Northern Ireland Courts and Tribunals Service, and will be until the matter is resolved. It will be resolved either through a declaration in the High Court saying that the practice is permissible and can continue or a provision in the Bill providing sufficient legislative authority to make the deductions.

Mr McCartney:

Will the money that was paid prior to February 2010 be paid back to the clients?

Ms Fee:

That will have to be considered in light of the terms of the judgment. It is a very valid consideration. If the payments were not permissible without express statutory authority, we would be looking at refunds and would have to calculate the interest payments, etc.

Mr McCartney:

Has the practice been in place since 1978?

Ms Fee:

No, it began in 1996, so it was in place from then until February 2010.

Mr A Maginness:

What happened before 1996?

Ms Fee:

I do not know the answer to that.

Mr Ronaldson:

We still invested in various equities and gilts prior to that, but there were no stockbroker management fee charges at that time. It was only in 1996 that they commenced the payment of stockbroker fees.

Mr A Maginness:

What was the reason for that — high demand?

Mr Ronaldson:

I cannot tell you that, because I am not aware of the reasons.

Mr A Maginness:

An awful lot of money — £260 million — is involved here. The fees seem very substantial, but maybe they are not that substantial in comparison with the £260 million. However, they are over £300,000, which is a charge on the Courts and Tribunals Service at the moment, and they could go up to £500,000. What sort of charge is there for investing funds for individual plaintiffs?

Ms Fee:

The stockbroker's charge is a percentage rate of the individual investment and is competitive in comparison with the rates for other private investments. I cannot really go into detail about the precise percentage because that is commercial in confidence. However, if the Committee wants me to write to it to let it know what the percentage rate is, I can do so.

Mr A Maginness:

Can you give us a percentage for the individual amounts being invested?

Ms Fee:

As you say, the Court Funds Office manages around £260 million worth of funds. About £169 million of that is subject to stockbrokers' advice for around 4,850 clients. We are satisfied that the percentage that the stockbroker levies for an individual portfolio is a competitive rate and is not disproportionate in any way.

Mr A Maginness:

That money comes out of the compensation money that a person receives, so, at the end of the day, that person is not really getting the full amount when their money matures. For example, someone who gets £10,000 in compensation would get that amount with interest but minus charges.

Ms Fee:

That is right. The alternative, however, would be either to leave the amount invested in cash deposits or to have the state pay for the services of the stockbroker. In principle, we consider it appropriate that the person who uses the service should meet the costs of that service rather than the public purse having to do so.

Mr A Maginness:

I take your point. I am not so sure that I agree with it, but I understand what you are saying.

The Chairperson:

The briefing paper states that, if the High Court rules that previous reductions were unlawful, the Courts and Tribunals Service could be landed with a bill of £2·5 million.

Ms Fee:

The figure of £2·5 million is approximate, because we are undertaking a rigorous audit to ensure —

The Chairperson:

Where do you see that £2·5 million coming from?

Ms Fee:

Provision for that will need to be made within departmental budgets. We have alerted the Department to the issue.

The Chairperson:

Are you saying that provision has been made within the budget or that it will have to be made?

Ms Fee:

I am not sure whether it has been made or whether it will have to be made, but the Department is aware of it in its financial forecasting.

The Chairperson:

The loss of £2·5 million would drive a substantial hole in any budget, would it not?

Ms Fee:

It is a significant amount of money.

The Chairperson:

Carál Ní Chuilín, you wanted to ask a question.

Ms Ní Chuilín:

That is the question that I was going to ask. If you stop reading my mind, I will finish the other half of the question I was going to ask. *[Laughter.]*

Mr A Maginness:

That shows you how close the DUP and Sinn Féin have become.

The Chairperson:

It just shows you how we try to pre-empt everything.

Ms Ní Chuilín:

Perish the thought.

The amount of money is significant. You are saying that you are not sure whether that money has been set aside in the budget yet.

Ms Fee:

I am sorry; I cannot say whether it has been set aside, but I can confirm that for you later.

Mr Johnston:

Of course, as yet it is only a contingency, because it very much depends on the outcome of the application to the High Court.

Ms Fee:

That is right. There is a possibility that the High Court will rule that the previous practice was permissible, in which case the question of refunds will not arise. We will proceed to make the application to the High Court within the next couple of months.

Ms Ní Chuilín:

If the High Court decides that it was not the right thing to do, we are going to have to amend the Bill to include a provision that was not consulted on in order to ensure that funds can be deducted. One way or the other, money will have to come out of the public purse to pay people back the money that they are owed. Will they also be paid compensation?

Ms Fee:

I think that it would be a case of restitution. However, I should say that the deductions were made with the approval of a court order. I do not want to leave the impression that they were not.

Ms Ní Chuilín:

I understand that. Thank you.

Mr McCartney:

How did this come to light? Did someone make a challenge?

Ms Fee:

No; I think it came to light because of a review of general court funds practice. The issue was triggered by internal consideration and then investigated.

Mr McCartney:

Why is it being presented to the High Court? If it came to light as part of an internal review and you think that it is not the correct thing to do, why not just —

Ms Fee:

We think that there is a doubt. As was said, £2·5 million — or approximately £2·5 million — is a significant sum of money, and that liability would lie with the taxpayer. Again, I stress the point that I just made: the deductions were made with the approval of a court and under the authority of a court order. Before we can say that the money should be paid back, we need legal clarity on the issue, and a declaration from the High Court will provide that clarity.

Mr McCartney:

So when the court was making the order to invest the money, it was not sure that what it was doing was proper?

Ms Fee:

No; I think that the court must have construed that the approval that it was giving for the deduction of funds was within its powers.

Mr McCartney:

Then someone discovered that it may not be. It just seems to be a bit odd.

Ms Fee:

I understand that, but, at the same time, I think that it is possible to construe a provision as entitling two different approaches.

Mr McCartney:

Who made the judgement that the matter should be contested in the High Court? Did that happen because there was a doubt?

Ms Fee:

It was because of the doubt and the issue of restitution from the public purse. There are accounting issues involved as well, and before proceeding to make a judgement that would disturb previous court practices, I think it is a valid approach to take an application to the High Court.

Mr McCartney:

There was a review of this around February 2010, and that was the conclusion.

Ms Fee:

I do not think the conclusion, at the point, was that the application would be made to the High Court. What was concluded in February 2010 was that there was sufficient doubt for the practice to stop until there was further consideration of what the next step should be.

Mr McCartney:

However, when it was initiated, no one thought that the doubt was there.

Ms Fee:

I cannot speak to that from personal knowledge, but I think the matter came to light in the context of a wider review.

The Chairperson:

Where did the advice come from originally that said that what was done in the past may not have been right and that there may be a bill for reimbursement coming down the track?

Ms Fee:

As I said, there was a review of general court funds practice, from which the issue came to light.

Then, I believe, we sought —

The Chairperson:

Who brought it to light?

Mr Ronaldson:

We were undergoing a process of modernisation in the Court Funds Office. A modernisation project group was involved in the procurement exercise with the stockbroker, and it was during that procurement exercise that there was a review of the legislation to determine what we could and could not do within the bounds of the stockbroker contract that we were going to award. That is when the first doubts arose.

The Chairperson:

Your paper also states that stockbrokers are the best people to advise on investment. Have I read that right?

Mr Johnston:

This was essentially a legal rather than a financial issue. In fairness, everyone has assumed that this power existed for a lot of years. The then Court Service and the Court Funds Office assumed that, and it was only when the review was carried out that we realised that there was some doubt about it.

The Chairperson:

Will a lot of people also have assumed that the Court Service would get it right?

Mr Johnston:

It is not yet clear whether anybody has got it wrong.

The Chairperson:

You are the folk who have put the question mark over it; not us. Therefore, you are not totally satisfied that you have got it right. I accept that you have not admitted that you have got it wrong.

Ms Fee:

As we said, there is room for doubt about the interpretation of the provision, but again, it is important to stress that it was not only an issue for the Court Service. The actions that the Court Funds Office took were under the approval of a court order, so it was also the perception of the court ordering the deduction that that was also within their powers at that time.

The Chairperson:

Do you expect a ruling on this in the near future?

Ms Fee:

We have yet to make the application to the court. It is hoped that that application will be made in the next month. We have made provision in our budget to continue to pay the fees that are due this year for the first quarter of 2011-12, so we anticipate that the matter would be resolved either by the declaration or by commencing this provision if it is enacted within that time frame.

The Chairperson:

Have you discontinued the practice in the meantime?

Ms Fee:

Yes; the practice was discontinued as of February 2010.

The Chairperson:

So, you had sufficient concern to discontinue it. I know that you have not accepted that there may something wrong, but you were sufficiently concerned to discontinue it.

Ms Fee:

Yes; and we are also sufficiently concerned to feel that there needs to be legal clarity on it, and that is why the accountant general will bring the application to the High Court.

Mr O'Dowd:

It is the High Court part that I want to query. Are you bringing yourselves to court?

Ms Fee:

It is not unusual to approach the High Court for a declaration to set out what the actual terms of a legal provision or practice are. Yes, I —

Mr O'Dowd:

Sorry; is that like a judicial review?

Ms Fee:

It is akin to a judicial review, but you are basically approaching the High Court to ask it to state whether a previous practice was permissible within the terms of the legislation. Part of the declaratory jurisdiction of the High Court is saying what the law is, what it means and what can be done under a certain provision.

Mr O'Dowd:

I just want to get this clear in my own head. Will there be a hearing with argument and counter-argument?

Ms Fee:

It will probably be done on the basis of an affidavit, but we will make the application. We are in contact with the official solicitor, who will act as the contradictor to the arguments that we will put forward. She will act, therefore, on behalf of the people whose funds are affected, and can put to the court reasoned arguments as to why the arguments that we put forward should not be accepted. It is also possible that the Attorney General may intervene in the proceedings or act as what is known as an amicus to the court to provide additional legal argument where necessary.

Mr O'Dowd:

You have not made the application yet. What will be the timescale between the application being made and a finding or decision?

Ms Fee:

We are hopeful that the matter will be resolved in the first quarter of the 2011-12 financial year.

Mr O'Dowd:

As you know, we have just gone through the Department's budget. I do not recall any such provision in that budget. However, if memory serves me right, there is a £5 million slush fund sitting to one side. Maybe it is unfair to mention that to you as you do not deal directly deal with the Department's finances, but we will wait to see what happens.

The Chairperson:

OK, Mr O'Dowd. Are you finished?

Mr O'Dowd:

Yes, I learned something new today.

The Chairperson:

It is always a poor day if you do not. I thank the officials for coming. Are members content with the proposed new clause as it has been outlined?

Ms Ní Chuilín:

I am not sure.

The Chairperson:

Do you want more time to think? On reflection, it might be appropriate if we return to this issue on Tuesday. That will give members time to consider it. Are members content with that approach?

Mr O'Dowd:

I agree with that approach, but we may be in a position where we are making new legislation, a hearing will be going on in court and the judge could come to a ruling that is contradictory or adds new light to the clause that we are looking at. We may be putting the cart before the horse.

The Chairperson:

You can make this decision on Tuesday rather than today, but is the inference that you do not think that the new clause is appropriate at this particular time?

Mr O'Dowd:

It is certainly something worth thinking about.

The Chairperson:

We can think about it until Tuesday and decide then. Did you want to say something, Gareth?

Mr Johnston:

To address Mr O'Dowd's point: we will commence the clause only if it is needed.

Ms Fee:

If we did not proceed to include this provision in the Bill and the High Court were to rule that the previous practice was not permissible, not only would the restitution have to be paid out of the public purse, but either the practice of engaging stockbrokers would have to cease or meeting their fees would have to come out of the public purse. So, we fully recognise that there is a possibility that including this provision in the Justice Bill may not be necessary.

However, what I can say to the Committee is that, if we miss this legislative window, it is likely to be more costly to the public purse in the event that the High Court rules that the previous practice was not permissible. Also, depending on the terms of the High Court judgement, it may not be necessary to commence the provision. We will, of course, continue to liaise with the Committee about the proceedings that are going to be taken in the High Court. Any decision on commencement can be made in light of the terms of the High Court judgement.

Mr O'Dowd:

If we adopt the clause as set out before us and it is there for a commencement Order, can we then amend the clause to bring it into line with a High Court ruling that may shine new light on the matter? If something occurred that we had not considered, for example, if money was paid out and there was no clause in the first place, the High Court might take a look at it and, after it has heard all the arguments, decide that it believes that to be legal, but that you must do A, B and C. What do we do if that has not been included in the clause?

Ms Fee:

As with all such matters, there is always a possibility; however, that scenario is unlikely. The clause is drawn in broad terms to allow the deduction of fees from court funds, basically, to fill the potential legislative gap that exists. It would be possible if the High Court gave a declaration that indicated that certain administrative practices needed to take place. That could be supplemented by guidance, which could be developed and followed. The Department would not, in any way, seek to act in contravention of any guidance that is given by the High Court as to what should be done. Given the way that the clause is drawn, I do not believe that a scenario is likely to come from a High Court judgment that would necessitate the amendment of the clause. However, you are correct to say that, as the Bill stands, the ability to amend the clause when it is enacted is not there.

The Chairperson:

Having heard the additional information and asked questions, are members still content that we park a decision on the clause until we meet on Tuesday, when, I am sure, we can deliberate on it further?

Mr McCartney:

Is it possible to get a copy of what that amendment would replace?

The Chairperson:

I see nods all round. Can we have that for Tuesday's meeting?

Ms Fee:

Yes.

The Chairperson:

Thank you.

We will move on to the next issue, which is solicitors' rights of audience. The departmental officials will outline the proposed amendments, after which representatives from the Law Society will give their views on the amendments. Finally, departmental officials will come back to the

table to respond to the issues raised by the Law Society and to take any questions. The Department's briefing paper is included in members' packs. Two of the officials are staying, and I welcome Robert Crawford and Maria Dougan, who are joining us. Folks, I will hand over to you.

Ms Fee:

At the outset and in the interests of transparency, I should highlight that I am a barrister by training, although I have not been in private practice for around 20 years.

The Committee will be aware that the Minister had previously signalled his intention to bring forward provisions in the Bill that would extend solicitors' rights of audience in the High Court and Court of Appeal in Northern Ireland. Unfortunately, those provisions were not settled in time to be included in the Bill on its introduction. The Minister had indicated his intention to bring forward those provisions by way of amendment at Consideration Stage.

As the Committee will have noted from the briefing paper, solicitors in Northern Ireland have unlimited rights of audience in the Crown Court, County Court, Magistrate's Court and tribunals. However, restrictions are placed on the rights of audience of solicitors in the High Court and Court of Appeal. The proposed clauses are intended to remove those restrictions and, therefore, give effect to recommendation 41 of the Bain report on the regulation of legal services in Northern Ireland, which was published in November 2006. Bain recommended that a suitably qualified solicitor who had undertaken the necessary advocacy course should not be constrained from appearing as an advocate in the higher courts. The Bain report also placed an important caveat on that recommendation, namely that a solicitor should be obliged to make clear to the client where any additional fees would be earned by that solicitor for representation and that there was the alternative of using a barrister.

In developing a clause to give effect to the Bain recommendation, the Department liaised closely with the Attorney General's office and has taken into consideration the views of key stakeholders. We believe that the proposals that are before the Committee give the public a wider choice of legal representation and enhance the provision of legal services in Northern Ireland.

In overview, the clause creates a system of authorisation by the Law Society for solicitors who wish to exercise rights of audience in the High Court and Court of Appeal by making various amendments to the Solicitors (Northern Ireland) Order 1976. The clauses would also amend the Judicature (Northern Ireland) Act 1978 to provide that a solicitor who holds such an authorisation shall have the same rights of audience in the High Court and Court of Appeal as counsel.

The framework for the authorisation scheme contains provision designed to ensure that standards of advocacy are maintained in the higher courts. The Law Society will be required to make regulations that will prescribe the education, training or experience requirements that a solicitor must meet before authorisation to appear in the higher courts can be granted. Those regulations may also provide that a solicitor who has completed such training, education or experience shall be taken to hold such authorisation. Those regulations will require the concurrence of the Lord Chief Justice as well as the concurrence of the Department after consultation with the Attorney General. In addition, the Law Society must maintain a register of authorised solicitors.

In designing the framework for those arrangements, the Department has also been mindful that solicitors enjoy direct access to the public, while the Bar is a referral profession that depends on instructions from solicitors. Therefore, the clauses amend the Solicitors (Northern Ireland) Order 1976 to include measures that are aimed at ensuring that competition for advocacy is maintained and that the potential for perceived conflicts of interest is minimised. Those measures will include the creation of a duty for a solicitor, where he is minded to use an authorised solicitor to represent a client in the High Court and Court of Appeal, to advise the client in writing of the options available for representation; a duty to act in the best interests of the client and to give effect to the decision of the client; and a duty to inform the court that the client has been advised accordingly. The clauses also make provision for a complaint to be made to the Solicitors Disciplinary Tribunal where there has been an alleged breach of those requirements.

The clauses also contain some technical and ancillary amendments that I will highlight. The clauses give the Department an Order making power to make technical amendments to certain legal aid primary legislation to take account of the extension of solicitors' rights of audience. Those Orders will be subject to the negative resolution procedure. They also make a technical

amendment to the County Courts (Northern Ireland) Order 1980 to remove a restriction that prevents a solicitor being retained by another solicitor as an advocate.

The rights of audience proposals have been subject to an equality screening exercise that did not identify any adverse impacts for section 75 categories. The proposal was also part of the equality impact assessment (EQIA) on the Justice Bill. Two responses were received on the proposals, which welcomed the extension of solicitors' rights of audience as giving the public a wider choice of representation. The Law Society also responded, expressing disappointment that the provisions had not been included on introduction and requested that amendments should be introduced at a suitable juncture.

A final technical point that I should bring to the Committee's attention is that the Secretary of State's consent has been granted for the amendment to the Extradition Act 2003, which is an excepted matter under the Northern Ireland Act. The amendment, which will be made by Order, will amend section 184 of that Act, which relates to the granting of free legal aid in extradition proceedings as a consequence of the extended rights of audience provisions.

We welcome any comments, and we are happy to take questions.

The Chairperson:

Thank you. How do the clauses differ from the original clauses that you intended to bring?

Ms Fee:

The clauses have been the subject of a lot of discussion with the Attorney General's office in light of the concerns that he expressed about the interface with competition law. In particular, he considered that the safeguards that we provided were not sufficiently robust. Consequently, we developed certain safeguards in and around the training and experience requirements in particular and how they would be provided for so that any regulations in that regard would be made subject to the concurrence of the Department. The intention underpinning that was to ensure that, as a wider public interest was engaged, the Department would be involved in considering that that wider public interest was met when the concurrence was being given.

Additionally, there were concerns around the competition issues where there could be a perceived conflict of interest with a solicitor, who has direct access to the public, potentially being able to influence the choice of representation. Therefore, it was considered that certain duties should be imposed on solicitors to ensure that full advice as to the choice of representation would be given to the client. The duties and the regulation making requirements have been strengthened in the clauses.

The Chairperson:

There was considerable discussion on the training and whatnot in the past. To what degree, if any, has that been changed or is it likely to change?

Ms Fee:

The training and experience requirements will still be prescribed in regulations issued by the Law Society, because it is well placed to determine what matters a solicitor should be qualified in before being able advocate in the higher courts. However, we are keen to ensure that advocacy standards are maintained in the higher courts, and, therefore, we have provided a concurrence role for the Department, after consultation with the Attorney General, before those regulations can be commenced.

The Chairperson:

If my memory serves me right, there was a concern about the perception — I suspect that it is more than a perception — that the solicitor is the gatekeeper in all this. Is there any change to that?

Ms Fee:

Yes. We have provided that, where a solicitor is minded to engage an authorised solicitor to provide representation in the High Court or the Court of Appeal, he will be under a duty to advise the client in writing about the advantages and disadvantages of his choice of representation, outline that there is a choice and confirm to the client that the choice of representation is solely for the client. The nuts and bolts of what will be included in that advice can be prescribed in regulations to be made by the Law Society. Again, to ensure that the wider public interest is taken into account, we have also, after consultation with the Attorney General, provided the

Department with a concurrence role. In addition, the solicitor will be under a duty to act in the best interests of the client in providing that advice and will also be required to notify the court when that advice has been given.

The Chairperson:

He is already under that duty, is he not?

Ms Fee:

A solicitor is under a general duty to act in the best interests of the client. When framing the clauses, it was considered, because of the wider public interests and because of the perceived risk of conflicts of interest in providing that advice, that the duty would be set out again and made specific to the provision of advice on that issue.

Mr McCartney:

I have two broad questions. I have not read — and will not pretend to have read — the Solicitors Order 1976, so I say this in ignorance. The briefing document says that the regulations are subject not only to the concurrence of the Lord Chief Justice but to the concurrence of the Department, which must consult the Attorney General. I assume that the Committee will have a scrutiny role to play around the regulations?

Ms Fee:

No. The regulations under the Solicitors Order govern the practice and conduct of the profession. They are professional regulations and, therefore, are not the type of regulations that are, ordinarily, subject to Assembly scrutiny. Most regulations that are made under the Solicitors Order relate to matters such as advertising, the way in which a solicitor issues fees and general issues on the regulation of the profession. Those regulations are made by the Law Society and are subject to the concurrence of the Lord Chief Justice. For these regulations, because there is a wider public interest issue, we considered that it is appropriate to leave the regulation making power with the Law Society but to add in ministerial concurrence after consultation with the Attorney General. The exercise of the ministerial function is, of course, subject to the scrutiny of the Justice Committee.

Mr McCartney:

The briefing document says that the Law Society is required to make regulations on the education, training and experience that a solicitor must possess before authorisation can be granted. Are you saying that this Committee will have no scrutiny role to say whether we feel that that is appropriate or inappropriate?

Ms Fee:

The Bain review on the regulation of legal services in Northern Ireland reported in 2006. The Executive endorsed the broad thrust of that review, although proposals have yet to be brought forward to give effect to it. The Bain recommendations were adopted, and those found that the professions should be allowed to continue to self-regulate and that that was appropriate. So, Bain did not recommend that the Assembly should be involved in the making of solicitors' regulations. We have been consistent with the spirit of Bain in that the power to make those regulations will stay with the relevant professional body. However, what we have sought to do, where wider public interest is engaged, is to make provision for ministerial concurrence after consultation with the Attorney General.

Mr Robert Crawford (Northern Ireland Courts and Tribunals Service):

One of the reasons why the Department feels it appropriate to have an approval role in the training is that it will make the regulations for legal aid payments. So, it is important for the Department to satisfy the accountability requirement that the training is of the appropriate quality and standard to justify that expenditure.

Mr McCartney:

I do not know what the regulations are. However, let us say that one of them is that solicitors should have at least two years' experience. Are you are saying that the Committee should not play a role in scrutinising that regulation and that it should be left up to the Law Society, the Lord Chief Justice and the Minister?

Ms Fee:

It is to do with professional regulation, and it is consistent with the Bain recommendations. An independent review of the regulation of legal services in Northern Ireland was undertaken, and

that was the conclusion of the report, which was endorsed by the Executive. As I said, we departed from that slightly but not fundamentally.

Mr McCartney:

Gareth will know that there has been wide public consultation on every aspect of this Bill right throughout. Therefore, will those groups that made valuable contributions on all the other clauses be brought back into the process and be consulted about the late inclusion of this clause in the Bill or will this remain basically a three-way process between us, the Law Society and the Bar Council. Should we be seeking other views?

Ms Maria Dougan (Northern Ireland Courts and Tribunals Service):

We initially conducted a targeted consultation on those clauses and proposals through the Bain recommendations, and the Bar and the Law Society were heavily involved in that. Last March, we also conducted a targeted consultation on our proposals, and we engaged with both professions throughout the drafting process for the clauses.

Mr McCartney:

What about other stakeholders, such as the Probation Board, and the many others who made valuable contributions to the process?

Mr Johnston:

I think that I am right in saying that our original plans for the original clause were included in the equality impact assessment on the whole Bill, which was put out to wider consultation.

The Chairperson:

What we are hearing today is that you have been consulting organisations such as the Law Society and the Bar.

Ms Fee:

There have been ongoing discussions. The development of those clauses has taken place over a period of time.

The Chairperson:

Sorry, I do not understand. We are getting this today. What was the period of time? Was it last week or the week before? I am talking specifically about the new clauses in front of us.

Ms Fee:

The new clauses before us were shared with the Bar and the Law Society last week.

The Chairperson:

They were shared with the Bar Council last week?

Ms Fee:

I believe that the letter did not issue until Monday, but the intention was to issue it as promptly as possible after the clauses went to the Committee.

The Chairperson:

So, was there a full consultation with the Bar Council?

Ms Fee:

There has been ongoing consultation on the development of the clauses that have been settled for presentation to the Committee. Those clauses were only settled in time to go to the Committee last week, and thereafter, they were issued to the Law Society and to the Bar.

The Chairperson:

Do you want to disclose what they said to you? Were they thrilled about the whole thing? Did they say that it was a good idea?

Ms Fee:

No; the Law Society wrote to us yesterday evening making representations on the clauses. I do not know if the Committee has had sight of that letter. I could address the points raised by the Law Society now, but I presume that the Law Society will want to make a presentation to you on

those, after which I could answer any points. The Bar Council also wrote to us recently about our proposals. There were ministerial meetings with the Bar Council and the Law Society on the proposals in the middle of January. We sought to keep the Bar Council and the Law Society informed on progress as the clauses were being developed, and we have taken on board representations from both professional bodies in the development of the clauses.

The Chairperson:

You have taken those on board in your final findings?

Ms Fee:

Yes.

Mr McCartney:

I want to go back to the consultation process. I do not want to labour the point, but, at each stage of the Bill, observations about the provisions have been made by people who, from a distance, may seem like they have no reason to make an observation, but they have. What provision has been made for other organisations, not just people who may have a vested interest — I use that term loosely — to guide us on whether it is the right thing to do?

Mr Johnston:

In the consultation on the equality impact assessment, which, as you know, went out to about 300 interested parties, only a couple of respondents commented on that area. They welcomed the extension of solicitors' rights of audience as it would give the public a wider choice of court representation. One respondent welcomed the provision as enhancing the opportunity for disabled people to be legally represented by someone who understands their disability. Indeed, one respondent expressed disappointment that it had not made it into the Justice Bill. The views that we were getting back from the wider community were certainly supportive.

Mr McCartney:

Yes, but the clauses were not introduced at that stage. They are now being introduced.

Mr Johnston:

We had said at that stage that we intended to make provision for solicitors to have rights of audience in the higher courts. That was before we realised that there were competence difficulties that we needed to work our way through. However, we were signalling the intention at that stage. We were not giving the exact text of the clause that you and I have before us, but we were essentially saying what it would do.

Mr A Maginness:

Does that apply to the Court of Appeal in its exercise of its criminal jurisdiction?

Ms Fee:

Yes, it applies across the board to the High Court and the Court of Appeal.

Mr A Maginness:

The briefing paper states:

"Implementing the rights of audience provisions has no cost implications for the legal aid fund."

How do you come to that conclusion?

Ms Fee:

Our understanding is that it should be broadly cost-neutral to the legal aid fund.

Mr Crawford:

That is right. We have not yet drafted regulations because we are going out to consultation on what those regulations might say, but our expectation is that, when a solicitor acts in the role of counsel in the higher court he would replace that counsel, so there would not be a higher cost. In most cases, we anticipate that the fee will be about the same.

Mr A Maginness:

So there will be no enhancement?

Mr Crawford:

There will be an enhancement of what the solicitor would receive at present. Obviously, in the

higher courts, that is not really a fee.

Mr A Maginness:

But it would not be additional?

Mr Crawford:

No, because one fee would replace another.

Mr A Maginness:

The other point that I wanted to raise was about training. How long does it take to train a barrister?

Ms Fee:

There is the degree requirement, which is currently three years, the institute course, which is a year, and then the non-practising pupillage for a year.

Mr A Maginness:

So that is two years.

Ms Fee:

It is two years post-law degree.

Mr A Maginness:

How long do you envisage that it will take to train a solicitor advocate?

Ms Fee:

The training regulations have not yet been made.

Mr A Maginness:

But how long do you anticipate that it will take?

Ms Fee:

We have not turned our mind to that.

Mr A Maginness:

Will it take a year? Two years?

Ms Fee:

We have to discuss that with the Law Society, because the power will be vested in the Law Society to set the training and experience requirements for a solicitor advocate. The Department will be alert to considerations in the public interest, given its concurrence role. As you are aware, some solicitors currently undertake the advanced advocacy certificate, which entitles them to payment of an enhanced fee. That course is in two stages and is focused around evidence exams, which last a couple of days, and a week's intensive training, at the end of which they are required to undertake a mock trial in front of a Crown Court judge. Those are the training requirements that the Law Society has set.

Mr Crawford:

From a legal aid perspective, my understanding is that, in the Crown Court, we currently provide a fee for solicitor advocates. The advanced advocacy course is the training requirement to attract a higher fee. You can, by all means, check that with the Law Society when it gives evidence. My understanding from the Law Society is that a solicitor cannot take the advanced advocacy course unless they have done three years' practice.

Ms Fee:

I think that it might be two years.

Mr A Maginness:

The Chairperson referred to solicitors as being gatekeepers, but is it not appropriate to say that, in this instance, they are self-interested gatekeepers? For example, if I were a solicitor representing Lord Browne and I were to say to him that I had a very fine man or woman in my office who is a solicitor advocate and that Lord Browne really would like that person to represent him in the High Court —

Lord Empey:

If he got a ticket for parking on a double yellow line, he would get six months.

Ms Ní Chuilín:

You only get that for stealing jeans.

Mr A Maginness:

In that situation, I, as the principal in the firm of solicitors, would get the fee because I would have got the man or woman to represent Lord Browne, and I would not have gone out my way to dissuade Lord Browne and to tell him that he might be better off getting a barrister to represent him because the barrister has plenty of experience and knows the ropes. It is a bizarre concept that one would go along with a page or two of written descriptions of the advantages and disadvantages of representation by an authorised solicitor and by counsel respectively. It is a nonsense, given that the solicitor is so self-interested.

Ms Fee:

We have recognised the risk of self-interest and have sought to put in place sufficient safeguards. The provisions are drawn largely from provisions that exist in Scotland, where there are requirements to advise the client of the advantages and disadvantages of their choice of representation. We have gone further than the provisions in Scotland by requiring that that advice should be provided in writing. We have gone further than in Scotland by requiring that a notice be submitted to the court to confirm that that has taken place. We have gone further than in Scotland by setting out clearly in the primary legislation that the duty to act in the best interests of the client relates specifically to the provision of that advice.

In that package of measures, we have tried to ensure that the risks of someone acting in self-interest are minimised while giving effect to the Bain recommendation that said that there was no reason why a suitably qualified solicitor should not have those rights of audience in the higher courts.

Mr A Maginness:

The English experience is that the Public Accounts Committee criticised the system because it reduced the quality of representation not in the High Court or the Court of Appeal but in the Crown Court.

Ms Fee:

Again, the situation in England and Wales, as I understand it, is that there is only a general duty in a code of conduct to act in the best interests of the client. There is no duty to provide advice in writing, and there is no duty to inform the court. Additionally, we have sought to ensure that there are no issues over the standard of advocacy in the higher courts by providing that training requirements specified by the Law Society will be outlined in regulations that will be subject to the concurrence of the Department after consultation with the Attorney General. We have sought to ensure that advocacy standards are maintained and that conflict of interest is minimised. That will allow the Law Society the flexibility to provide the detail of the regulations while ensuring that the core details are in primary legislation and that there is ministerial concurrence where required. That package strikes the balance.

Mr A Maginness:

Could I just declare my interest?

Lord Empey:

What is that? *[Laughter.]*

The Chairperson:

There are two names before me for questions. However, I will stop after that, because the officials will be coming back to the table later. Therefore, if you feel that you did not get a chance to ask your question now, you can ask it then.

Lord Empey:

I understand that the Attorney General was initially quite exercised about this. What has occurred to mollify his stance?

Ms Fee:

The Attorney General was concerned about the implications for compliance with EU competition law, particularly the Provision of Services Regulations 2009, which implement the EU services directive. In particular, he was concerned that, where the provider of a service creates an authorisation scheme, that scheme should in no way discriminate, in EU terms, against the provider of another service. He was concerned that, as Mr Maginness outlined, because of the direct access issue for solicitors to the public and the Bar being a referral profession, it would be necessary to protect against conflicts of interest and maintain effective competition for advocacy services. In framing the duties to be placed on a solicitor when engaging directly with a client, we have sought to address those concerns because they should ensure that competition is maintained.

Lord Empey:

Is the Attorney General now content with the proposals?

Ms Fee:

Yes. As I say, he has yet to indicate formally as to competence. However, he has indicated that he is content with the provisions as drafted. That is why the Minister has brought the clauses forward.

Lord Empey:

Therefore, although the Attorney General has not formally signed off on them, you expect that he will.

Ms Fee:

Yes; I think that that is a reasonable conclusion.

Lord Empey:

I have been to the Bar Library, and I know a little about it. Has consideration been given to the impact that the legislation will have on the Bar in the long term? There is a very high level of competition at present, and a significant number of junior barristers are being trained. Can the examples of England and Scotland teach us anything about what percentage of potential advocacy

by barristers will be undertaken by solicitors? The clauses must have a significant implication for the choice of profession of those who are graduating or in law school. Unless there is a huge increase in the amount of legal representation required, there could be problems, as the current level of work will now be shared among a larger pool of people. Has consideration been given to the implications for increasing solicitors' workload or diminishing barristers' workload?

Ms Fee:

These clauses focus only on extending rights of audience in the High Court and in the Court of Appeal. Solicitors and barristers already compete for work in the Magistrates' Court, County Court and Crown Court. Solicitors have had rights of audience in the Crown Court since 1978 and, since 2005, have been able to claim an enhanced fee. Our figures suggest that only a small percentage of legal aid payments are made to solicitor advocates for work done in the Crown Court. Because of that, our prediction was that the effect on the Bar of the extension of rights of audience to the High Court and the Court of Appeal would not be unduly significant. Furthermore, our view was that any impact would be outweighed by enhanced choice for the client and the enhanced provision of legal services.

Lord Empey:

I am reluctant to ask a question that is very hard to answer, because it calls for a prediction. However, for something that is alleged to have relatively modest implications, there has been a fair degree of activity over the last period on the part of the various professional representatives. I am not sure that everybody would see the picture as quite so benign. However, no doubt we will come back to that.

The Chairperson:

We will leave it there. I thank the officials for their briefing and their attendance. You will be staying with us because you will be coming back before us a little later.

Members, we will now hear evidence on this matter from representatives of the Law Society. I welcome Alan Hunter, chief executive of the Law Society, and Peter Campbell, chairman of the society's higher rights of audience committee. I will hand over to you, gentlemen. You know the drill by now. We will hear what you have to say on this matter, we will ask questions, and then

we will hear the response from the departmental officials.

Mr Alan Hunter (Law Society of Northern Ireland):

Thank you for inviting us to appear before the Committee. We are grateful for the opportunity to make representations on proposed Part 8 of the Justice Bill, which shall, if it is enacted by the Assembly, introduce rights of audience for solicitors in the higher courts. As Committee members and Assembly Members will know, this matter has been exercising the Law Society for some time. Indeed, the society has been engaged on the issue with the Committee, Assembly Members, the Minister and the Department.

The first indications from the then Government that they would introduce rights of audience for solicitors in the higher courts were given to the society more than 10 years ago. It has taken a little time for the clauses to be brought forward, and the process has not been without difficulty. Nevertheless, the society is pleased to have reached this stage in the discussion.

I want to introduce, if I may, Peter Campbell. Mr Campbell is an elected member of the council of the Law Society, chairman of our higher rights of audience committee, and a partner in the firm Campbell Fitzpatrick Solicitors, specialising in commercial litigation, mergers and acquisitions, and personal injury litigation. Mr Campbell completed the Law Society's solicitor advocacy course in 2002. You will be aware that that course is run in conjunction with the American National Institute for Trial Advocacy and is highly regarded.

As a matter of public policy, it looks extraordinary to the public that barristers have rights of audience in all courts, while solicitors have rights of audience in some courts, including the most complex trials before the Crown Court, but do not have rights of audience in the High Court or the Court of Appeal. However, in fact, any person — legally qualified or not — may represent himself or herself in proceedings in any court. I understand that there is an increasing trend of litigants in person.

All solicitors have undertaken training in advocacy as part of their postgraduate vocational training. That enables them all to be well trained to appear in the courts where they presently have rights of audience.

It is clear that the society considers that the introduction of rights of audience is in the public interest, as well as in the interests of the profession. The provision will enhance clients' choice and, as the draft legislation makes clear, it will allow the client to determine who he or she wishes to represent him or her in the proceedings. The society considers it a fundamental choice that should be open to the citizen.

As I said, it is interesting to note that, while members of the public in England and Wales, the Republic of Ireland and Scotland have all hitherto had this choice, it has been denied to the citizens in this jurisdiction. It may well be that a member of the public would prefer to be represented by their solicitor or by a solicitor connected by the firm that they routinely instruct.

To look at it from a purely human point of view, take, for example, a sensitive family situation. There may be a difficult background or story to tell, and a high degree of trust and confidence may have been built up between the client and the solicitor. Perhaps the Committee can see that, in such circumstances, the client may have built up confidence in a solicitor and might, naturally, wish that solicitor to make the case to the court on their behalf rather than have to meet another person about very personal issues and have to repeat their story again.

However — this is an important point — that will always be subject to the solicitor's overriding duty to act in the client's best interests. That duty includes providing advice on who is best placed to represent the client in court. That is already part of a solicitor's duty and part of their day-to-day work and advice to clients. The society has no difficulty whatsoever with that requirement continuing, nor do practising solicitors. Fundamentally, that is the present position, and in ethical terms, it will continue. The interests of the client must be paramount, and judgements will be made in individual cases as to what is best for the client.

Members have copies of the society's briefing paper, which was submitted yesterday. I will highlight some of the significant issues that the society invites the Committee to consider.

A significant issue was raised about the absence of any provision to address the lacuna in the Magistrate's Court that would otherwise exist. That relates to the fact that the legislation does not

empower district judges in Magistrate's Courts to award a legal aid defence certificate to a solicitor advocate on the same basis as counsel. Since I issued my submission to the Committee, the society has received an assurance from the Department that that matter is being addressed, and you have heard the departmental officials speak on that.

You have already touched on the first and most significant point, which is that the society regards it as entirely inappropriate for the Department of Justice and the Attorney General to have a statutory role in the regulation of the solicitors' profession. Under current arrangements, our regulations are subject to oversight and scrutiny by the Lord Chief Justice. It is a significant departure that the independence of the solicitors' profession may be compromised by a statutory duty to consult both the Minister and the Attorney General.

We make other points in our submission. As regards new draft article 9(a), there may be a need for a definition of legal representation so as to isolate the new rights as compared to the existing procedures. As regards new draft article 40A(2)(a), we are concerned that it may be difficult to determine the advantages and disadvantages of representation by an authorised solicitor and by counsel, and a view may be taken retrospectively on a matter that would perhaps have been unclear at the outset.

As the solicitors' practice regulations already place a general duty on a solicitor to act in the best interests of a client, draft article 40A(4)(a) is not required. There is a requirement in new draft article 40B that a solicitor who is exercising those rights must inform the High Court or the Court of Appeal that he has complied with the legislation. It is an extraordinary proposition to suggest that an officer of the court must inform the High Court or Court of Appeal that he has complied with a duty. It is entirely unnecessary, to put it mildly.

As part of the work that Mr Campbell's committee has taken forward, the society has, some time since, passed a resolution in respect of our policy for solicitors who wish to exercise rights of audience in the higher courts. That was passed to the Department a considerable time ago. Our policy was determined at that stage to absolutely require solicitors to advise clients about the choice of advocate, including the availability of counsel. It also required that a record of such advice be written and retained on file for inspection. Our policy was, and is, that the client must

be informed that the solicitor may receive an additional fee for those services, and that advice is also required to be recorded in writing and made available for inspection.

To ensure continued high professional standards, the society has been developing a code of conduct for solicitor advocates. It has been considering the continued professional development requirement for solicitors and solicitor advocates on an ongoing basis. Its complaint mechanisms are also under consideration so as to ensure that they will be adequate to address the new circumstances.

Solicitors are experienced in advising clients on their options for legal representation generally. Regulations are in place that require solicitors to issue retainer letters to clients upon receiving instructions that set out the work to be done, an indication of the likely fees and the terms of engagement. It is likely that the society will amend that standard letter, which is offered for use by individual solicitors' firms, to include the various additional requirements that will apply to solicitors acting as solicitor advocates in the higher courts.

I want to refer briefly to some of the points that were raised with the departmental officials. The issue of quality was raised, and I am slightly concerned that there is almost a presupposition that the quality of advocacy and representation is dependent on whether someone is a solicitor or a barrister. The society does not believe that to be the case. It considers that, if there is an issue of quality, that issue should be considered against both solicitors and barristers and that a benchmark should be set against which both branches of the profession should be gauged. It is not about the difference between the quality of solicitor advocacy and the quality of counsel. The society considers that that is an entirely erroneous proposition and basis from which to work.

I also want to draw your attention to the proposal that Orders should be made by the Department under the negative resolution procedure. Given the amount of discussion that there has been around these provisions, the society considers that the Committee may want to look at whether it is appropriate for such Orders to be approved by that method.

I want to reserve the position of the society in some respects. We received the proposed new clauses last Friday. Although we have conducted a fair amount of work in preparation for

appearing before the Committee today, having heard some of the Department's observations, we may want to come back to you in writing on some points. If we could crave the Committee's indulgence on that, we would be grateful.

Having declared an interest, Mr Maginness made some observations about the potential for a solicitor to have a captive client. I hope that I have addressed the society's policy, which was developed in advance of us receiving the clauses. I also hope that I have given you the assurance that, in any case, the society's regulations would require strong advice to be given to the client.

Let me just quote the Attorney General, who also has a view on this. He is, of course, the leader of the Bar. I am quoting from a 'Belfast Telegraph' article of 30 September 2010. I trust that the paper is accurate — I am sure that it is. The Attorney General said:

"At the same time it has to be acknowledged that you do have a number of solicitors who are experts in their field and where the absolute bar in their participation in advocacy in the higher courts just strikes me as absurd."

Therefore, there seems to be a broad acceptance of the desirability of solicitor advocacy in the higher courts and that there are circumstances in which a client should have that choice open to him or her.

We are available to take your questions.

The Chairperson:

Thank you, Mr Hunter. In your paper, you say:

"The Society shall be making observations about the role of the Attorney General in Northern Ireland generally when a suitable opportunity arises."

Would you like to make those observations now?

Mr Hunter:

There is a discussion on the remit and role of the Attorney General, perhaps in connection with increased powers for the Public Prosecution Service. So, I expect that there will be a consultation exercise on the role of the Attorney General. The society wishes to reserve its position and to contribute to any such review.

The Chairperson:

You also say that it is irregular for the Attorney General to be consulted about Law Society regulations, which is currently the responsibility of the Lord Chief Justice.

Mr Hunter:

No; the Law Society regulations are currently made by the council of the Law Society. Once they are made by the Law Society, having previously consulted with the Lord Chief Justice, they are submitted to the Lord Chief Justice for him to concur or not concur. So, he has an oversight role and a very real role in the public interest element of the Law Society's regulations. At present, there is precedent for the Attorney General to be consulted on, for example, some legal aid regulations, but certainly not on regulations that are connected with regulating the solicitor profession.

The Chairperson:

You also said that the requirement to consult the Attorney General, although not without precedent, is inappropriate.

Mr Hunter:

Yes. There certainly is precedent for the Attorney General to be consulted on, for example, legal aid rates of payment and so on. Historically, he had a statutory right to be consulted on those matters. That is one set of circumstances. However, there is another set of circumstances, namely the training and education of solicitors. Our view is that it is not appropriate for the Attorney General to be consulted on those matters. The oversight and input of the Lord Chief Justice addresses those concerns and considerations, and that is sufficient. So, we draw a distinction between where government is enacting legislation to do with rates of pay and the training, education and regulation of the solicitor profession.

The Chairperson:

Your paper also says that the effect of the provisions is to engage the Department of Justice in the regulation of the profession on those matters and that that is a significant departure in the regulation of the legal profession.

Mr Hunter:

The legal process has been very carefully considered in the constitutional devolution settlement so that, for example, the independence of the judiciary in courts is enshrined in statute. As a corollary of that, it was accepted by the Governments and, as I understand it, the Executive since, that, equally, there should be no interference with the regulation of the independent profession and that the independence of the profession is required to be recognised.

Under these proposals, the Department will, as I understand it, for the first time, have a statutory role to be consulted on the training of solicitors, albeit solicitor advocates. I am saying that that is a significant departure and would require very careful consideration because, in every other area of the legal process, the political settlement has been such as to preserve the independence of the courts and the independence of the judiciary. If that is important enough, as of course it is, we are moving towards the Department beginning to be involved in the regulation of the profession. I am highlighting that for the Committee's consideration. The society certainly thinks that that is not appropriate.

The Chairperson:

Do you believe that the political settlement acknowledges the independence of the judiciary in all its parts?

Mr Hunter:

I am sure that there is good deal of discussion on that. All I am saying is that the independence of the judiciary is enshrined in the Justice (Northern Ireland) Act 2002. The precedent and the whole thinking has been to ensure that there is that independence of the legal profession, the judiciary and the courts. Since it applies specifically and directly to the judiciary and the courts, the society would say that the independence of the legal profession — both the solicitor profession and the Bar, although it is not for me to say — needs to be respected. Therefore, that encroachment by the Department is a departure from that. If the Assembly decides to do that, it should do so consciously and be aware of the overall context. The Law Society's position is that it is inappropriate and that the independence of the profession means that the profession should regulate itself.

Mr Peter Campbell (Law Society of Northern Ireland):

From a practical point of view, and as practising solicitors, we are always mindful of our position as officers of the court. It is a very onerous responsibility that we take very seriously. The Lord Chief Justice is the most senior judge in the jurisdiction and, as such, it seems entirely appropriate and fair that he oversees the regulations that control solicitors. Therefore, it seems entirely appropriate that he is in that position and is charged with that position, because we are officers of the court. This appears to be a departure from that position.

The Chairperson:

I want to ask a question on that point. These are your words, not mine:

"The Society strongly considers that it is entirely inappropriate that the Department concurs in such Regulations."

If it is regulated in this manner, do you believe that there is an unhealthy involvement, political or otherwise?

Mr Hunter:

Yes. Obviously the regulations have not been made; there would be discussion and a process involved in that. Therefore, it is very much in the abstract as a term of principle that there is recognition in the Justice Act that the independence of the judiciary and the courts is enshrined. If that is extended by corollary to the profession, can it be right that the Department begins to be involved in the regulation of the profession to the extent of training and so on? That is the issue that I am bringing before you. The professions self-regulate and, as Mr Campbell said, it is not that there is no oversight or no external involvement; there is, and it is subject to the oversight of the Lord Chief Justice, which is sufficient and appropriate.

Ms Ní Chuilín:

I do not want to sound like I am splitting hairs, but on the one hand you are clear about the role of the Attorney General with regard to regulations, and you say that it is entirely inappropriate. However, you make the distinction in the next paragraph of your submission, where you state:

"The Attorney General is the advisor to the Executive and the Head of the Department of Justice is the Minister for Justice."

The Minister for Justice is a member of the Executive. Do you not see a contradiction in that?

Mr Hunter:

I suppose what I am saying is that the Attorney General's role is to advise the Executive and the Minister. I am sure that the Minister is able to get his legal advice from the Executive on any point that he wants. Our point is that the way in which the profession is currently structured enables the society's council to make its regulations and that is subject to the oversight of the Lord Chief justice. We think that that is the appropriate way to do it.

Ms Ní Chuilín:

I want to ask about the equality impact assessment. This part was in the original draft and then it was removed. Had it proceeded, which it did through the passage of an equality impact assessment — even though I have difficulties because it was done in bits and pieces rather than in its entirely — I would not be happy with it at all. However, this proposed amendment will be subject to public scrutiny. Have you any difficulty with that, other than what you said previously?

Mr Hunter:

We have no difficulty with public consultation or the public expressing their views; quite the contrary. Every indication we have suggests that this is a choice that we think the public would want to have.

Ms Ní Chuilín:

You do not see a contradiction with public consultation. However, your submission states:

"The Society shall be making observations about the role of the Attorney General … generally when a suitable opportunity arises."

Yet, you feel that his involvement thus far has been inappropriate with regard to regulations.

Mr Hunter:

No, because no regulations have been made, and the Attorney General has not yet been consulted. This will create a statutory duty for those regulations to go through a particular process, which is a new process. At the moment, the regulations are made by the Law Society council and

overseen by the Lord Chief Justice, who concurs, or does not, as he considers appropriate. Under the new process and provisions, the regulations will have to have the concurrence of the Minister of Justice, who will be required to consult the Attorney General. That is a new statutory process, and it is a requirement. We are saying that we do not think that that is the right process for regulation of the solicitor profession.

Ms Ní Chuilín:

It is the imposition of a statutory duty. The Attorney General previously had some role, at least on paper, in respect of the regulations, but he was not really consulted. It is really just the introduction of a statutory duty now.

Mr Hunter:

No, because he nor the Minister nor the Department had any role in the regulations at all. Those were for the Law Society council and the Lord Chief Justice. Where the Attorney General and the Department had a role previously was in relation to legal aid payment rates and those kinds of things.

Ms Ní Chuilín:

Is that all it was?

Mr Hunter:

That is all that it was. This is a new departure. Apart from the fact that the Law Society feels strongly about it, I thought that it was important to highlight that departure to the Committee.

Mr McCartney:

I want to make a couple of points about the regulations. Alan, you said that the regulations were sufficient and appropriate as they stand.

Mr Hunter:

The process.

Mr McCartney:

Even if they are sufficient and appropriate, it does not mean that they cannot be added to. As I read them, the regulations are only a safeguard to ensure that the solicitor advocate will act in the best interests of the client. The Law Society may feel, for example, that it should be a year of practice, but I do not see the independence of the profession or the system in general being undermined by someone saying that it should be two years. I do not see a problem with that person not being part of the Law Society.

Mr Hunter:

You talked about a public consultation process and so on, and there is clearly a lot of interest in this. We touched on the training of a solicitor compared with that of a barrister. Solicitors will have studied a law degree for at least three years. They will then have done a two-year sandwich course, partly in a solicitor's office and partly at the graduate legal school at Magee or the Institute of Professional Legal Studies. At that point, they are qualified as newly admitted solicitors. They are restricted from practising on their own and must have continuing supervision for a period after that. As far as the current arrangements on solicitor advocacy are concerned, there is a requirement that solicitors cannot undertake the solicitor advocacy course for a three-year period after qualification. Therefore, it is, in fact, eight years before solicitors are even eligible to do the course, which is a significant period of time.

Mr McCartney:

I am not questioning the substance of the regulations in any way. What I am saying is that there seems to be a view that we should have no say in whether those regulations are good, bad or indifferent. If the regulations were presented, we might say that they are excellent and of a high standard. However, there seems to be a view that we should not have any input. I do not think that our involvement would undermine the profession or the independence of the judiciary in any way. Indeed, in many ways, it would strengthen both. It would lay your regulations open to scrutiny rather than the accusation being made that you decide and the rest of us have no say.

Mr Hunter:

I accept that that is your position, but it is not our position. We now live in an environment in which I receive regular comments and representations from a range of people. The Law Society,

of course, takes those views into account.

Mr McCartney:

We are being asked to legislate, yet we have the feeling, rightly, wrongly or indifferently, that somebody is saying that we have to approve their regulations whether we like them or not. That is where I see the gap. We are legislators, and, to legislate, we should be satisfied that the regulations are in line with what are trying to do in bringing about a change in the law. That is why I stress that this is not about the substance of the regulations, nor do I want, in any way, to undermine the society's independence or the independence of the wider judicial system.

Mr Hunter:

It is a departure in principle. The Law Society maintains its view. The third point is that the draft clauses go considerably further than some of the other jurisdictions to meet some of the concerns that have been expressed by other parties. The legislation that you are being asked to enact already goes a significant way down that road, but our view is that it is important that the co-regulation of the society and the Law Society's regulations are made by the Law Society's council after concurrence with the Lord Chief Justice and all the other people who are engaged in that process. Some external people are involved.

Mr McCartney:

The officials might be able to answer my question, which is on the process. Has the trial judge any role in establishing whether the defendant or the client has been advised properly of his or her rights in selection?

Mr Hunter:

It is suggested in the legislation that rules of court, presumably made by the Supreme Court Rules Committee or in the Crown Court, will require to be satisfied that the advice has been given, and the rules of court will make provision to enable the judge to be satisfied about that. As I said in my opening statement, we do not find that to be a realistic proposition. The fact is that clients are advised on a range of issues. If it is a requirement that solicitors advise on choice, they will, of course, do so.

As I said also, it was already settled Law Society policy that, when those rights of audience were introduced, it would be a requirement that solicitors would advise on choice between solicitor and counsel, that a note would be made of that in writing and that it would be available. Therefore, we believe strongly that that is important, and that is our policy. The legislation goes one bit further and says that the fact that that has been done has to be verified to the court, and the manner in which it is to be verified is to be determined by the Rules Committee. We think that that is unnecessary.

Mr McCartney:

Do you think that it is unnecessary that the trial judge satisfies himself or herself that —

Mr Hunter:

We think that it is unnecessary because we question why that is picked out rather than any other piece of advice that the solicitor gives to the client.

Mr McCartney:

When the officials said that the client has to be advised in writing, it struck me that, when we went to Hydebank Wood, we were told that 70% of the people there do not have level 1 literacy. I say that without prejudice.

Mr Hunter:

That point also occurred to the society, and it is why so much advice, particularly perhaps in criminal matters, is given verbally to clients.

Mr P Campbell:

There is a second branch to the obligation in the regulations to advise the client in writing. That is that the choice of advocate, be it an authorised solicitor or counsel, is the choice of the client alone. That must also be confirmed. That would take care of the informed consent, as opposed to a written document, which is a quite separate requirement from the obligation to inform the court as to the compliance with that obligation. So, there are two separate strands there.

Mr McCartney:

How would that be done in a practical sense? Would the best person to confirm that not be the trial judge? If that were in place for a trial judge to satisfy himself that a person has been —

Mr P Campbell:

That is a different matter, because the obligation to advise the trial judge that the written requirement has been complied with would not necessarily deal with the understanding of the client. It may be a separate matter in which the trial judge could inform himself or satisfy himself as to the level of understanding of the informed consent. My response to you was simply that the requirement on the solicitor to advise the client in writing is a two-tiered obligation to do so in writing and then inform the court that the choice of advocate is the client's alone. That, to me, suggests an informed consent, if the person has made a choice. It was just in response to that point.

Mr McCartney:

I am talking about independent verification. If people have a view, as articulated by Mr Maginness — self-interest, etc, etc — then if the trial judge asks someone at the start of the proceedings if they are satisfied that they have been well advised, and outlines their rights, opportunities or choices, and the person says yes, in your best interest, it has to be better satisfied.

Mr Hunter:

Our policy was that the client would be advised, a note of advice would be recorded and that would be kept on the file and would be available for inspection, along with a host of other advice that would be given about a host of other matters. Part of our thinking in developing that policy was exactly the point that you made: that to send a client a letter indicating what their choices are gives rise to a range of issues, such as literacy, language, interpretation issues, and so on. We thought, therefore, that that was the better way to do it. To answer your specific question: a client is given a range of advice from a solicitor. Where do you draw the line? Why is there a necessity to seek verification on that particular matter when it is available for inspection on the file? That is our view.

Mr McCartney:

Your briefing states, "Otherwise there is a lacuna". I was hoping I would not be asked what that meant. I pretended to know. Over to you, Chairperson. *[Laughter.]*

Mr A Maginness:

Are you in favour of the clauses or against them?

Mr Hunter:

We are in favour of the policy, and we bring those matters to you as our representations on how we think they can be improved.

Mr A Maginness:

It seems to me that, on one hand, you want the basic principle of solicitor advocates in the High Court and the Court of Appeal, but you are not really prepared to undergo any serious regulation around that quite substantive change in the work of a solicitor. It seems to me that you want to have your cake and eat it. I think that is the impression you are giving to this Committee. I cannot speak for the whole Committee, but it is certainly the impression that I get.

Mr Hunter:

I will ask Mr Campbell to address some of those points.

Mr P Campbell:

I think that is much too wide. We have concerns about some aspects of the draft clauses that are before you. I would like to highlight the proposed new clause, which seeks to insert new article 40A(1)(a), by way of example. I think it is our duty to come before you and point out its shortfalls. The proposed new article effectively creates the obligation on the solicitor to advise the client of the choice of advocate, but it does so if the client is "likely to require, legal representation". My issue with that is that I think that "legal representation" requires some definition or refinement. If the phrase "advocacy representation" was used instead of "legal representation", I would fully understand how the rest of that clause flows.

In many cases, when a solicitor is either issuing proceedings or defending a case and entering

an appearance in either the County Court or High Court, at that stage, it is likely that advocacy services may be required, but it may be far too early to know some of the obligations that will be required to be informed to the client, such as any cost implications or the type of choices of advocate that may be needed. At an early stage of a personal injury claim, you may be defending a claim without knowing what the injuries are. Therefore, to impose an obligation on a solicitor at a stage in proceedings when he or she may not be able to comply with those requirements is a potential failing of the proposed primary legislation.

There are areas that we have concerns about in the proposed primary legislation. However, we started by welcoming, in principle, the intention to reintroduce those clauses. We are grateful for the intention to do so. That is our first principle as we appear before you.

Mr A Maginness:

Of course, you also had a problem with the proposed new article 40A(2)(a). Your submission states that it may be difficult to determine and that:

> "Obviously each case will turn on its own merits but this is quite a subjective judgment. The Society wishes it to be noted that this is a vague and general requirement and must therefore be a matter for the subjective judgment of the solicitor concerned in the particular circumstances of the case at that point in time."

I agree with you entirely. That is the point that I was making. Whether you like it or not — I am not trying to be offensive — you are a self-interested gatekeeper. You would require the virtue and selflessness of a saint to urge a client to obtain the services of a barrister when your firm is set up, you have solicitor advocates, you know that you can do the job — or, at least, you feel that you can — and you go along to your client, Lord Browne, and say that, although you really do not think that he needs the services of a barrister, if he wants those services, he can, of course, have them. Now, Lord Browne is an intelligent and experienced man. However, if you take a minor, someone with a disability or someone who is not as well educated or experienced in life as Lord Browne, how do you think that you could objectively — I underline the term "objectively" — advise your client to use a barrister when it is in your financial self-interest to retain that client or to retain the services of a solicitor advocate in your own firm? I cannot get round that. In your submission, you say that it is a:

"vague and general requirement and must therefore be a matter for the subjective judgment".

You cannot give an objective assessment. That is the weakness in this.

Mr P Campbell:

There were a lot of questions there. In no particular order, I will start with the advantages and disadvantages of the draft article 40A(2)(a). Our concern with it is the fact that it can be answered only in principle. Therefore, on a subjective case-by-case basis, matters may simply boil down to experience and cost. It may be as simple as that. If that is the case and our members comply by giving that advice, so be it. However, you talk about us being gatekeepers and our potential conflict of interest. As a practising solicitor, I find it particularly — with respect, you are at the receiving end of solicitors' instructions — easy to answer your question in so far as solicitors, almost daily, instruct counsel in cases that they could take themselves. For all types of practical reasons, matters of choice and experience, they choose to use counsel.

I can say without a shadow of a doubt or fear of contradiction by my colleagues that the solicitors' profession needs an independent and expert Bar, and that must remain. The structure and nature of the solicitors' profession is such that it requires the availability of independent expertise. As has been alluded to by the Courts and Tribunals Service, there has been a small uptake in solicitor advocacy in the Crown Court. My understanding is that, in the County Court, where there has been a financial inducement for solicitors to brief themselves and to appear in their own cases for over 10 years now, there has been even less uptake; it has been very modest and small. There may be many reasons for that, but that is the reality of what is happening. The evidence from the jurisdictions of England, Scotland, Wales and the Republic of Ireland, in which equivalent regulations have existed for more than 15 years, is that the Bars there are thriving.

Mr A Maginness:

I do not think that any members of the English Bar would say that their Bar is thriving.

This is a charter for very large firms of solicitors. An ordinary, small firm in a small country town or even in Belfast could not spend the time on solicitor advocacy. The big firms in Belfast and elsewhere, however, would be able to do that. They could set up departments and would be able to clean up. These clauses would undermine the Bar by weakening the general work that it

does, thereby diminishing its role and reducing the expertise that is needed to build up and maintain an independent Bar.

Mr P Campbell:

I can understand that fear, which is why I deliberately chose to emphasise the support that the solicitors' profession gives to the Bar and the fact that the profession requires an independent expert Bar. However, as regards practical application, the practical evidence from the County and Crown Courts over the past 10 years suggests that your fear, while understandable and therefore valid, may not be as great a concern or fear as you have articulated.

The Chairperson:

The last member whom we will hear from on this is Lord Empey.

Lord Empey:

I get the feeling that, although you are seeking something perfectly reasonable, namely solicitor advocacy, Alban's concern is, to some extent, that that would open a Pandora's box. However, strictly speaking, the issue is not quite how he put it, because we are talking about clauses that deal with the regulation of solicitor advocacy as opposed to the principle of solicitor advocacy. Nevertheless, I share some of his concerns. However, I think that Mr Hunter was perhaps being a wee bit diplomatic in some of his comments, and I understand that. The truth is that we have an Attorney General now, and his role is not yet fully determined right across the board.

As regards people being completely divorced from things, you could make the gatekeeper argument, as Alban does. However, that argument could equally be applied to the Attorney General or the Bar. Everybody has their own interests. The Department will probably say it has an interest because it supplies legal aid. However, the principle of regulation worries me a wee bit. Presumably, Mr Hunter's fear is that, if the Department and the Attorney General get a foot in the door by having a role in the regulation of advocacy rules, qualifications and training, it would set a precedent for solicitors' activities more generally. Is that really what is at the back of your mind in all of this, Mr Hunter?

Mr Hunter:

That is fundamentally it. It is a departure, and we are concerned that it could create a precedent.

Lord Empey:

Mr McCartney asked why we — I include the Department and us in that "we"— should not have a role in this. After all, we are contributing large amounts of money and so on. However, I have some concerns about bringing a Department into the regulation of a profession. For example, does the Health Department regulate the medical profession? I think that those are the sorts of areas that are at the back of your mind and that you are really concerned about.

The Minister and the Attorney General will change over time: some may have little interest, some may have no interest, and others will be acquisitive in trying to extend their role; we do not know where that would lead. I suspect that that might present a greater danger than is presented by the narrower issue of the regulations, which are a comparatively small part of the overall picture. So, are you saying that it is the precedent that would be set that is at the bottom of the society's concerns?

Mr Hunter:

Certainly, the precedent is the concern. We are concerned because it is a departure from the pre-existing position and because that departure occurs against a background of a recent review that felt that it was important for the independent profession to continue to independently regulate itself.

Lord Empey:

I presume that, if the Department and the Attorney General start to look at your training and regulation, at a future point they could start to look at the Bar, too. There would be a whole chain of events around the self-regulation of the professions under the Lord Chief Justice and others, which could mean that we would start to get our political sticky fingers involved in the professions generally. Is that a possibility?

Mr Hunter:

Yes, it is about perceptions, too. A number of precedents are being set, and they will, in due

course, apply across the whole legal profession, both to solicitors and the Bar. Therefore, precedents are being set here for the whole profession.

The Chairperson:

I have one last question, Mr Hunter, for you and your colleague. I still have some doubt as to whether you are for or against the clauses.

Mr Hunter:

I am grateful that you have allowed me to return to that issue, because I want to respond to Mr Maginness's point about us seeking to have our cake and eat it. As members are aware, it has not been entirely straightforward to get to the stage of having the clauses before you today. However, without that process, the society would have come to the Committee and made representations, as other bodies and organisations do. Indeed, we do that when we feel we have something to offer on matters that do not directly impact on us but that we consider to have a public interest element.

It is important to note that we recognise that, if a clause is going to affect our profession, it is entirely appropriate that we come along and tell you what we think about it. However, we acknowledge that it is for the Assembly to make a final decision on it. We welcome the policy and the fact that these clauses are before you. We welcome the fact that the Assembly will have an opportunity to debate them, and we hope that they will enact the clauses. We make some fine points here, which are our observations on the clauses as they stand, as we think it is our responsibility to do that. However, in principle, we welcome that the policy will be considered by the Assembly, and we seek the Committee's support for the enactment of the clauses, subject to it taking a view on the points we have raised.

The Chairperson:

OK, thank you very much. We have to stop there.

The departmental officials will now return to the table. We must be quite brief, because we have gone over our time, and we still have three quarters of our agenda to get through. The officials have heard what has been said. I hand over to them to hear their comments, and I will then take a few questions from members.

Ms Fee:

We have had sight of the paper that the Law Society submitted to the Committee last night, and it may be helpful if I try to address the points in the paper in the order in which they appear. Hopefully, I will capture them all.

Mr Campbell made a technical point about the definition of legal representation. The letter refers to that definition being in a different article, but it is in new draft article 40A(1)(a). We agree with what the Law Society said about how that provision should work. However, we consider that the clause as drafted will give effect to that policy. The clause must be read as a whole to make it clear that the duty to advise in writing applies only when a solicitor orally argues before the court. However, we will take the provision away and examine it again in consultation with legislative counsel to ensure that we are all reading the clause in exactly the same way.

I turn to the provision that requires solicitors to advise their clients of the advantages and disadvantages of their choice of representation. As the Committee will be aware, the aim of the provision is to ensure that the person can make a fully informed choice. Any requirement to advise of advantages and disadvantages must be seen against that background.

We note the point about the level of literacy that some clients have. In providing that the advice should be given to the client in writing, we in no way meant to suggest that that is the only way that such advice could be given. We anticipate that a solicitor would fully explain the advantages and disadvantages and give clients a copy of that information in writing, because often when things are explained to us, we go away and ask ourselves exactly what was said. We in no way meant to obviate that requirement, and we are well aware that solicitors would take into account the literacy of their clients.

When we originally sought to make that provision, we looked at the Scottish model. Rule 3 of the practice rules for solicitor advocates in Scotland sets out in more detail the matters on which a solicitor would be required to advise a client. However, we listened to representations from the Law Society that it could be overprescriptive and difficult to deal with the matter in primary

legislation. We moved to provide in primary legislation the key framework of what the advice would include. It would involve telling someone the pros and cons of what they were doing, but it would be left to the Law Society to develop, by regulations, exactly what that advice would be. We take Mr Campbell's point that solicitors are well practised in advising clients.

We included a safeguard in the form of a requirement that there should be the concurrence of the Department, because we felt that there was a wider public interest. We have sought to stop that requirement being vague and to allow the Law Society to provide input on how the requirement should be delivered in practice. I will deal with that safeguard in more detail later.

Points were also made about solicitors already being subject to a duty to act in the best interests of the client, and we fully accept those. However, we have taken on board the fact that, in providing that advice, there is a perceived conflict of interest. Therefore, we felt that it was important to state in the legislation that a duty to act in the best interests of the client also clearly applies to the provision of advice in this situation.

The intention behind the duty to inform the court is to effectively reinforce consumer confidence. There could be written advice in a file, but a client might think that that advice never sees the light of day again. The intention is simply for the solicitor to notify the court that they have complied with the requirement. It will be for the Rules Committee to determine the time and the manner in which that notice is provided to the court. The Court of Judicature Rules Committee includes representatives from the Law Society, and they will have input to it.

I should clarify a point that Mr McCartney touched on; the position of the trial judge. Our intention is that the position of the trial judge should remain as now. If the judge has concerns about the standard of advocacy he sees in front of him, he will, in the normal course of events, raise those concerns. He might then choose to look back through the papers to see what advice was provided to the client. There is certainly no intention to provide the court with an enhanced supervisory role in relation to the advice that is provided to the client.

I turn now to the substance of the discussion about the role of the Department in rule-making. As I indicated, the desire of the Department in making that provision was to take account of the

broader public interest that would be engaged in those two discrete areas relating to training for solicitor advocates and the advice that would be given.

I noted the discussion on judicial independence. There is certainly no desire or attempt to undermine that in any way. We have also sought, in so far as possible, to stay true to what was decided in the Bain recommendations — that the regulation of the legal profession is for the legal profession. The Department has not sought to take that away or to vest the regulation-making powers in itself. It has made a limited change to provide that there should be a concurrence role in two discrete and limited circumstances. I should also point out to the Committee that there is precedent for ministerial concurrence and Attorney General involvement, as the representatives from the Law Society indicated, albeit in the format of legal aid regulations.

I would also highlight that the rules of conduct and the training regulations for solicitor advocates in Scotland are made by the Law Society of Scotland, with the concurrence of the Lord President of the Court of Session and with the approval of Scottish Ministers. So, although there is the idea that any kind of departmental involvement would result in interference in the profession's independence, the precedent in Scotland clearly shows that that model can work and has worked. There is still an independent Law Society and an independent Faculty of Advocates in power in Scotland.

The other point I would like to make is about the role of the Attorney General. There was a suggestion that this might be the thin end of the wedge and that there might be political involvement in the profession. The Attorney General is not only legal adviser to the Executive; he also has a wider remit in that he is guardian of the rule of law. Before the Department exercises its concurrence role, it must fulfil its duty to consult with the Attorney General and to take on board the Attorney General's views. That is a good element of counterbalance to any ministerial involvement.

Another point that I would like to draw out is the role of the Lord Chief Justice in the concurrence role. That role has been left undisturbed. It was recognised by Bain that the Lord Chief Justice has the confidence of the professions and the wider public. We endorse that, but, in matters of conflict of interest, we felt it appropriate for there to be departmental concurrence.

I think that I have dealt with everything.

The Chairperson:

Thank you. I want to ask about the issue of contamination of judicial independence. Do you feel that that theory holds no water? Do you feel that there is no possibility at all of that happening? Do you feel that judicial independence will be totally protected and that there will be no cross-contamination of any shape, size or form?

Ms Fee:

Judicial independence is enshrined in the Justice (Northern Ireland) Act 2002, and there is no intention at all to change that. We are dealing with the regulation of rights of audience and solicitors' access to the higher courts. We are simply giving effect to a recommendation of Bain. We are trying to ensure that, as recommended by Bain, suitably qualified solicitors have access to those courts and that the client has the choice and safeguards that were recommended by Bain.

Judicial independence is sacrosanct and separate. The Law Society made the point that there is, in some way, some encroachment on the independence of the Law Society. As I said, we recognise that regulation of the legal profession is for the legal profession. We have not fundamentally altered that. We have put in place in two discrete areas safeguards that are designed to maintain advocacy standards in the higher courts and to protect against perceived conflicts of interests.

The Chairperson:

You said that you had sight of the Law Society's paper. Its words are very clear and straightforward:

"Further the Department of Justice may not concur in the regulations unless regulations have already been made by the Society and are in operation in relation to what advice must be given."

It goes on to say:

"This is a significant departure in terms of the regulation of the legal profession."

It continues:

"The Society strongly considers that it is entirely inappropriate that the Department concurs in such Regulations.

It further states:

"It is irregular for the Attorney General to be consulted about Law Society regulations which is presently the responsibility of the Lord Chief Justice."

It goes further to say:

"The Society shall be making observations about the role of the Attorney General in Northern Ireland generally when a suitable opportunity arises."

Do you want to comment on those fairly direct comments?

Ms Fee:

I can only reiterate what I have said. The Department's role is not to somehow take away the Law Society's regulation of the profession. There are two discrete areas. There is precedent for departmental involvement in the making of regulations, both in this jurisdiction and in Scotland. The model that we have followed is similar to that in Scotland. It is not identical, but it is similar. The Attorney General is the guardian of the rule of law, and the Department intends to consult him before giving any concurrence regarding the rules.

The Chairperson:

Do I take it that you disagree with those observations?

Ms Fee:

Yes.

The Chairperson:

You feel that they are not appropriate.

Mr Crawford:

Reference was made to legal aid legislation. I will read from article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, which governs most legal aid payments. The following matters can be taken into account in determining the level of fees:

"(a) the time and skill which work of the description to which the rules relate requires;

(b) the number and general level of competence of persons undertaking work of that description;"

I draw attention to the words "general level of competence". In other words, training and the level of qualification of advocates or solicitors can be taken into account in setting fees. That is already done in the Crown Court regulations, where a higher fee is paid to a solicitor advocate who has passed the advanced advocacy course. The Committee has heard how that works.

There has been no criticism by the Law Society or, indeed, by the Bar of the arrangement through which a higher payment is linked to a training course. Those regulations are made after consultation with the Attorney General, and there has never been a quarrel with that. So, as regards setting training requirements and consultation with the Attorney General, what we have at present in the Crown Court has apparently worked quite well and without criticism, and our proposal is to extend those higher fees into other courts in due course, which is a point that Lord Empey raised.

The Chairperson:

What legislation is that in?

Mr Crawford:

The 1981 Order. Since then, the complication with European law has caused some difficulty.

Mr McCartney:

The Attorney General is not the incumbent.

Mr Crawford:

The Attorney General must be consulted under the —

Mr McCartney:

The Attorney General that you refer to in this instance is not the current Attorney General.

Mr Crawford:

No. Since devolution, it applies to the Northern Ireland Attorney General. It carries across, as most references do. Those would have required, for example, the Lord Chancellor to make the regulations, but it is now the Minister.

Mr McCartney:

In the Scottish model, is there any scrutiny beyond the Department?

Ms Fee:

Yes. In the Scottish model, the rules are made by the Law Society with the concurrence of the Lord President of the Court of Session, who is the equivalent of our Lord Chief Justice, and Scottish Ministers, who must consult on the training regulations with the Office of Fair Trading. It is the same formula for the rules of conduct regulations. The Scottish Ministers must consult the Office of Fair Trading if a competition element is engaged.

Mr McCartney:

Does the Scottish Assembly not have a scrutiny role?

Ms Fee:

No. The theme is similar. It is about the regulation of the professions, and, therefore, it is normally a matter for the professions. However, Scotland has built in certain safeguards where there are competition interests etc in play.

Lord Empey:

If the Attorney General has a general duty to the rule of law, why should it be confined to solicitor advocacy in the High Court? In other words, what is the logic of confining the roles of the Attorney General and the Department to this one area? To carry the argument through to its logical conclusion, would it not make sense for the Department and the Attorney General to be involved in the whole operation and the full range of duties?

Currently, you have the Law Society and the Lord Chief Justice. There are four fingers in the pie now, whereas previously there were not. I am not clear how the situation can ultimately be confined to this one area of activity. That is the area that still bothers me. The next time someone comes to the table, perhaps a new Attorney General or a new Minister, that person may have a different view and question why the rule of law should stop at solicitor advocacy in the High Court. That person may feel that we pay millions of pounds of legal aid and, therefore, should have a role right across the board.

Ms Fee:

I will first address your point about the Attorney General being the guardian of the rule of law. I

emphasised that merely to underline that he was an apolitical figure with whom the Department consults before giving its concurrence in the area of the regulation of solicitors. I have to answer your question by drawing us back to the Bain recommendations, which indicated that the regulation of the professions should remain with the professions. That has been endorsed by the Executive. As I understand it, an incoming Executive will have to decide whether legislative proposals to give effect to that should go forward.

Bain made a recommendation to allow solicitors access to the higher courts. In developing those provisions, we have liaised with the professions, but we have also sought the advice of the Attorney General. The Attorney General has indicated that he feels that safeguards need to be in place to deal with the competition aspects arising in circumstances in which an area of work that was previously the preserve of one side of the profession is opened up to the other side and in circumstances in which there can be perceptions of conflict of interest. That is why this formulation has been used in this instance.

I reiterate that there is precedent for that in Scotland, where a similar type of formulation has been used in the same limited circumstances. The training regulations and conduct regulations that are made in Scotland are all still the preserve of the Law Society and the Lord President of the Court of Session. There is no intention to change those arrangements. The arrangements we are dealing with here are linked to rights of audience in the higher courts. Robert might want to say something about enhanced payments.

Mr Crawford:

We propose to use similar standards when setting higher fees for solicitors in other courts, which again, is a point that was made earlier. We have to include the primary provision in the Bill to allow us to do that at Further Consideration Stage, when we see what goes through on solicitor advocates generally.

Lord Empey:

I do not doubt what Geraldine said about the intention, but I need to think about it. I wonder how or why this can ultimately be confined. Of course, competition can apply to a whole range of things. Once we get Europe involved, we are really opening a Pandora's box. We will still be

dealing with this Bill at Christmas.

The Chairperson:

We will stop there. We thank the officials very much for their attendance.

I remind the Committee that these clauses are not currently part of the Justice Bill. We might want to reflect on them and return to them next week, or members may wish to take a view on them. However, my opinion is that we should just hold off on that. Are members in agreement with that line of thought?

Members indicated assent.