JUSTICE 1 COMMITTEE

Wednesday 5 December 2001
(*Morning*)

Session 1

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JUSTICE 1 COMMITTEE
33rd Meeting 2001, Session 1

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Lord James Douglas-Hamilton (Lothians) (Con)
*Donald Gorrie (Central Scotland) (Liberal Democrats)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

*attended

WITNESSES

Colin Boyd QC (Lord Advocate)
Ms Margaret Burns (Scottish Conveyancing and Executry Services Board)
Michael Clancy (Law Society of Scotland)
Alistair Clark (Scottish Conveyancing and Executry Services Board)
Martin McAllister (Law Society of Scotland)
Joseph Platt (Law Society of Scotland)
Eric Simmons (Scottish Conveyancing and Executry Services Board)
Kay Telfer (Law Society of Scotland)
Mr Jim Wallace (Deputy First Minister and Minister for Justice)
Duncan White (Scottish Conveyancing and Executry Services Board)
Philip Yelland (Law Society of Scotland)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Wednesday 5 December 2001

(*Morning*)

[THE CONVENER *opened the meeting at 09:46*]

Items in Private

The Convener (Christine Grahame): I am sorry to push members, but the Minister for Justice is coming in a few minutes and we must start. I welcome members to the 33rd meeting this year of the Justice 1 Committee. I remind members again—not that they have been naughty—to turn off mobile phones and pagers.

I ask the committee whether we may discuss items 7 and 8 in private. Item 7 is to consider the issues to be included in our stage 1 report on the Freedom of Information (Scotland) Bill. Item 8 will be a discussion of our forward work programme. Is the committee content that those items be discussed in private?

Members *indicated agreement*.

Subordinate Legislation

Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2001

The Convener: Item 2 is subordinate legislation. We are to consider an instrument that is subject to negative procedure—the Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2001. There is a note from the clerk about the instrument. Do members wish to make any comments on the instrument, or is the committee content simply to note it? The note from the clerk is paper J1/01/33/6. Members are aware of negative procedure and can tell me whether they have any comments to make on the instrument.

I think that I am moving too swiftly for some members this morning. Does anybody have any comments to make on the instrument?

Members *indicated disagreement.*

The Convener: Shall we simply note the instrument?

Members *indicated agreement*.

Convener's Report

The Convener: Item 3 is the convener's report. I refer members to paper J1/01/33/7, which is a copy of a letter from Tony Cameron to me about the committee's meeting on 23 October. Committee members have the letter, which is important. I take this opportunity to read it out so that it is included in the *Official Report*. It says:

"Dear Ms Grahame,

1. Thank you for your letter of 21 November affording me the opportunity of looking at the records which I did not have with me when I met the Committee on 23 October.

2. I can confirm that I was not present at the meeting on 26 January to which Mr Stevenson referred. I was mistaken in recalling that I was at that meeting. I was at the briefing and debrief for that meeting with Ministers but not at the meeting itself. I also had in my mind discussions between the Deputy First Minister and Mr Salmond on 16 February at which I was present.

3. May I take this opportunity to comment on what Mr Stevenson is recorded as saying that Ministers had given the assurance that the quality of service at Peterhead would be the determining factor in making a decision on the future of the prison service in that location and I am recorded as saying that Ministers had also stated that the future provision at Peterhead would be decided in the context of the Estates Review and that costs and alternatives would be considered and that no undertaking was given that one feature would prevail over others.

4. I see from examining the record of the Minister's meeting to which you refer that Ministers stressed 'that the consultation would recognise the qualitative aspects as well as well as the quantitative aspects and that the qualitative "cultural" aspects would be included in the consultation on the Estates Review'.

5. Though my recollection of being at that particular meeting was mistaken, I think that my response to Mr Stevenson accurately recalled the views that Ministers gave to Mr Salmond at that meeting and which was repeated on 16 February.

6. I am copying this letter to the Deputy First Minister.

Yours sincerely,

TONY CAMERON".

Now that we have received that response, I ask members what they wish to do, bearing in mind the context in which the matter was first raised. That letter was copied to the person who was first referred to—Alex Salmond MP—and I have not yet received from him a response to it. Any such response might also be interesting.

Maureen Macmillan (Highlands and Islands) (Lab): If it is important to find out what was said at that meeting, we cannot get that evidence from Mr Cameron, because he did not attend it. We must ask the ministers who were present and Mr Salmond for their recollections of the meeting.

The Convener: Can I take it that the committee wishes to call the Minister for Justice, Mr Henry McLeish and Mr Alex Salmond before it in relation to the matter?

Maureen Macmillan: A letter to them would be appropriate, rather than bringing them before the committee to give evidence.

The Convener: Do you want a written response in relation to what was said at the meeting?

Maureen Macmillan: Yes.

The Convener: The only problem that I have with that—I am not trying to be difficult—is that the way in which things are said at meetings is important. We have minutes and so on, and I accept that what Mr Cameron said at the meeting was recorded, but the way in which things are said and the emphasis that is put on them are at the bottom of the matter. The crux is whether an undertaking was given and it might be difficult to get to the heart of the matter through correspondence instead of asking people directly. That is why I made my suggestion.

Paul Martin (Glasgow Springburn) (Lab): To be fair, we have asked Tony Cameron to respond in writing; I think that Alex Salmond and Henry McLeish should be given a similar opportunity. Thereafter, we could consider whether to call them before us.

The Convener: I accept Paul Martin's guidance. In the first instance, we will ask for a response and comments. Then, if we wish further to press the matter, we can leave ourselves the possibility of determining whether any undertaking was given and whether any emphasis was placed on Peterhead prison. We do not want to lose sight of the point.

Members *indicated agreement*.

Lord James Douglas-Hamilton (Lothians) (Con): As a matter of general practice, civil servants always keep minutes of meetings. Such minutes are always invaluable. When people's recollections are being asked for on the spur of the moment, those are not as conclusive as the minute, which is usually typed out on the day following the meeting. I think that it would be perfectly permissible to ask for a copy of that minute, because the facts in this case have been under question.

The Convener: The minute of the meeting that is under discussion was among our papers for our previous meeting. I am content with Lord James's comments about minutes although, as we know, minutes are often skeletal compared to the detail of everything that was said.

I accept Paul Martin's guidance. In the first instance, we will write requesting responses from those who attended the meeting and we will make progress from there.

Freedom of Information (Scotland) Bill: Stage 1

The Convener: Item 4 on the agenda is the Freedom of Information (Scotland) Bill. I see that Mr Jim Wallace is waiting in the wings. I welcome the minister to the meeting. With him are Geoff Owenson of the constitution and parliamentary secretariat of the Scottish Executive, and Keith Connal, who is head of the freedom of information unit. Thank you for attending, gentlemen. I believe that Mr Wallace wishes to make a short opening statement.

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): It will be very short, convener. Thank you for this invitation to give evidence on the Freedom of Information (Scotland) Bill in support of the committee's stage 1 scrutiny of the general principles of the bill. You have already mentioned Keith Connal and Geoff Owenson; I am also joined by Robbie Kent, who is also from the Scottish Executive justice department. All the officials have been very involved in the detailed preparation of the bill and might be familiar to committee members.

I understand that previous evidence sessions have been stimulating. A number of important issues have been focused on in particular, such as class exemptions, the absence of a purpose section, and ministerial overrides. I hope that my answers to members' questions will be helpful.

The Convener: Thank you minister—that was short and sweet.

Maureen Macmillan: I would like to talk about the purpose section—or the lack of it. We have heard evidence to the effect that having a purpose section could play an important role in setting the tone of the legislation and in making its spirit clear, which would ensure that the proposed freedom of information regime was supported by a culture of openness. There is a fear that, although the bill might be passed, nothing much will change because people will not have signed up to the idea, which will mean that the culture will stay the same. How will you ensure that not including a purpose section does not defeat the aims of the bill? Do not you feel that a purpose section is necessary?

Mr Wallace: I had an open mind on whether to include a purpose section and I gave careful consideration to the idea. It was only in the final stages of putting the bill together that I concluded that a purpose section was unnecessary and, as I will explain, perhaps even inappropriate.

Section 1(1) of the bill states:

"A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority."

That is a very simple statement of the principal right that is established by the bill. It is a statement of purpose—so, in that respect, the bill does have a purpose section. I accept Maureen Macmillan's point about culture. We were not sure about the effect that inclusion of a purpose section might have and we wondered how it would affect the balance between the right of access, exemptions, harm tests and—in particular—the functions and powers of the commissioner.

I have made it clear that the bill takes us only so far. The culture is important and a change to that culture will not necessarily be achieved by words in a bill because such a change must be driven from the top. We have made clear the Executive's objective of encouraging openness and accountability.

A key part of the process will be the work of the commissioner, whose role will not simply be that of arbiter in cases in which applicants are dissatisfied with a refusal from a public authority. Much of the day-to-day work of the commissioner will be to foster and nurture a much more open regime. As time passes, that will allow the culture of openness to be refreshed and it will allow us to take account of changing circumstances. The alternative is the danger that, in future, words that are set in statute might be interpreted by courts in such a way that we would be, in effect, stuck in one time.

Maureen Macmillan: Those are warm words, but how will you put those ideas into effect? You say that the commissioner will foster a culture of openness, but how will that happen? Will there be training for public bodies?

Mr Wallace: Yes—very much so. A working group was established in February this year, which includes representatives of various Scottish Executive departments and other public bodies that will be involved with the proposed legislation. That group has met on a number of occasions and one of its main tasks is to prepare the ground for training to ensure that the culture is right when the resultant act comes into force. The group includes the Convention of Scottish Local Authorities, the health trusts, the Scottish Environment Protection Agency and the Association of Chief Police Officers in Scotland.

When I went to Ireland and met the commissioner and the minister who have responsibility for freedom of information there, the message that was clearer than any other was about the importance of training public officials. That is something that we have put in train and that will continue to develop with—no doubt—increasing pace the closer we get to the legislation's being implemented. Training is an

important aspect of the process for the Executive and the public authorities.

Members should also note the references to the Scottish information commissioner in sections 42 to 46 of the bill, which make it clear that the commissioner will ensure that good practice is disseminated. Indeed, the commissioner's work will encourage a culture of openness that I hope we all want to see.

10:00

Michael Matheson (Central Scotland) (SNP): It was interesting that the minister referred to discussing freedom of information with the commissioner in Ireland. Last year, the Canadian commissioner who is responsible for freedom of information through the Canadian Access to Information Act 1985 was in Scotland and he stated that, after some 15 years, the greatest challenge that they faced was changing the culture of secrecy. Like Maureen Macmillan, I think that there have been lots of warm words in the minister's evidence, but I am not convinced that they will provide us with a way to change that culture of secrecy and to ensure that the bill is effectively implemented.

The minister mentioned Ireland. Given that there are other countries that have considerable experience in the matter, what lessons have you learned from Ireland about changing a culture of secrecy?

Mr Wallace: I was impressed by how training in Ireland generally tries to change the culture of secrecy. Ireland has a strong freedom of information act and it also has a strong commissioner. The combination of those two factors has helped.

New Zealand is the other country with which I have had discussions and which I have considered in more detail. I was impressed by the work of New Zealand's ombudsman—as they call him, rather than commissioner—who deals with freedom of information.

The Freedom of Information (Scotland) Bill will generate its own commissioner case law, which will help because public authorities will need to have regard to what emerges from case law. Returning to Ireland for a moment, I think that I am right in saying that the Irish commissioner took the view in the early stages that it was better to take time in determining some of the cases that were referred to him—even allowing a backlog to build up—because he knew that his decisions on those cases would be influential in how the Irish act operated. Public authorities could use his decisions as guidance, which would mean that he would not get the same request time and again because it would be clear to public authorities that the commissioner would rule in a particular way. A strong commissioner is important.

In New Zealand, it was drawn to my attention that the worldwide web was being used by government departments proactively to put information into the public domain. In fact, those departments and their ministers—it was often the minister who took most responsibility for the matter—which sought proactively to put most information into the public domain were usually the departments about which there were the fewest complaints or referrals to the ombudsman. I hope that ministers in Scotland and other public bodies in Scotland will note that by being proactive they can reduce the number of times that they will be subject to challenge.

Members will also be aware that there will be publication scheme provisions for our bill that will place an onus on public authorities to publish what they are doing to promote openness and accessibility to information.

The Convener: In linking our discussion to the culture of openness programme, I want the committee to move on to two matters that appear from the evidence that we have heard to mitigate against that culture. Those are class exemptions—which seem substantial—and ministerial certificates.

Donald Gorrie wanted to ask questions on ministerial certificates. That ties in with my question. We have a letter from the freedom of information unit that refers to the minister's experience in New Zealand and Ireland with regard to ministerial certificates. We are all very much in favour of a robust freedom of information bill, but class exemptions and ministerial certificates are, I am sure that the committee would agree, matters for concern. The letter says that, in Ireland, three certificates

"have been issued since the Act came into force in 1998".

In your initial submission you said that such certificates were used very rarely and that you could think of no examples. I am taken aback to learn that three certificates have been issued in Ireland in that time.

Secondly, I am concerned that you have not been able to obtain information on the use of ministerial certificates in New Zealand. The letter states:

"There is a particular difficulty in obtaining information on the use of Ministerial certificates in New Zealand because these relate to events between 1982 and 1987."

The letter is dated 30 November. Are you any further forward on that? Have we got any information from other countries that have freedom of information regimes and which use ministerial certificates?

Mr Wallace: The two regimes to which the convener refers are relevant because the ministerial certificate is a feature of both cases. It is important not to isolate the ministerial certificate—it is part of a package and the overall package is balanced in terms of openness. The fact that the harm test specifies "substantial harm" decisively favours those who seek information. The fact that the commissioner has the power to order disclosure, rather than simply to make a recommendation, is an important part of the overall scheme. It is against that background that one should consider the ministerial certificate.

In Ireland, the ministerial certificate precludes consideration of an appeal by the commissioner. In other words, the commissioner would never get the opportunity to consider whether the public interest test has been met. In Scotland, the commissioner would be able to determine that. It should be kept in mind that the ministerial certificate applies after a determination by the commissioner in only six classes out of 17.

I recall that I claimed that it was in New Zealand, rather than in Ireland, where the ministerial certificate override had never been used since the change in 1987. In Ireland, there have been three ministerial certificates, each of which has been signed by the Minister for Justice, Equality and Law Reform. The first certificate was issued in respect of a freedom of information request for records relating to a joint Department of Justice, Equality and Law Reform and Garda Siochana implementation and strategy group, which was considering enhanced co-operation between the Garda and the police authorities in Northern Ireland. The second certificate concerned requests for records relating to a review on the continuing need for a special criminal court. The third concerned records relating to telephone intercepts. They all fell within the category of justice and security matters.

The Convener: I understand those points. I am talking not about the earlier use of the ministerial certificates, but about the final veto—the equivalent of the First Minister's certificate. That is the contentious matter.

Mr Wallace: I know. I was trying to put the matter into context. Ireland is often held up as an example of a country that has a robust freedom of information regime—you referred to that in your question, convener—but there, there is an option for ministerial intervention even before the commissioner can make a judgment. I argue that our system will be stronger in its openness, because such matters would go through the commissioner and would become the subject of a ministerial certificate only subsequent to that consideration.

We are still seeking detail from New Zealand on the number of ministerial certificates that it issued between 1982—when the legislation came into force—and 1987. During that period, certificates could be issued by individual ministers. After 1987 a veto, or ministerial certificate, could be issued only with the collective agreement of the Cabinet. There has been no use of ministerial certificates since they became a collective responsibility. That was the case when I was in New Zealand last December and I am not aware of any case of their use since. In the five years prior to 1987, there were a number of cases in which individual ministers issued veto certificates. We are still trying to get details of those cases.

The scheme that we have chosen involves collective responsibility; it would not be a matter for a justice minister or an environment minister to issue a certificate.

The Convener: There is no collective responsibility. Section 52(2) uses the phrase "after consulting", which is not the same thing as collective responsibility.

Mr Wallace: The intention is that collective decisions will be made by ministers. When I appeared before the committee during consultation on the bill, I remember explaining that, if we were to use the phrase "Scottish ministers", the structure of the Scotland Act 1998 would lead to the very situation that we want to avoid—namely, that of individual ministers making decisions. We have tried to take account of concerns and to find a form of words that will mean that collective decisions will be made by ministers. That was our policy intent, but the committee might wish to say in its report that it does not believe that we have achieved that policy intent. If that is the case, we will reconsider the matter. However, I assure the committee that much thought was given to finding the best way of reducing to words in statute the policy intent that the issuing of certificates should be a collective decision of the Cabinet and not simply a decision of either the First Minister alone or of other individual ministers.

Lord James Douglas-Hamilton: The minister will recall the Scott inquiry into arms to Iraq, during which it was alleged that the use of ministerial certificates had been abused. Will the Deputy First Minister confirm that he has no intention of using ministerial certificates in that way?

Mr Wallace: I think that you are asking about public interest immunity certificates, which I believe arose during the Scott inquiry. PII certificates deal only with withholding documents from courts, for which there is a higher test. I do not think that anyone would ever expect ministers to give a blanket denial that would affect for all time the discretion of other ministers. However, such considerations have nothing to do with the

bill; we are talking about something totally different. In two and a half years, there has never been a suggestion of our coming anywhere near a PII certificate.

Lord James Douglas-Hamilton: We took evidence from journalists and from David Shayler, who believed that ministerial certificates should not be used under any circumstances. During emergencies or very important criminal investigations, or if intelligence emerged that led you to understand that a very serious crime was about to be committed, could ministerial certificates be used?

Mr Wallace: I am not sure that we are talking about the same thing. If we are talking about someone applying for information that, if released, could assist in dealing with a crime that our intelligence told us was about to be committed, I would rather hope that the commissioner would take that into account. Initially, that information would be refused as being exempt if it were about to prejudice a continuing investigation. If the information found its way to the commissioner, who then said that the information should be disclosed—for whatever reason—and ministers took the view that that disclosure would prejudice a crime operation that might be about to take place, that might be a circumstance in which the minister might override the commissioner's decision.

Although national security is a reserved matter, since 11 September ministers have been involved in the civil contingencies committee at Whitehall, which has been putting emergency planning procedures into operation. Therefore we have sensitive information, albeit that national security is a reserved matter.

10:15

Lord James Douglas-Hamilton: Would it be correct to say that ministerial certificates operate as a safeguard for the public interest? If they were removed altogether, would that safeguard be removed?

Mr Wallace: That is one of the reasons why we have that override power. Ultimately, in the six exemption categories, the question of public interest would be determined by ministers. It is unlikely to happen, but the safeguard exists. Of course, ministers would be accountable to the Parliament for exercise of such an override power.

The Convener: We will appoint a worthy commissioner who is distinct and separate from all the public authorities and in whom everyone must have trust. However, as the bill stands, there is a problem with section 52 in that only one public body—Scottish ministers—will be able to say that it does not care what the commissioner says. Ministers will use the power of veto under section 52, and will issue a certificate and say that information cannot be disclosed. It is difficult to understand why we will have an independent commissioner operating with all the information before him, but with ministers telling the commissioner why information should not be disclosed. If the commissioner took the view that information should be disclosed, the First Minister could then use his veto. That detracts from the idea of freedom of information. It also introduces to a situation the politics and political views of the First Minister and his cabinet colleagues, which could place further pressure on the operation of the veto. That is why I am concerned about section 52.

Mr Wallace: I understand and acknowledge that concern. I argue strongly that the scheme and the provisions of the bill are consistent with an approach that is considered to be appropriate and necessary in other countries that have freedom of information regimes, which are widely recognised as being strong and progressive.

We consider it appropriate that the bill contains limited provision—it applies only to six categories of information out of seventeen—that allows ministers to take a final decision on whether sensitive exempt information should be disclosed in the public interest. Ministers will be accountable to Parliament for such decisions. It is not a political reality that we would just toss aside the commissioner's view. Were such a situation to arise, it is inevitable that ministers would use the power only after giving their utmost consideration to the gravity of the information involved. For that, we would be accountable to members of the Parliament. Whether sensitive information should be disclosed in the public interest should be determined by ministers.

The Convener: You mentioned being accountable to Parliament. Section 52(3) states that you will lay a copy of the certificate before Parliament and give notice of the reasons for the opinion that has been formed. However, in giving those reasons, the section states:

"except that the First Minister is not obliged to provide information under paragraph (b) if, or to the extent that, compliance with that paragraph would necessitate the disclosure of exempt information."

I suspect that we are not going to be told very much.

Mr Wallace: If you think about it for a moment, you will realise that we could not disclose the exempt information.

The Convener: Of course not. That makes sense.

You are therefore saying that ministers will be able to lay a certificate before Parliament that says

that information will not be disclosed because disclosure is not in the public interest. That is what we will be told and we will just have to believe it.

Mr Wallace: I know the convener's parliamentary skills well enough that I do not think for one minute that she would let such a certificate lie. The convener would not just put her hands up and say, "You must be right." A considerable amount of probing and challenging of such certificates would come, not only from the Opposition, but from—

The Convener: The media.

Mr Wallace: It would come from the media, but it would also come from the back benches of the Executive parties. For that reason, ministers would not undertake lightly such a course of action. It might well be for those reasons that ministers in New Zealand have never taken that action.

Michael Matheson: I caution the minister, because he appears to be at one with the Conservative party over the need for a ministerial veto. When the Conservatives were in Government, they were not forthcoming in providing information to the public. I do not know whether that comes as a comfort to him.

Mr Wallace: It should come as a comfort that I want to protect the police's criminal investigations.

Michael Matheson: Let me take the issue further. It is easy to use the example of criminal investigations—I am sure that the public interest test would apply in such cases. You referred to Ireland and New Zealand. How many countries that have freedom of information legislation in place have a ministerial veto?

Mr Wallace: I cannot give an answer off the top of my head. However, countries that do not have ministerial vetoes might have other checks and balances in the system, which remove the need for a ministerial veto.

Michael Matheson: We are getting bogged down in a debate about the systems in New Zealand and Ireland. Although those two systems have a ministerial veto, they are exceptions. However, the Executive wants to introduce a system that has a ministerial veto. The American and Canadian systems, for example, do not have ministerial vetoes. Why have you chosen to take the route of the exception rather than the norm?

Mr Wallace: There is no need for a veto in the United States system because there is no commissioner to be overruled.

Michael Matheson: There is a good public interest test system.

Mr Wallace: Freedom of information cases in the United States are pursued through the courts, which is expensive and time consuming. In many respects, our system will be more accessible to the public than is that of the United States. Every country puts together its own scheme and we looked around and borrowed ideas when we thought it useful. We have what is widely acknowledged to be a robust scheme. It includes a substantial harm test and gives the commissioner the right to make decisions—not recommendations—that can be implemented. Furthermore, the commissioner will be independent and appointed by the Parliament, not by the Executive.

Those are key parts of a robust freedom of information system. In a limited number of cases that involve very sensitive information, we have reserved the power for ministers collectively to present a certificate to override the system. That is one of the checks and balances. Whatever scheme one considers, one finds checks and balances throughout it. I believe that our system—taken as a whole and including the ministerial override certificate—is decisively tilted in favour of openness and the applicant. The circumstances in which the ministerial override certificate will apply are limited. In the ultimate analysis, consideration of what is in the public interest in relation to sensitive information should be for ministers, who are accountable to Parliament.

Michael Matheson: I do not believe that you have achieved the correct balance. On the one hand, there is the public harm test, which is predicated on a requirement for good evidence that shows that the publication of the information might cause the public harm—

Mr Wallace: Substantial harm.

Michael Matheson: Yes, substantial harm.

Mr Wallace: You were being loose with your words, Mr Matheson.

Michael Matheson: The public harm test requires substantial harm, but it is predicated on a requirement for information to be provided. On the other hand, there are the class exemptions and the ministerial veto. Given that the bill includes the substantial prejudice measure and the public harm test, why do you need what appears to be the sledgehammer approach of the ministerial veto and the wide-ranging class exemptions? There is no balance.

Mr Wallace: I believe that the balance exists. Many objective commentators have said that the proposed scheme ranks highly in terms of its openness and robustness in promoting freedom of information. You mentioned class exemptions, but the public interest can override them. That is a matter for the commissioner to determine in every case. For six of the 17 categories of information, ministers have a residual power to present a certificate to overrule requests. That power is very

limited and in your description of it, you omitted to say that the public interest could override the class exemptions. That should not be overlooked. There will be an independent commissioner who will not be appointed by ministers. All those things stack up.

In order to try to get the balance right, we are saying that in the ultimate analysis—in those areas that, as Lord James suggested, might relate to intelligence that could be useful to criminals—ministers should make decisions in the public interest. That process should, of course, be subject to parliamentary accountability.

Michael Matheson: It is interesting that you make reference to information that might have an impact on security, because the evidence that we received from the police did not indicate that that was their primary concern. They felt that the checks in the system would provide sufficient protection for any live investigations.

Mr Wallace: I agree entirely with that.

Michael Matheson: The police were referring not to the ministerial veto, but to substantial prejudice.

Mr Wallace: With respect, you have become so obsessed by the ministerial veto—

Michael Matheson: I do not think that we need it.

Mr Wallace: You ignore the fact that most matters would never get anywhere near the ministerial veto, because of the scheme that we have adopted.

Michael Matheson: That is exactly why we should not have the veto.

Mr Wallace: The veto is only for exceptional cases—such as have never arisen in New Zealand in 14 years—in which ministers might take the view that the public interest would not be served by releasing particular information into the public domain. I think that Michael Matheson can rest in his bed at night, safe in the knowledge that the scheme is well balanced. As he rightly said, the police indicated in their evidence that they were content with the general scheme. We are talking about some very exceptional circumstances, so it might well be proper to apply the ministerial veto in those circumstances.

The Convener: I bring in Donald Gorrie to pursue the ministerial veto and—as we have touched on it—class exemptions. Paul Martin will follow.

Donald Gorrie (Central Scotland) (LD): Most of the people who have spoken to us accept that the bill is a huge step forward, that it is well intentioned and that there is good will among those who are promoting it. However, many of the bodies that seek information have lived with an atmosphere of civil service secrecy for many years, so they retain residual suspicions.

One witness gave evidence to us of a recent analogous case in London. Although the Home Secretary promised in a debate that there was no reason to use an exemption certificate to prevent the release of factual and background information, the Westminster Government overruled the parliamentary ombudsman and refused to give out factual information, because it thought that the information would be embarrassing to ministers. Many people fear that when the Government makes mistakes—mistakes that would be revealed by information—the law will be used to reduce its embarrassment.

On factual information for ministers, I understand that in Ireland exemptions cannot be used to withhold factual and statistical information or its analysis; to withhold scientific or technical expert advice or opinion; to withhold the reasons for a decision that was taken by an authority; or to withhold a study into an authority's effectiveness. Would it be possible to remove some of the class exemptions or to broaden the provision that allows merely for the release of statistical information? Can you comfort us by improving the bill so that it is not merely a vehicle for avoiding ministerial embarrassment?

10:30

Mr Wallace: Mr Gorrie has asked a question with many parts. I hope that I have remembered them all. I do not doubt that he will let me know if I omit to answer any parts.

I acknowledge the underlying premise of the question. We have said during the meeting that for far too long a culture of secrecy has pervaded most of the public service. Like an oil tanker, the situation cannot be turned round immediately. Changes have been made; I have seen them myself. Mr Gorrie can be assured that every encouragement will be given for that to continue. I have mentioned some of the things that we are doing to promote change.

Many of the problems that have been identified require, to some extent, an act of faith. I had a meeting yesterday morning with Friends of the Earth Scotland to discuss some of its specific concerns. We found that we often agreed on the end point that we wanted to achieve, but the words "act of faith" came up several times. It will be difficult for many people to have such faith for some time until the change in culture manifests itself. That is the background. I assure the committee again that efforts are being made to try to ensure that we change that culture of secrecy.

The Robathan case in Westminster is distinct

from what we are discussing here on one or two important fronts. In that case there was a recommendation on a code of practice, which was not part of the statutory regime. It was not a ruling or a determination, but a recommendation by the ombudsman. Distinctions can be made.

I can readily understand why the suspicion that the veto would be used to cover Government embarrassment exists, but there are in the scheme as it stands enough checks and balances to make it difficult for a Government that was seeking merely to hide embarrassment to get away with that. The class exemptions, other than the technical measures, are subject to a public interest test. I would not consider saving a minister from embarrassment as being in the public interest and I hope that a robust independent commissioner would take the same view.

Mr Gorrie asked about statistics. Section 29(2) of the bill uses the words:

"Once a decision as to policy has been taken".

I want to make it clear—this has been raised in the past—that "a decision" means a decision to go ahead or not to go ahead. It could be a decision not to do something, which can be as relevant a decision as one to go ahead with a project. Section 29 (2) continues by saying that

"any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of"

that exemption

"as relating to the formulation or development of the policy in question; or … as relating to Ministerial communications."

I refer the committee to section 2(1)(b) on the effect of exemptions. It says:

"To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that— …

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption."

Section 29(3) states:

"the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision."

The exemption does not preclude disclosure of statistics or facts. Statistics are not exempt after the decision has been made and the factual background relating to Government policy can be withheld only if it is in the public interest to do so. If there were a refusal to disclose the information, it would be subject to an appeal to the commissioner. I also want to draw the committee's attention to section 23(3)(a)(ii), which relates to the publication schemes. It states:

"In adopting or reviewing its publication scheme the authority must have regard to the public interest in—

(a) allowing public access to information held by it and in particular to information which— ….

(ii) consists of facts, or analyses, on the basis of which decisions of importance to the public have been made by it".

In regard to an individual request and the general approach that a public authority must adopt when it brings forward its publication scheme, there is a decisive tilt in favour of the publication of facts and analyses.

Donald Gorrie: On creating the right sort of climate, it has been pointed out to the committee that, although there is a measure for dealing with individual cases in which a public body does not give information—which would allow for that body to be taken to court—there is no general provision. One could imagine a situation in which some errant quango, council body or whatever was consistently as laggardly as possible in providing information and produced it only to stay out of court. Would it be possible to include in the bill a section that would give the commissioner some power over such bodies—for example, by allowing him to send in a member of his staff to see how the body operated? Life proceeds on a basis of whip and carrot—there should be some sort of general whip as well as whips for individual issues.

Mr Wallace: I do not think that we need a specific statutory provision for that, because the functions of the commissioner are both general and specific. They are specific in that the commissioner can deal with an appeal in relation to a specific application. Also, as the provisions in the bill relate to the general functions of the commissioner, the commissioner has considerable power to promote good practice. For instance, he or she has specific powers of entry and inspection under schedule 3. The commissioner also has quite wide powers to make recommendations concerning good practice. Section 44(1), for example, states:

"If it appears to the Commissioner that the practice of a Scottish public authority"—

which could be the recalcitrant quango—

"in relation to the exercise of its functions under this Act does not conform with the code of practice … the Commissioner may give the authority a recommendation".

There are provisions in section 44 for practice recommendations that will specify the steps that the commissioner thinks that

"the authority ought to take to conform."

I stress that the commissioner does not have to wait for a specific complaint from a member of the public, a public body or a dissatisfied applicant before initiating proceedings against an authority.

If he or she is aware that there is a general malaise or that enforcement notices are being breached, the commissioner can step in and, if the prescribed steps are not taken, the commissioner can then ask the Court of Session to find the authority in contempt of court. I think that that is a pretty robust set of provisions.

The Convener: We were concerned that there were no penalties. However, action would take the normal route of finding an authority in contempt of court.

Mr Wallace: Yes—the provisions allow the courts to hold a public body in contempt in certain circumstances.

Paul Martin: The convener raised a point about the process that will be followed for the submission of exemption certificates that are laid before Parliament. One of the concerns that were expressed by the National Union of Journalists related to the "practicable" period that is mentioned in the bill. The bill states that a certificate will be laid before Parliament "as soon as practicable". Could that be made more specific in the bill? The NUJ's concern was that a story could be killed off during that "practicable" period. Why would we want to include that term in the bill?

Mr Wallace: It is a term that appears often in bills and is more pressing than "in due course". However, I am happy to consider whether that could be tightened up.

Lord James Douglas-Hamilton: I would like to ask a very general question. What information does the bill make available that is not currently available?

Mr Wallace: The bill applies to certain groups that the code for access does not cover, such as the police, the national health service and schools. The simple answer is that the bill makes all information available. At the moment we have a code and recommendations; the bill will establish a statutory right.

The Convener: It has been brought to the committee's attention that the codes of practice that will be issued will be important. I know that there must be consultation about the codes, but will the codes be available to the committee—even in draft form—when we reach stage 2?

Mr Wallace: I think that that is the intention. Mr Connal has indicated that the codes will be available during stage 2.

The Convener: Thank you.

Legal Profession Inquiry

The Convener: We have to switch our hats now. I ask members—I think that this applies to me and to Lord James Douglas-Hamilton—to declare any interests before we question members of the Law Society of Scotland.

Lord James Douglas-Hamilton: I declare that I am a non-practising Queen's counsel.

The Convener: I am a member of the Law Society and a non-practising solicitor.

Maureen Macmillan: I had better declare that my husband is a solicitor and a former member of the council of the Law Society.

The Convener: Perhaps we are going too far, but I take your point, Maureen.

I remind members that we have agreed that our remit is not to examine individual cases, but to examine the general issues arising from those cases and to draw together various common strands from the many cases that have come to our attention.

Members might wish to refer to the summary of the issues that individuals have raised, which is entitled "Summary of views from individuals".

I welcome from the Law Society of Scotland Martin McAllister, who is its president, Michael Clancy, who is director of law reform, Joseph Platt, who is convener of the client care committee, Philip Yelland, who is director of client relations, and Kay Telfer, who is a lay member of the client relations committee. I note that Mr McAllister wants to make a brief—I emphasise "brief" because he has been here before—opening statement.

Martin McAllister (Law Society of Scotland): You have saved me the trouble of introducing people, which shortens my statement.

The Convener: Is that the statement?

Martin McAllister: I will mention a little bit about Kay Telfer's background. She is a lay member, not a solicitor. She has over 20 years of experience in the citizens advice bureaux movement, fulfilling various roles. She has been a member of one of our client relations committees for five years.

History and fiction show us that people do not like lawyers. They seem to like them no more than they like journalists or even politicians. We have research results that bear that out. The research shows that people do not like lawyers as a group, but it also shows that people generally like their own lawyers.

10:45

As solicitors, we are used to dealing with reality as is the Justice 1 Committee and the Parliament. However, we are very aware of issues of perception. Linked to that question of perception is the fact that any complaints system must strive to win public confidence. The Law Society of Scotland's task is to ensure that we continue to improve our work on complaints and work to gain more public confidence.

I want to deal with another perception. The Law Society of Scotland is the regulatory authority for solicitors and its remit does not cover other lawyers or participants in the legal system. There is also a perception that the regulation of a profession tends to mean dealing only with complaints. I was privileged on 19 June to be given an opportunity to address the committee in a briefing session to explain the regulatory functions of the society, which relate to admission, continuing education and development, indemnity insurance, guarantee fund and professional practice rules.

The committee's inquiry is now focusing on complaints, which is an area where there are winners and losers, rather than winners and winners. However, I must qualify that statement by referring to the work that the society has done in recent years on conciliation. I will come back to that later. We deal with people who are discontented and can be difficult to satisfy, even if their complaint is upheld. It is a responsible task that is delegated to us by statute and by Parliament. We operate within the law that has been given to us. That often gives us challenges and one reason why I welcome this inquiry is that I am sure that the committee will assist us to meet those challenges.

The Convener: We are pressed to get on to questions, Mr McAllister.

Martin McAllister: I have a couple of important points to make that will take only two minutes.

The Convener: Can I cut you down to even less than that? I am sorry, but we want to get into questions. I think that we know about the duality or multiplicity of the Law Society of Scotland's roles. With respect, we want to get into questioning. You might have other important points, but we are already aware of what you have said so far.

Martin McAllister: Perhaps I can just give you my final statement.

The Convener: Please do.

Martin McAllister: The Law Society of Scotland is a statutory organisation and it is appropriate that Parliament reviews the society's work in terms of its statutory framework for regulatory functions, which include complaints.

I am sorry, but that is not my final statement. I will now get to it.

We are open to change and want to make improvements. It is proper that Parliament is reviewing the checks and balances that operate, but it is a fundamental right of citizens in a democracy that the legal profession is independent. Such a profession is a guarantor of the rights of citizens—and in Scotland we deserve no less.

Maureen Macmillan: I want to pick up on what the convener said about the duality of the Law Society's role. In your evidence, you have said that the Law Society is charged with the promotion of the interests of the solicitors profession in Scotland and of the interests of the public in relation to that profession. You refer to the difficulties that stem from the duality of that role. How does the society seek actively to promote and protect the public interest? How do you ensure that the interests of the profession do not outweigh those of the public?

Michael Clancy (Law Society of Scotland): That is an interesting issue for the Law Society. We have to be conscious of that duality all the time. The Royal Commission on Legal Services, which reported in 1980, considered that question and came to the view that it would be detrimental to the interest of the public if the society were to be shorn of its responsibility to the public. In effect, it would then become a trade association or trade union. The royal commission thought that it would be better if the society upheld the interests of the public alongside the interests of the profession.

Because of that confirmation of the society's role in 1980, which just followed the introduction of the Solicitors (Scotland) Act 1980, and which was considered again in 1989, we have been able to consider the interests of the profession and the public in tandem. One way in which that is done is by having lay members on committees. It is ensured that the structure regards the interests of the public at every stage. My colleagues will be able to detail the thought processes that go into that.

We are mindful of the interests of the public running alongside those of the profession, and I am sure that, if we failed in that duty, the Parliament would call us to account over that.

The Convener: The royal commission to which you referred published its report 21 years ago. Time has moved on, as have, quite rightly, the expectations of the public and of all professionals. Perception was mentioned early on. For the sake of argument, what if we just accepted that the Law Society is terribly good and that everything is hunky-dory in your own complaints system? That is not the perception, but let us say that it is.

Surely the system needs to change anyway.

Martin McAllister: The point is that the organisation is changing. We have made a number of changes in how we deal with complaints over the past 10 years. I do not think that the committee would find it useful to go through a list of those, but some key things are important in improving public perception, one of which is greater lay involvement. A second is the improvement in literature, so that the public have a much better idea of how we deal with complaints. We have brought with us our current, revised leaflets.

We can only do our job and deal with the duality if the checks and balances in place are appropriate. It is those checks and balances on which the committee's inquiry is presumably focusing to determine whether they are sufficient. As you said, convener, it is 21 years since the royal commission reported and it is entirely appropriate that Parliament considers the efficacy of the current checks and balances, which include the legal services ombudsman.

Maureen Macmillan: How many lay members are there? Is there only one? Is it just Kay Telfer? How does the practice of having lay members on committees work? What is Kay Telfer's opinion on the question of duality?

Kay Telfer (Law Society of Scotland): In practice, complaints are considered extremely carefully in committees. Perhaps it is a question of outside perception; perhaps the Law Society has sold itself short in the presentation of the cases concerned.

I am a reporter on cases as well as a member of the client relations committee. As a reporter, I am the only person who sees the solicitor's file. I have the sole responsibility for looking at that file, for preparing a report on the case and for giving the opinion on it. The client relations committee has the right to question my opinion and change the recommendation if necessary. The complainer and the solicitor have the right to make comments on my report. I still have the responsibility for my report. Nobody else considers it.

Martin McAllister: Maureen Macmillan asked how many lay members there are. That situation has improved over the years. There are four client relations committees with 10 members, four of whom are non-solicitors and six of whom are solicitors. The fact that, at a given meeting of a committee, four lay members and only two solicitor members might be in attendance does not matter to the work of that committee.

The Convener: Does anybody else want to come in on duality, which is at the core of the matter? Lord James Douglas-Hamilton wants to ask a question. Is your question about duality?

Lord James Douglas-Hamilton: I want to ask about the rating of complaints.

The Convener: Does Michael Matheson want to follow up the issue of duality?

Michael Matheson: I will ask about reporters and lay members. What system do you have for identification and recruitment of reporters and lay members?

Martin McAllister: Perhaps Joseph Platt is best placed to describe the current arrangements.

Joseph Platt (Law Society of Scotland): I am happy to do that. The positions are advertised in the press and interviews are conducted. I think that no member of the council of the Law Society of Scotland has been on the two most recent interview panels, which have been chaired by the sheriff principal for Lothian and the Borders. The competition for the posts is open. People apply, their applications are considered, interviews take place and appointments are made.

Michael Matheson: How frequently do you overturn the recommendation of reporters? What percentage of recommendations are overturned?

Martin McAllister: Are you asking how often the client relations committees overturn a reporter's recommendations?

Michael Matheson: Yes.

Philip Yelland (Law Society of Scotland): We do not have precise statistics for that, but I think that it is fair to say that it happens regularly. In a decision or two every month the reporter might find that the client relations committee takes a different view on some aspects of the matter; the reporter's recommendation might be rejected and the committee might make a different recommendation for the final disposal of the matter.

Martin McAllister: Kay Telfer is a member of a client relations committee and it would be wrong for me to speak for a member of a committee, but it would be wrong to think that a client relations committee's view of matters divides down solicitor and non-solicitor lines.

It is also fair to say that a reporter, who considers a matter in isolation and looks at all the relevant papers, may take a view but then, after discussion with the committee, say, "I think that I missed something and would like to re-examine the matter."

Michael Matheson: My question was connected to Kay Telfer's comment that the reporter is the only person who sees the solicitor's file. They then compile the report, which goes to the committee with the reporter's recommendation. From what you say, it appears that the reporter's decision is overturned by the committee in a substantial

number of cases.

Philip Yelland: There are a number of such cases. It might help if I explain that, once the client relations committee receives the report, it is sent to the person who has made the complaint and to the solicitor for comments before it comes before that committee. The committee sees the reporter's report and the comments of the solicitor and the person who is dissatisfied, so it may pick up whether something has been missed or viewed in a different light. Both parties have a chance to see and comment on the report before the committee considers it at all.

Martin McAllister: Remember also that the recommendations can be overturned positively as well as negatively.

Michael Matheson: Of course, I have no doubt about that. I am just interested in the percentage.

Lord James Douglas-Hamilton: I will ask a question that is fundamental to complaints in general. A criticism of your complaints procedure has been that those who take up the representations might also be those who decide on them. Could the Law Society have a complaints procedure whereby those taking up representations would be separated by firewalls from those dealing with the complaints so that any accusations of a conflict of interest could never be made? If that could be done through having two separate organisations relating to the Law Society, would that be feasible and what would be the structure?

11:00

Martin McAllister: I am unsure what you mean by "taking up representations".

Lord James Douglas-Hamilton: I understand that, if a complaint is sent in by a lawyer, the person dealing with that complaint could conceivably be concerned with resolving it at a later stage. The separation of interest is not as clear as it might be.

Joseph Platt: The person who deals with the complaint is one of the case managers, who is an employee of the Law Society and is entirely neutral. He or she would not take up anyone's side as their duty is to investigate the complaint.

What appears to be concerning you is that, if a client relations committee of the Law Society recommended to the council of the Law Society that a complaint be upheld, a solicitor might instruct a member of the council to make representations on his or her behalf when the matter was being decided. However, by the same token, at that same council meeting, the recommendation would be spoken to by the convener of the client relations committee that made the recommendation. From an adversarial point of view, there would be someone representing each side of the case at the council.

We are considering having a separate system but, without the delegated powers that we seek, the Solicitors (Scotland) Act 1980 still constrains the council's decision.

Martin McAllister: If members are concerned about the process by which matters are considered, they should read pages 25 to 27 of our leaflet, which shows a flow chart of the process. I repeat the invitation I made in June that, if any members of the committee want to see the process in action, they would be welcome.

Lord James Douglas-Hamilton: I am not sure that you have entirely addressed the question that I was focusing on. Might it not increase public confidence in the system if it were generally perceived that there were two separate organisations that were separated by firewalls: one that handled the complaints as they came in and one that adjudicated on them in due course?

Joseph Platt: I reassure the committee that, in serious matters of professional misconduct, two separate organisations are involved as those cases are decided on and prosecuted before the Scottish solicitors discipline tribunal, which is an independent body.

Lord James Douglas-Hamilton: Why, then, are there accusations of conflicts of interest?

Joseph Platt: People—including some solicitors—seem not to understand that the solicitors discipline tribunal is an independent body.

Lord James Douglas-Hamilton: Is there scope for increasing the legal powers of the ombudsman?

Martin McAllister: Anything that would improve public confidence should be considered. I was interested in the submissions that were given to the committee. In the UK, we have three legal service ombudsmen who all have different powers. In particular—

The Convener: I am sorry, Lord James, but I would like to leave the issue of the ombudsman to one side for the moment as it is a separate issue.

The flow chart in the leaflet tells us that the client relations committee considers all the evidence and makes recommendations to the council. Then both parties comment on the recommendations before the papers go to the council and the council makes a decision. That is the point that I want to ask about. I understand that a solicitor against whom a complaint has been made has the opportunity to comment before the council makes a final decision on the complaint, yet the

complainant does not have the same opportunity. Is that the case?

Philip Yelland: No. Once the committee has made a recommendation in relation to the disposal, both the complainer and the solicitor are given an opportunity to comment. Their written representations accompany the report, the opinion and the minute from the committee that sets out the recommendation for consideration before the council.

The Convener: The complainer and the solicitor against whom the complaint has been made both make written representations, but does the solicitor have the opportunity to appear before the council?

Martin McAllister: No. However, you have hit on an interesting point, convener. The absence of delegated powers under the Solicitors (Scotland) Act 1980 means that the council has to determine such issues. Each month, the council must deal with issues such as complaints of inadequate professional service and the reports of committees on that. Prior to the legal advice that we got a couple of years ago on the operation of the act, the committees made the decisions and the council did not have an opportunity to consider them. I qualify that by saying that, initially, the council made the decisions and gradually a procedure was developed in which the committees dealt with service complaints, because of the absence of delegated powers. I know that the Justice 1 Committee is aware of the difficulties that that presents and of the draft bill to address them that we are currently promoting. The council still has to look at each complaint because that is what the law tells us we must do.

The Convener: We are told that lay involvement takes place early on. Is there any lay involvement in the council?

Martin McAllister: No.

The Convener: Whom does the council comprise?

Martin McAllister: The council comprises 51 solicitors who are elected on a geographical basis or who are co-opted, such as people in public service or in-house lawyers. An academic who is also a solicitor is usually co-opted to the council.

The Convener: Do you think that there should be lay involvement in the council?

Martin McAllister: As we have said, there is a question of public confidence in relation to matters concerning complaints. That is why we are considering the issue. The fact that service complaints have to go before the council, which has no lay involvement, is not helpful. In matters where there is determination of a solicitor's conduct and, potentially, prosecution before the solicitors discipline tribunal, it should perhaps be reserved to solicitors to determine. I consider as unhelpful the absence of delegated powers and the fact that service matters require to be dealt with by the council.

Joseph Platt: Perhaps I can correct a misperception. Members should bear it in mind that the recommendation going to the council comes from a committee on which there are non-solicitor members—indeed non-solicitors are sometimes in the majority. It would be wrong for the Justice 1 Committee to have the impression that the council regularly or routinely overturns the recommendations of committees. The council does not rubber-stamp the decisions or recommendations of committees, although those recommendations are followed in most cases. The committees consider the matter in depth and, in general, the council is satisfied. The council takes into account further representations made by the person making the complaint, the solicitor or both. If the Justice 1 Committee is concerned about that, members might want to ask Kay Telfer about the matter.

The Convener: I refer to the first column on page 22 of your submission, which shows that 383 complaints were disposed of by the council and 148 were dismissed. How many of those decisions varied from the recommendations of the reporter or of the Law Society committee?

Joseph Platt: I cannot give the committee an exact figure, but the answer is very few.

The Convener: I appreciate the fact that you might not have exact figures, but it would be helpful for the committee to have a paper that could advise members of that information.

If you have information on any of the other questions that have been directed fairly specifically at you, it would be useful if you were to provide the committee with it. We will return to the Law Society on the matter.

Martin McAllister: Before we leave the matter, I should make an important point of clarification, convener. Your question was whether the solicitor has the right to appear before the council about a complaint. I said that the solicitor does not have that right. However, the solicitor has the right to ask a council member to make representations on his or her behalf. I do not want there to be any confusion on that issue.

The Convener: Does the complainer have anyone making representations on their behalf?

Martin McAllister: The convener of the Law Society client relations committee makes representations on behalf of the complainer. Having been the convener of such a committee for three years in the early 1990s, my experience is

that conveners fight tooth and nail to defend the committee. In a sense they are acting as the advocate for the decision of the committee. I do not know whether you want us to expand on that.

The Convener: A batch of members now have their hands up. I will take a question from Maureen Macmillan and then one from Gordon Jackson.

Gordon Jackson (Glasgow Govan) (Lab): I will save my question until later.

The Convener: Gordon is saving himself, so I will take a question from Maureen before I ask Lord James Douglas-Hamilton and Donald Gorrie to come in.

Maureen Macmillan: I want to ask quickly about the solicitors discipline tribunal. Who sits on that? Are lay members on it?

Michael Clancy: There are lay members. The constitution is set out in schedule 4 to the Solicitors (Scotland) Act 1980. The details are that the tribunal is constituted by

"(a) not less than 10 and not more than 14 members … who are solicitors recommended by the Council as representatives of the solicitors' profession throughout Scotland, appointed by the Lord President of the Court of Session, and

(b) 8 members … who are neither solicitors nor advocates, appointed by the Lord President after consultation with the Scottish ministers".

The Convener: Does Gordon Jackson want to ask about the discipline tribunal at this stage?

Gordon Jackson: The point that the Law Society makes is that the discipline tribunal is entirely independent of the Law Society.

Martin McAllister: That depends on what you mean by dependent.

Gordon Jackson: That is the difficulty. You said earlier that the tribunal was a separate body. There is not a perception that it is a separate body.

I declare an interest in that I am, obviously, a lawyer, but I have also appeared before the solicitors discipline tribunal representing a solicitor. Even I, having a vague understanding of those matters, felt like I was appearing before lawyers who were dealing with the lawyer. The lay members were there, but it seemed like the real power in the place was the lawyer—the chairman is a lawyer. That is anecdotal evidence, but it is my anecdote.

I wonder whether there are ways in which the Law Society could increase the perception that the tribunal is a separate body, perhaps by having a non-lawyer chairperson. Appearing before the tribunal, I was conscious that I was appearing before lawyers who were sitting in judgment on a lawyer. I am not saying that that meant that the tribunal was soft—I think that people are sometimes harder on their peers, but that is not the issue. The issue is the perception of transparency. Are there ways in which that could be improved as a matter of presentation?

Martin McAllister: The presentation is important. As president of the Law Society, I know a minimal amount about the workings of the solicitors discipline tribunal. That is perhaps an indication of my ignorance or an indication of the fact that we have nothing to do with the tribunal, other than prosecuting people before it.

We are trapped by the Solicitors (Scotland) Act 1980, in as much as that the council has to make nominations for membership. I can understand the perception difficulties with that. The committee might want to examine the matter and consider whether there are alternatives. As far as the workings of the tribunal are concerned, there is a complete separation of powers. It has its own clerk and deals with its affairs in its own way. It is a judicial body.

11:15

Gordon Jackson: The fact that the council recommends the membership creates a perception.

Martin McAllister: It only recommends the lawyer members.

Gordon Jackson: But it recommends the majority of the membership. That creates a perception, because you know and I know that who you pick to do something affects how it gets done. I am not saying that the council does this, but there is the potential for the council to pick someone who may not be as independent-minded as might be thought. I am not saying that that happens—it has not been my experience. Are there ways in which we could improve that, albeit that it would need statutory change? The first step is to decide what we want to change, then we must consider how we might do it.

Martin McAllister: The attempt that we have made towards improving the situation—we are still trapped by the Solicitors (Scotland) Act 1980—is that recently the process has been done by open advertisement.

Gordon Jackson: What do you mean by open advertisement?

Philip Yelland: What has happened over the past few years has been that members of the profession have been invited, by advertisement in the *Journal of the Law Society of Scotland*, to apply if they want to become members. Any solicitor in Scotland can apply. Consideration is then given to nominations that might be made to the Lord President.

Lord James Douglas-Hamilton: There is considerable pressure for a clearer separation of interests. How best could that be achieved? It may well be that you cannot give a quick answer this morning. It would be helpful if you could give us a short paper. You said a moment ago that a member of the council can represent the solicitor. Separation of interests could be clearer and more distinct than it is.

Martin McAllister: We would be happy to examine that matter. With the tribunal, the separation of interests—or the perception of separation of interests—could be helped by statutory change.

Joseph Platt: It is a problem of perception rather than reality. The committee will probably be aware that the society prosecutes solicitors before the tribunal. It may be unhappy with a decision and will appeal a decision of the tribunal to seek something stronger.

The Convener: Lord James, I suggest that having put that proposal, as we are having the Law Society back and the discipline tribunal representatives are coming next week, we might consider the matter in a paper rather than receiving ad hoc—if you will forgive me for saying that—recommendations.

Martin McAllister: There are two points. Lord James's concern was representation at council. Mr Jackson raised a concern about the discipline tribunal.

The Convener: Yes. Those are separate issues. It would be interesting to receive your views on both matters. It would be helpful if you put ideas in writing for the committee to consider rather than discussing the issue now, as we have other matters to get through this morning. We can write out specific questions, which we can circulate to members if they wish, and raise them with you. As I say, you will be coming back to the committee.

Donald Gorrie: I will come back to the interesting evidence from Kay Telfer. The complaints that we have had from individuals include a long list of complaints about the procedure. For example, information was withheld from the complainant, the lawyer got information and they did not, or when they tried to correct information they were told that it was too late or that the procedure did not allow it.

Either there are quite a lot of failures in the system that was described by Ms Telfer or there used to be failures that have since been put right—I do not know how historical some of the complaints are. Another possibility is that some of the complainants are not fully aware of the process and complain in ignorance. Looking at the procedure from the outside, how do you feel about it? Does it help complainants to go through the process properly, as in the leaflet? Is the balance kept fairly between the complainant and the lawyer? I would welcome your views on those matters and on how to improve the system.

Kay Telfer: The way that complaints are dealt with has improved tremendously, even in the five years that I have worked with the client relations committees. Things have been tightened up and procedures have improved. The standard letters and the leaflets have been simplified so that they are much less legalistic and much more understandable to the normal run of people—the kind of people whom I see regularly in the citizens advice bureau.

Reporters certainly get every scrap of paper that comes into the building. From looking at the Law Society files, I know that information that comes in from the solicitor is sent to the complainer and information from the complainer is sent to the solicitor. Both parties see copies of everything, unless it has been requested specifically that information should not be transferred. That is very unusual—I cannot remember having come across that.

Time limits are set for responses, but they are very flexible. There are times when the case managers fall over backwards to help the complainers—or sometimes the solicitors. That applies not only when there are simple problems, but more particularly in cases involving people who have problems of communication. The case managers try extremely hard to see those people and might send somebody to interview them at home or to get them help.

We go through a lot of information. I feel quite happy that the client relations committee looks at everything carefully and that the complainers are given all the information that comes in. You also said that some people were told that things had arrived too late. I am not quite clear at what stage that would arise. Occasionally, when representations have been made on a complaint, an extra representation might arrive too late for the committee. Other than that, I am not aware of that problem.

Martin McAllister: My understanding is that that happens when a case has been put to bed—in the sense that the final decision has not been made, but the committee has finished its deliberations—and put before the Law Society's council. At council meetings, a client relations committee convener regularly—at almost every committee meeting, I would say—stands up and says that further information has come to light and they would like to take the case back to committee. Every opportunity is given for full consideration of a complaint. A client might not be happy with a decision that the committee has taken on the

information that has been submitted. That is a completely different matter.

Donald Gorrie: We have a summary of a lot of different individual complaints. Some people seem to feel that the client relations committee is quite honest and works properly, but bases its decision on duff information. That seems to be the thrust.

Martin McAllister: I want to comment on the information in the summary. Rolling changes have been made over the past 10 years, the past five years, the past two years and the past year. Although someone who raised an issue on the way that a complaint was dealt with four or five years ago might have had a perfectly valid claim then, that issue might have been addressed—the procedures might be different now.

The Convener: I want to go right back to the beginning of the complaint process. Imagine that I am the person who has written to the Law Society because I am unhappy about my solicitor. Section 33 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 states what one of the society's first obligations is:

"Where any person with an interest has made a complaint (a 'conduct complaint') to a professional organisation that a practitioner has—

(a) been guilty of professional misconduct; or

(b) provided inadequate professional services,

the organisation shall investigate the matter."

We go right back to the beginning of the flow chart in your help leaflet—"Dissatisfied with your solicitor"—where it says, "Investigation starts". Who decides and how is it decided—what definition is used—that the matter is a complaint under section 33 of the 1990 act?

Philip Yelland: The easiest way to describe that is to say that that is the job of the case managers when they look at the letters that are received. They will look at the definition that you just referred to and decide whether the complaint is about the solicitor's conduct or about the service provided. For example, someone might say that their case has taken too long, if there has been a failure to communicate. The case managers will also consider whether the person has got an interest to complain. If they decide that the complaint falls into one of those categories, consideration of how to deal with the matter can start. If it is a complaint about service, as you will see from the flow chart, it might flow down the conciliation route with an attempt to resolve the complaint. If that is not possible, the complaint will move into the written investigation.

The Convener: The case manager makes that decision.

Philip Yelland: Yes.

The Convener: So I have written in to the case manager. I take it that the case manager is one person.

Philip Yelland: Yes

The Convener: What does the case manager have in front of them when they are considering whether or not I have a complaint?

Philip Yelland: The case manager will have in front of them the actual letter of complaint or the help form that has been completed. They will also be aware at that stage of the terms of the 1990 act and what we can and cannot do. The complaint letter is initially judged on that basis.

The Convener: There is no file or anything else—just the letter.

Philip Yelland: There is nothing else at that stage. One of the improvements that we have introduced in recent years is that if we are going to start the written investigation we write back to a complainer saying what we think their concerns are. That ensures that we understand what they are complaining about so that we do not go off on the wrong track. When we set off we know what their concerns are and can put those to the solicitors and get a response. For the committee's information, that is covered on page 27 of the help leaflet, where it mentions "Head(s) of complaint confirmed".

The Convener: I want to consider again the tight definition in section 33 of the 1990 act, which refers to "professional misconduct" and "inadequate professional services." How is that defined? How do we know how that is defined, let alone the person who makes the complaint and is told by you that it is not a complaint with which you can deal? What do those definitions mean? Obviously the person thinks that they have a complaint—that is why they have come to you.

Joseph Platt: Almost anything could form the basis of a complaint about inadequate professional service. An enormous range of areas of complaint might form the basis of a complaint about professional misconduct. Professional misconduct is defined by law and it is for the society to decide whether what is complained about might amount to professional misconduct. If it is decided, after the complaint has gone through the process, that there might be professional misconduct, it is for the society to decide whether to prosecute. The answer is that there is nothing that precludes any concern that a client has about a solicitor's conduct or service from being considered. These issues are also dealt with in the help leaflet.

It is one of the strengths of the system that on the face of it, at first blush, nothing is shut out. The society will consider every concern that a client

has about a solicitor, to see whether that concern could form the basis of a complaint under either of the provisions in the statute. We are constrained by statute. However, our system is more open than many others in which areas of complaint are quite narrowly defined.

The Convener: Say you reject my complaint. Can you give me an example of something that would not be a complaint because the case manager has decided that?

Joseph Platt: Sometimes someone might complain that the solicitor for the other side had done their job too well, or something like that. There could be areas where the person might not—

The Convener: Well, that is an easy one. Talk about my solicitor. It is my solicitor that I am complaining about. That is an easy one to give as an example. I am unhappy about my complaint. What have I put in my complaint that would make it fall outwith your wide-ranging definition, which you tell me is very flexible? I am unhappy with the service that I have got. I am unhappy about paying for it.

Philip Yelland: I draw the committee's attention to what page 3 of the help leaflet indicates. It gives a broad explanation as to what misconduct and inadequate service might be. If a person wrote to us and said that they are happy with their solicitor's service but think that the solicitor charged too much, that would be an example of an issue that might not concern inadequate service from a solicitor.

Whether the solicitor is entitled to charge what they did and whether the charge is fair or excessive is a matter that is not within the Law Society's power to determine. The matter is determined by a process that is known as taxation, which can take place before either the auditor of the sheriff court or the Court of Session. If somebody sends such a letter, we have an information sheet that we issue. We always say, "Please come back to us if you think that we have misunderstood your concerns."

11:30

Joseph Platt: If a complaint is rejected or not accepted, the person who wrote in is also advised that he or she may take the matter to the ombudsman. Sometimes the ombudsman will consider a complaint and say that the Law Society was wrong and that it should consider the matter. The ombudsman will then recommend to us that we open the complaint and, in general, we do.

The Convener: Joseph Platt has provided a link to the ombudsman. Does anybody want to take up that cudgel?

Michael Matheson: I want to talk about an issue that was mentioned earlier. The complaints that I receive are not so much about getting into the complaints system as about decisions that have been arrived at and the way in which things have been conducted. That goes back to Martin McAllister's point. It was said that a solicitor who has had a complaint launched against him can have a council member make representation for him in the council. I take on board the fact that the convener of the client relations committee could be the advocate for the person who made the complaint. What is the relationship between the convener of that committee and the client who made the complaint? Does the convener sit down with the client, go through the case and tell them what they will do when they go to the council?

Martin McAllister: No. The convener of the committee defends his minute—the committee's decision or recommendation. The convener does not take instructions, if you like, from the person who made the complaint. In service matters, it might be thought that that is inappropriate, but it is what the statute tells us to do. Prior to the advice that we must do that, committees dealt with such matters themselves.

Joseph Platt: I want to correct what may be a misconception on the part of the committee—that the council will always decide in favour of a solicitor. That is simply incorrect. The committee minute may recommend dismissal of a complaint, but the council may think that it should not be dismissed. The committee's recommendation may be for a disposal that falls short of prosecution, but the council may think that the conduct of the solicitor as relayed in the minute and the papers is more serious and will recommend prosecution. The council will not necessary decide in favour of the solicitor. It is constrained by the statute to decide. Its discretion is not fettered—it decides matters fairly.

Michael Matheson: With all due respect, committee members are aware that the council sometimes makes decisions against solicitors. I am not saying that it always makes decisions in favour of solicitors. The issue of perception is crucial. There is a major hotspot between the council and the discipline tribunal. I want to be clear. Is the council member who can make representation for the solicitor in a position to take instruction from the solicitor whom the complaint is about? Can the solicitor whom the complaint is about make representation to a council member? Is the council member in a position to meet that solicitor so that the solicitor can give them instruction?

Martin McAllister: That could happen. Also, a council member who has not had any contact with the solicitor complained against—who does not

know or has not spoken to that solicitor—could say to the council that they think that the committee should consider the matter again. The member of the council could say that they have considered the council's deliberations and think that the committee has got it wrong and would like the convener to take that back to the committee and consider it. The convener may say, "No. I want council to determine it. I am moving my minute." There would then be a vote.

Michael Matheson: It is an issue of balance of representation.

Martin McAllister: That is why I was careful to raise that point.

The Convener: I am sorry, I will have to stop the discussion. We have a full agenda this morning. We will have you back. It might not be in January. I know that you may want to raise other issues as we gather more evidence. I thank you all very much. You will be back in late January or early February. We will be in touch as soon as possible, as we know that diaries have to be done.

Martin McAllister: Thank you, convener. I will make this invitation again. As so much of the discussion has been about process, it may be useful for committee members to come along and look at the process.

The Convener: We will consider that.

I welcome to the committee Alistair Clark, who is chairman of the Scottish Conveyancing and Executry Services Board, Ms Margaret Burns, who is a member, Duncan White, who is a member, and Eric Simmons, who is the secretary.

I understand that you would like to make a brief introduction. You heard the comments that I made to the previous witnesses about the time constraint. In fairness, the committee knows less about your organisation than it did about the Law Society of Scotland. We start from a lower threshold of knowledge.

Alistair Clark (Scottish Conveyancing and Executry Services Board): Thank you for asking me to speak. I am aware that there is a time constraint. I will keep my introduction as brief as possible.

As has been said, I am chairman of the Scottish Conveyancing and Executry Services Board and a former practising solicitor. The introductory information has been typed out for the committee.

The Convener: Thank you very much. I have just been handed your introductory statement. It is longer than we require. As we have it before us, I suspect that members would be content to proceed with questions. I am sorry, as it seems impolite, but we are under extreme pressure this morning to get through a great deal of business, especially as the committee must prepare for its stage 1 report on a bill.

Alistair Clark: I am anxious that the board's points—

The Convener: You can mention any points that you want to highlight, bearing in mind that we have received your introductory statement.

Alistair Clark: I would like to refer to one addition.

In the second paragraph on the second page, I refer to our complaints procedure, which we have written down on tablets of stone. The procedure relates to independent qualified conveyancers. Oddly, there is no similar complaints procedure for independent executry practitioners.

The Convener: I am sorry—which paragraph are you on?

Alistair Clark: At the end of the second paragraph at the words, "circulation to this committee." Do you see that?

The Convener: Yes.

Alistair Clark: It says:

"copies of which have been lodged for circulation to this committee."

The Convener: Oh, yes.

Alistair Clark: It is on page 2.

The Convener: I have not found it.

Alistair Clark: The page starts, at the top, with the words:

"*Perhaps I could talk to the Terms of*—"

The Convener: Yes, I see that.

Alistair Clark: Then there is the first paragraph of normal type, as it were.

The Convener: That is it:

"So far as the **existing systems and procedures**"

and then you have,

"**75% Lay Membership**, deals with complaints in terms of—"

Alistair Clark: Yes, before "**75% Lay Membership**"—

The Convener: Oh, I see.

Alistair Clark: At the end of that paragraph—"circulation to—"

The Convener: Right. Have all members now followed that? It is at the end of the first paragraph. I am the only one that has not followed it, obviously.

Alistair Clark: I refer in that paragraph to the procedure that we have for conveyancers. There

is no such procedure for independent executry practitioners although, if there were a complaint against an executry practitioner, we would follow the system for complaints against qualified conveyancers.

I would like to point out an omission on the third page. The first paragraph ends with the phrase:

"of the other systems w hich is really a".

Some words are missing. The line should end with the words "really a matter for the Justice 1 Committee."

Gordon Jackson: How many people are registered? How many independent conveyancers and executry practitioners are there?

Alistair Clark: Not many. Eric Simmons will be able to give members precise up-to-date figures.

Eric Simmons (Scottish Conveyancing and Executry Services Board): We have 13 registered members, one of whom is independent.

Gordon Jackson: Are those people conveyancers or executry practitioners?

Eric Simmons: People can register on the conveyancing register and/or the executry register. Of the 13 members, four are registered on both registers. They are not different people: they are the same people with two skills.

The Convener: How many are on the conveyancing register?

Eric Simmons: There are 13 altogether.

The Convener: How many are on the executry register?

Eric Simmons: Four.

Gordon Jackson: Is that four of the 13?

Eric Simmons: Yes.

Gordon Jackson: Four of the 13?

Eric Simmons: Absolutely—Four of the 13. There are 13 in total.

The Convener: Right. Is that for the whole of Scotland?

Eric Simmons: Yes.

Gordon Jackson: Is the figure surprising? Did you expect that there would be more members? It is a terrible thing to admit as a lawyer, but I never knew that the board existed until today. That is an incredible confession to make. Its existence totally passed me by. Is there a lack of awareness of the board's existence?

Alistair Clark: The situation is historical. It seems to me and to the board members that most organisations, boards and societies evolve out of existing groups. That was the case with the Law Society of Scotland, but not for us. We had a learning curve to follow, as far as the public and practitioners were concerned. At one stage, it became very difficult to publicise our existence when we did not have any practitioners. However, practitioners are gradually coming through the universities. We need more time and the quinquennial review thought that we needed more time but, as members probably know, we are under threat of execution.

Gordon Jackson: Aren't we all?

Alistair Clark: The situation is improving, albeit gradually. The figures are not as good as we hoped they would be.

The Convener: How many complaints have you had since your inauguration in 1997?

Alistair Clark: Two—one of which is current and one of which has been completed.

The Convener: How long does the process take? You say that one complaint is current and one has been completed. When—so that we know what statistics we are talking about—were the complaints lodged?

Duncan White (Scottish Conveyancing and Executry Services Board): I am sorry, convener. You are asking—

The Convener:—about the two complaints since 1997.

Duncan White: Margaret Burns dealt with one, probably about a year ago. I am currently dealing with the second complaint.

The Convener: I see.

Duncan White: On the length of time that it takes to deal with complaints, we have a timetable that we must follow. The maximum time would be 28 and a half weeks; but it could be as short as 10 or 12 weeks.

The Convener: Are you talking about the number of complaints received or the number of defined complaints?

Duncan White: I am talking about two complaints that have gone into our system for dealing with complaints against practitioners. Both have been designated as serious complaints in terms of our regulations.

The Convener: What representations have you received that have not been designated as complaints? That is what I am trying to get at. Were there only two?

11:45

Ms Margaret Burns (Scottish Conveyancing and Executry Services Board): We have a wide definition of "complaint". People need not put a

complaint in writing or anything like that. The way our procedure works is that we will examine anything that we think stands up. That might be a bit of a problem if we received significantly more complaints, but we have had only two.

Maureen Macmillan: The questions that I was going to ask have probably already been answered. I was interested in the proportion of lay members on the board—you said that such members account for 75 per cent of its membership. How do you choose the members of the board?

Perhaps you could also tell us a little more about your definition of a complaint. What is the process for determining whether to take a complaint forward?

Alistair Clark: The members of the board were appointed by the then Secretary of State for Scotland and have continued in office since then. I presume that Scottish ministers would now deal with that. Almost all the members were appointed in the first instance for five years or less. Because our position is being reviewed, those appointments are being continued for three years or for such lesser periods as might be necessary.

Ms Burns: The act that set up our organisation specifies where board members must come from. Some represent the interests of consumers; that is why I was appointed. Other types of people are also specified in the legislation, and the ministerial appointments come from that.

Maureen Macmillan: Are the appointments publicly advertised?

Ms Burns: I do not know. It would be for the Scottish Executive justice department to answer that. Initially, they were not advertised, but that was before the Nolan committee made its recommendations.

Maureen Macmillan: I assume that appointments are now advertised.

Alistair Clark: I think that they would have to be.

Ms Burns: One would assume that.

Maureen Macmillan: How do you determine whether a complaint is genuine?

Alistair Clark: You must remember that we have a completely novel complaints procedure; I have never seen one like it. There are very strict time limits and attempts must be made to keep all parties informed of what is happening and when, so that there is no uncertainty about what the future will hold as far as time and action are concerned. We feel that, because of its novelty, there are areas in which some refinement of the (a) procedure might be desirable. We can refine the (b) procedures, because they are the board's own procedures. They can be changed subject to the consent of ministers. We feel that there is room for change in the definition of what constitutes a complaint and what does not. In the meantime, determination of a complaint is left to the complaints officer, who happens to be the part-time secretary.

The board's view is that, in the light of recent experience, there should probably be some refinement to create guidelines as to what constitutes a complaint and what does not, rather than leaving that to the complaints officer to decide. He could throw out a complaint right at the start. A complainer could appeal to the ombudsman.

Maureen Macmillan: Have you rejected any complaints? You have had so few that perhaps you will want to deal with every one that comes along.

Ms Burns: No. The way in which our regulations are drafted means that there is no option to reject complaints. As I said, almost everything that looks as though it is a complaint must go into a Rolls-Royce process involving a board member. There is not much leeway for the complaints officer to say that a complaint is not serious. We must investigate and do the whole works on anything that stands up half way. That has been fine until now, but it might be difficult to manage if there were many more complaints.

Maureen Macmillan: That is a point about which I was going to ask you. As you get busier, you will obviously have to be more selective or have a bigger board.

Ms Burns: As I said, we are not sure how the system would be affected if we had even a reasonable increase in the number of complaints. There is a question about whether we would be able to manage.

Duncan White: We have a definition of complaints in our rules, which goes some way to answering Maureen Macmillan's question. That definition states:

"'a complaint' means a complaint which is made to the Board in connection with the provision of conveyancing services by a practitioner".

That could include a non-serious complaint or a serious complaint, but the definition is

"a complaint … in connection with the provision of conveyancing services".

The rules go on to define a "serious complaint". The definition lists a number of criteria including,

"that a practitioner—

has been guilty of professional misconduct;

has provided inadequate professional services;

(c) has failed to comply with regulations …; or

(d) has been guilty of a criminal offence".

Serious complaints are defined clearly in our procedure.

The initial classification is as a "complaint"; in which someone says that they are unhappy with the way in which a practitioner has dealt with something. The complaints officer must then decide whether the complaint is serious and whether the procedure for serious complaints should be invoked.

Paul Martin: In effect, your organisation is a quango. I am keen to determine the costs of operating that quango. For example, how many staff are there? Do you feel that the number is sufficient for you to deal with an increase in complaints as a result, for example, of your receiving a large number of complaints after your appearance before the committee today?

Alistair Clark: Our organisation is certainly a quango. On costs, the secretary probably has the figures at his fingertips.

Eric Simmons: Our running costs are about £120,000. However, within that figure is a rather large sum for professional indemnity insurance. The situation is rather unusual. Qualified conveyancers who work for a solicitor are covered by the solicitor's master policy and do not need insurance from us. Independent conveyancers pay their part of professional indemnity insurance. However, when the board was set up, to ensure that there was proper protection for the public, it took out a professional indemnity policy that covers all its members. The irony is that, of the 13 members, 12 are covered by a solicitor's master policy and one pays her own premium. Although there is nobody else left to insure, we still carry a professional indemnity insurance policy and a separate compensation fund policy. Those figures are included in the running costs.

There are two staff: an assistant secretary and me. We both work part time.

Paul Martin: I appreciate, convener, that that question is not quite—

The Convener: I wanted to keep to questions about the complaints procedure and come on to the board later.

Paul Martin: The point that I am trying to determine is whether, if the board received a large number of complaints tomorrow, it would be able to deal with them. I appreciate that there are only two part-time members of staff. Would you be able to deal with an increase in complaints?

Eric Simmons: The problem would not be for the staff but for the board. Under our complaints procedure, the investigation is made by a board member. As complaints officer, I consider the case initially, but thereafter it is put into the hands of a board member. The board members would be put under pressure if there were a large increase in complaints.

Paul Martin: Will you advise me of the procedures by which the lay members would be involved in the complaints process? We have heard from the Law Society of Scotland about its procedures.

Ms Burns: I am a lay member of the board. Our complaints process is that a complaint, right from the get-go, is handed to an appointed board member to investigate, to form a view on the facts and to make a recommendation to the board. The whole board takes a final view on that recommendation.

As Eric Simmons said, the problem is not to do with staff. Our complaints process requires board members to handle complaints. It is a part-time board and there is a big question about whether the members would be able to handle a big increase in complaints.

Duncan White: We have had two complaints so far. Margaret Burns has handled one and I am handling the other. We can cope with that. We then report to the board so that it can make decisions on the complaints. If we were snowed under by a large number of complaints, I do not know whether the board would have enough members to cope. However, so far we have been able to handle comfortably the complaints that we have received.

The Convener: I am interested in the composition of the board. Is that what you want to ask about, Lord James?

Lord James Douglas-Hamilton: I want to ask about that and the future of the board.

We are aware of the proposal to abolish the board and to hand its functions to the Law Society. Do you have any comments on that proposal? As a minister at the time, I was involved in the legislation that created the board. Do you consider that the board has made a successful contribution?

Alistair Clark: I do not think that the board's contribution so far has been as successful as we had hoped. As you know, there is a similar organisation in England, where there are approximately 600 or 700 licensed conveyancers. After a sticky start, that organisation has become quite successful and, as I understand it, financially independent.

On the basis that our population is 10 per cent of England's, if we had 10 per cent of the English organisation's membership—which is 60 or 70—I doubt that we would be self-sufficient. That is just

a back-of-an-envelope calculation. We would therefore have to be more successful than the organisation in England and Wales for us to be self-sufficient.

Nevertheless, as I understand it, the essence of the legislation was to provide competition for the solicitor branch of the legal profession. It might be that the price is worth paying, at least to some extent, in order to provide that competition. We feel that we have not had enough time. The process is developing. Universities are providing courses and people are qualifying. However, not enough people have the courage of their convictions to move out of the qualified state into the independent state.

I want to deviate slightly and talk about cost. A major part of our expenditure is on the premiums on the policies to which Mr Simmons referred, although they have been reduced because of our good claims history. I gave evidence at the quinquennial review and said that we have not been as successful as we would like to be. If we were given more time and were still unsuccessful, we would hold up our hands and say "Sorry. We have not done a very good job." However, we do not think that we are getting the opportunity to do a good job, especially since we have calculated that, if our function was transferred to the Law Society, the saving would come down to something like £38,000 per year. That is not very much in Scottish Executive terms.

Michael Matheson: That leads to the point that I want to raise. My understanding is that—notwithstanding the review that has already taken place—the Minister for Justice intends that the board's functions be moved to the Law Society for Scotland. He stated that in June.

Given that there are now university courses that lead to qualifications in your field, would the board's time be better used in considering what should happen with the transfer to the Law Society? I understand that that might be signing your own death warrant, but should we consider the way in which the complaints system that you administer could be moved to the Law Society? That would ensure that some of your present problems were addressed and that the process would work effectively if the transfer took place.

Alistair Clark: We are opposed fundamentally to abolition of the board. Notwithstanding that, we have been willing to join tripartite meetings between the Executive, the Law Society and the board to facilitate the proposed change, if it takes place. However, it is still at the consultation stage.

12:00

Ms Burns: We have considered how the Law Society will deal with complaints against our practitioners if it takes over. Problems will arise. We are independent of the people whom we regulate. Our members would have to face a committee of the Law Society, although such committees have lay representation. Even when that Law Society committee has made a decision, the matter must be put to the council of the Law Society, which is elected by solicitors. That does not look right.

Although we can discipline our practitioners, the council of the Law Society cannot discipline its practitioners, so the suggestion that is on the table is that the Scottish solicitors discipline tribunal might take that role on. Again, that does not look right, because there are questions about the membership of that tribunal. That is a problem that we have identified will occur if and when the Law Society takes over regulation of our practitioners.

The political decision may have been taken. We are discussing the matter with the Law Society, because we must protect our practitioners and their clients, who have access to a good complaints process at present. It is difficult to see how that will be maintained when the Law Society takes over. However, those talks continue and nothing has been finally decided.

Michael Matheson: I would like to be clear on this. Is the board being abolished? I understand that the board is being abolished, as Jim Wallace announced on 21 June this year, but you say that the matter is out to consultation.

Alistair Clark: Abolition is subject to satisfactory arrangements being made. We are still supposed to be in a consultation process. I think that that is the second consultation process. I understood that the matter had still to be finally decided, because much of it relates to complaints procedures, the compensation fund, professional negligence cover and other matters. Those issues are difficult. The Executive will have to work out the cost of and the saving from the change. We have done our calculations, but some are based on supposition. That is because, for example, we do not know what the Executive will pay the Law Society to run the system—I presume that the Executive will have to pay.

The Convener: I am sorry to race on, but we have much more to do. We must be quick.

Donald Gorrie: In the bullet points at the end of your written submission, you include people's compliments about your complaints procedure. Will you run quickly through your complaints procedure and highlight why you think that it is better than others? I see that you have a tick against the National Consumer Council's criteria.

Duncan White: I cannot compare our system with others. Under our procedure, when the complaints officer, who is the secretary to the

board, decides that a complaint is serious, he calls for the practitioner's file and remits it and any papers that he has on file to a board member, who has 20 days in which to submit a draft report. The board member sends part 1 of his draft report to the complainer and the practitioner, who have 20 days in which to reply in writing with any observations. Within 10 days of receiving any replies, or after 20 days, the board member prepares part 2 of his report, which contains recommendations as to what, if any, action should be taken against the practitioner, and recommends whether the complaint should be dismissed at that stage. The board member reports to the board, which considers the report. The board makes its decision within a further 20 days. That decision is sent to the complainer and the practitioner within three days of being made.

In dealing with a serious complaint, a clear timetable governs when tasks must be done under the complaints procedure. The first stage is to establish the facts and to decide, for example, whether the practitioner has provided inadequate professional services. Both the complainant and the practitioner are given an opportunity to respond at that stage. In part 2 of the process, the board member decides what recommendations to make to the board. Finally, the board decides what action should be taken.

The Convener: I am sorry that your evidence has been rather hurried today. Unfortunately, our timetable means that we are pressed for time. Thank you for coming along. We now know much more about your organisation than we did—Gordon Jackson is not alone in that.

Freedom of Information (Scotland) Bill: Stage 1

The Convener: I welcome the Lord Advocate, Colin Boyd QC, who has appeared before us previously, and Lindsay Anderson, who is the deputy principal for policy work at the Crown Office. Both are here to give evidence on the Freedom of Information (Scotland) Bill.

Lord Advocate, I understand that you would like to make a short opening statement.

The Lord Advocate (Colin Boyd): I understand that you have had a long meeting, convener. I have with me a short statement, but, as you might prefer to get on, it might be better if you were simply to ask questions.

The Convener: Is your statement short?

The Lord Advocate: It runs to six pages—[*Laughter.*]

The Convener: That is not short. You can tell from the groans around the table that the committee has rejected your definition of short.

The Lord Advocate: Fair enough.

The Convener: We will move straight into questions.

Gordon Jackson: Could we have a copy of your statement?

The Lord Advocate: Yes—I will arrange for it to be circulated.

The Convener: Thank you. It is handy that the deputy convener is on the ball.

Maureen Macmillan: Section 35 creates a content exemption in relation to law enforcement. For example, information will be exempt if its disclosure would prejudice substantially the apprehension or prosecution of offenders or the administration of justice. Would you provide us with examples of the types of information that the Crown Office and Procurator Fiscal Service is likely to release on request, as well as examples of where there is likely to be a refusal?

The Lord Advocate: We will start with a presumption of releasing information whenever possible. One must consider the way in which the section on law enforcement—section 35—fits in with section 34, which deals with investigations by Scottish public authorities. In particular, one must consider section 34(1)(a)(i), which covers investigations into alleged offences by individuals, and whether someone

"should be prosecuted for an offence."

Section 35 deals with the general policy issues

that will guide not only the Procurator Fiscal Service but the police. Information that might disclose police surveillance methods will fall under section 35. The test that must be applied is whether the release of information about police surveillance methods would substantially prejudice the prevention or detection of crime.

The Procurator Fiscal Service holds some information about those methods, although someone who is interested in it is more likely to go to the police. We give detailed guidance to procurators fiscal about the prosecution of offenders—how it should be conducted and so on. Some of that might fall within a claim for exemption under section 35(1)(b) or section 35(1)(c), if it is likely that the release of the information would substantially prejudice the prosecution of offenders or the administration of justice. For example, guidance about prosecution of trivial offences should not be released if doing so might lead to an increase in that type of offence.

We regard as confidential some policy issues to do with how we prosecute certain offenders. We must consider whether the release of that information would substantially prejudice the prosecution of offenders generally.

Maureen Macmillan: I am surprised that general guidelines might be thought too sensitive to release.

The Lord Advocate: You will understand that we deal with a wide range of offences covering the serious to the trivial. General guidance about the way in which we prosecute some classes of offenders might be useful to people who wish to circumvent the guidance in some way. For each request, we must consider whether the release of the information will substantially prejudice the prosecution of offenders. I hope that before we reach that stage, we will consider in detail the range of internal documents that we hold and decide on a case-by-case basis whether the release of that type of information would substantially prejudice either the administration of justice or the prosecution of offenders.

Lord James Douglas-Hamilton: Concerns have been expressed about the 20-day limits for dealing with applications and for requesting a review of an authority's decision. Will you be able to deal with requests in the 20-day time frame?

The Lord Advocate: We should be able to deal with a large proportion of requests in that time frame. I certainly hope that we can do so. However, it depends on where the request is made, where the information is held and very much on the age of the information. If we were talking about information that was held in archives somewhere, that process would take longer. However, I hope that we will be able to put in place systems that will enable us to respond within that time scale.

Lord James Douglas-Hamilton: Do you feel that the new regime will impact adversely on the Crown Office and Procurator Fiscal Service?

12:15

The Lord Advocate: It will certainly impact on it. I am always conscious of the effect on resources. If the regime were to be introduced tomorrow, there is no doubt that we would not have the resources to cope with it. To that extent, the impact would be adverse. However, I am a believer in greater openness in the Crown Office and Procurator Fiscal Service. Greater insight into what we do and how we conduct our business would be helpful. The service has been damaged by recent events, and greater openness might help to restore confidence in it.

Michael Matheson: Section 34(2) covers information in investigations into deaths that are not referred to the procurator fiscal or concerning which further investigations are carried out after the PF's inquiries have been completed. We have received written evidence expressing the concern that information that may emerge in the course of a PF's inquiry, which could be caught up in information on matters such as deaths and research that is undertaken into medical errors, industrial diseases and so on, would be exempt under this provision. Do you envisage that that could be a problem?

The Lord Advocate: No, I do not envisage such a problem. When a death is investigated by the procurator fiscal, we try—as far as we can—to assist the next of kin in understanding, for example, decisions that are made concerning whether a fatal accident inquiry should be held. We try to share with them the details of any medical reports that are made available to us. That is a sensitive area, as we are dealing with bereaved next of kin. They want to find out what has happened, but sometimes the details of that can be very distressing. We bring people into the office, often with either the pathologist or a medical expert who has been asked to investigate the medical problem, and share that information with them. We try to do that in a way that is sensitive towards their feelings and which respects their position.

I am not sure whether I have answered your question.

Michael Matheson: I was driving at the issue of whether some information that has come to light in the course of inquiries that have been undertaken by the PF, before they have decided not to proceed with any legal proceedings, could be

useful for those who are researching the death. The case could involve, for example, an industrial disease or some type of medical error. That information could be exempt under section 34(2).

The Lord Advocate: I am with you now. I would like to think further on that matter and write to the committee on it. I have given thought to the question of fatal accident inquiries generally and to how information is collected by the procurator fiscal, but it has not been suggested to me that fatal accident inquiries might be exempt under section 34(2). No doubt I am in error for failing to be briefed on that. I will write to the committee about the issue.

The Convener: That would be useful.

The Lord Advocate: It is quite a technical issue.

Donald Gorrie: You are in charge of prosecutions and of the prosecution service. I accept that it is important that you should be independent and that people such as me should not be able to lean on you—I do not have any power, but more powerful people should not be able to lean on you. Do you think that it is possible that more information could be given about the reasons for your decisions? I am not suggesting that you should lose your independence. However, if you could provide information that was not otherwise available to the public and that explained the reasons for your decisions, that might help you to defend your position where people were worried by a failure to prosecute in particular cases or by a tendency to plea-bargain in certain courts, which resulted in a lot of villains being let off. Do you think that you could provide more information without losing your independence?

The Lord Advocate: The short answer to that question is yes. However, this is a very sensitive area. From speaking to prosecuting authorities in other countries, I know that there is a wide range of views about whether it is possible to provide information while maintaining independence. England is moving cautiously towards giving reasons for decisions. In most cases, I would not be particularly happy to do that publicly. First, I do not think that it is right to expose individuals to the accusation that, although I cannot prove it, they may have committed an offence. That would open up the possibility of trial by media. Secondly, I think that publicly stating my decision or the decision of Crown counsel would begin to impinge on the independence of the system. I am very anxious to ensure that decisions do not become party-political footballs. Given the quasi-political nature of the Lord Advocate's position, that could easily happen.

However, I recognise that victims in the criminal justice system expect to receive an explanation of what is happening. We have started to provide people with such explanations. We are doing that in general terms through the publication of the prosecution code. When replying to letters from MSPs, I now send them copies of the prosecution code, which will, I hope, help them to understand the general principles that are applied when decisions are made. In very serious cases, we also try to explain the reasons for decisions to the complainer. We have done that for a long time in rape and sexual offences cases and are now doing it in murder cases. The procedure works well, but I am still not persuaded that I should routinely give reasons for decisions in public.

The Convener: I am interested in section 36, which deals with confidentiality. Section 36(1) says:

"Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt".

If both parties agreed that information given to the prosecution was confidential, would that constitute an absolute exemption? The information could not be disclosed to anyone who sought it, no matter what.

The Lord Advocate: That subsection really relates to information that might pass between solicitor and client. For example, under it, one could maintain in legal proceedings that such communications were confidential.

The Convener: Surely if I said to you, "Mr Boyd, I am going to tell you something in absolute confidence, and I will not tell you it otherwise," and you said that, in your professional capacity, you were prepared to accept it on that basis and to give that undertaking, you could not disclose that information later on in the proceedings if it were needed.

The Lord Advocate: If you came to me as a client and disclosed that you had committed some offence, I would be bound by professional privilege from releasing such information.

The Convener: No, I did not mean that. I meant that both parties had consented to keep the information confidential.

The Lord Advocate: The court would not look very happily on that. You might come to me with an allegation that Mr Jackson—or anyone—had committed an offence. I do not want to pick out the deputy convener.

The Convener: Mr Jackson is very robust.

Gordon Jackson: I have been done for speeding in my time.

The Lord Advocate: You might come to me with information that suggested that someone had

committed an offence. Even if you believed that you had told me the information in confidence despite the fact that there was no solicitor-client or counsel-client relationship, I could not maintain in legal proceedings that such information should be exempt. The fact that you or I maintain that the information has passed between us in confidence does not bind the court if someone else wants that information.

The Convener: You have lost me. If an informant with key information about a crime provides you with that information on the grounds that it will be confidential and that they will be exempt from any proceedings, surely that exemption must be granted.

The Lord Advocate: Yes. Such an exemption would be given under section 35, on law enforcement, or under section 34.

The Convener: Where exactly in section 34?

The Lord Advocate: Section 34(1) says:

"Information is exempt information if it has … been held … for the purposes of—

(a) an investigation … to ascertain whether a person—

(i) should be prosecuted for an offence"

If a registered informant provides information that is then acted on and investigated, such information is exempt.

The Convener: What if the information is not acted on, or contains other information that could be disclosed? You are just catching everything in that exemption.

The Lord Advocate: I am sorry, convener. I do not read section 36 as—

The Convener: I am taking you up on your comments on section 34. You gave the example of an informant who provides information that is used in a prosecution. However, what happens if no such prosecution takes place? I presume that none of the information that has been exempted could be accessed. Should not a substantial prejudice test be applied in this regard as it is elsewhere? The exemption seems absolute.

You are looking at me as if I have misunderstood the matter.

The Lord Advocate: I do not think that you are misunderstanding the matter. The substantial prejudice test is in section 35, which is on law enforcement. Section 34 deals with investigations. You are right that there is an exemption in perpetuity, but that is to protect investigations and to ensure that information that is given to the police or the prosecuting authorities can remain confidential. That confidentiality is essential for the proper maintenance of the prosecution of crime and enforcement of law.

12:30

Michael Matheson: The Lord Advocate referred to section 34 and police inquiries. My concern is how the provisions might apply to public authorities that have a regulatory role, such as the Health and Safety Executive, environmental health departments or trading standards departments. If they carry out investigations and submit a report to the local procurator fiscal, and the fiscal decides not to prosecute, is it not reasonable to remove the right to exemption for the information that that report contains?

The Lord Advocate: I do not believe so. It is important that the reporting authority knows that the reports that it submits to the procurator fiscal will not be transmitted on. The confidentiality of reports, particularly from the police, but also from other authorities, is very important. Those reports often contain highly confidential information.

Moreover, the UK Freedom of Information Act 2000 contains a similar exemption for bodies such as HM Customs and Excise, the Health and Safety Executive and the Benefits Agency. It would be difficult to ask those authorities to run two different regimes north and south of the border. That is particularly true for HM Customs and Excise, which might be investigating crime that does not respect borders between Scotland and England. A lot of drugs, for example, come up to Scotland from England.

Michael Matheson: Would it not be the case that UK legislation, rather than Scottish legislation, would apply to cross-border authorities? I was referring specifically to Scottish public authorities.

The Lord Advocate: I appreciate that, but you picked out the HSE as an example. That is the one area in which we might consider that disclosure would be in the public interest. We would still have to consider the public interest even where the exemption would apply.

With regard to the Benefits Agency and HM Customs and Excise, it seems highly desirable to maintain the same regime north and south of the border and to maintain the exemption for information that informants give to the investigating authority. Information comes from a wide range of people, sometimes from highly confidential sources. It is essential to maintain that exemption.

The Convener: I am sorry that we are under such pressure today—the pressure that we are under with the bill is ridiculous and I am getting very cross about it. It is not your fault, Lord Advocate.

I had wanted to ask you about section 48, which relates to specific circumstances in which there is no appeal to the information commissioner. Given

the pressure that we are under today, could we write to you about that, requesting a fairly swift response? We are locked into an accelerated time scale for producing our stage 1 report, and I would like that matter to be addressed by the committee. To clarify, section 48 is about certain non-appealable decisions that the Lord Advocate or a procurator fiscal makes. Thank you, Lord Advocate.

Before we go into private and before I ask members of the public to leave, I wish to assure members that the agenda for our meeting on 11 December will not be as packed as that for today and that we will have more time to deal with stuff. I suggest that we decide to discuss our lines of questioning for the witnesses next week in private, as we would usually do, and that we keep that session fairly tight. Are members content with that?

Members *indicated agreement*.

Gordon Jackson: Delirious.

The Convener: Somebody is delirious. Thank you.

12:36

Meeting continued in private until 13:10.

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