JUSTICE 1 COMMITTEE

Tuesday 11 December 2001
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
34th 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

John Barton (Scottish Solicitors Discipline Tribunal)
Dr Alastair Brown (Crown Office)
Valerie Macniven (Scottish Executive Justice Department)
Fraser Ritchie (Scottish Solicitors Discipline Tribunal)
Peter Rockwell (Scottish Solicitors Discipline Tribunal)
John Spencely (Scottish Solicitors Discipline Tribunal)
Mike West (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Chamber

Scottish Parliament

Justice 1 Committee

Tuesday 11 December 2001

(*Afternoon*)

[THE CONVENER *opened the meeting in private at 13:49*]

14:04

Meeting continued in public.

Legal Profession Inquiry

The Convener (Christine Grahame): Good afternoon. I welcome the witnesses from the Scottish Solicitors Discipline Tribunal to the committee. John Barton is the clerk, Judith Lea is the deputy clerk, Fraser Ritchie is the chairman, Peter Rockwell is vice-chairman and John Spencely is a lay member of the tribunal, which I am glad to say I have never appeared before. Members of the committee should declare any interests.

Lord James Douglas-Hamilton (Lothians) (Con): 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 (Highlands and Islands) (Lab): I say for the *Official Report* that my husband is a solicitor and a former member of the council of the Law Society of Scotland.

The Convener: We will proceed straight to questions to the Scottish Solicitors Discipline Tribunal.

Maureen Macmillan: How is the Scottish Solicitors Discipline Tribunal constituted? What provision is there for lay members? How important is the inclusion of lay members?

Fraser Ritchie (Scottish Solicitors Discipline Tribunal): I invite the clerk to say how the tribunal is constituted.

John Barton (Scottish Solicitors Discipline Tribunal): The panel of the tribunal is made up of 10 solicitor members and eight lay members. The quorum for any sitting is three solicitors and one lay member, but there are four solicitors and two lay members in a normal sitting.

Maureen Macmillan: How important is it to have lay members?

Fraser Ritchie: We are very much in favour of lay members. We value their contribution and are attentive to what they say in making decisions.

Maureen Macmillan: Is the balance right?

Fraser Ritchie: I think that the balance is right when four solicitors and two lay members sit—which is the norm—or when there are three solicitors and one lay person.

Michael Matheson (Central Scotland) (SNP): You said that the balance is right. I am sure that you are aware that a major concern is that it appears that solicitors predominantly sit in judgment of other solicitors. Would it be more appropriate to have a more equal balance between lay members and solicitors?

Fraser Ritchie: I do not think that we would have too much difficulty with such a balance. We think that it is better for the tribunal to have a legally qualified chairman because many legal points come up in hearings and we must adhere to the rules of evidence. From my experience of lay people coming on to the tribunal, there is a steep learning curve for someone who has no experience in law to be able to chair such a hearing. Ultimately, the chairman must also sign a finding which, although it is the clerk's work, he or she must approve and revise. Legal experience is important in doing that. The committee might wish to hear from our colleague, John Spencely, on lay representation.

John Spencely (Scottish Soilicitors Discipline Tribunal): I have served two terms and an extra year on the tribunal, so I have a fair amount of experience. At the back of the question is perhaps a perception or fear that solicitors who appear before the tribunal are judged by their peers and get excessive sympathy, but that is not the case. Each hearing is a judicial hearing with two stages. Stage 1 is the hearing of evidence and the making of a decision on the guilt or otherwise of the solicitor. Stage 2 is the sentencing.

The process of hearing evidence and making a proper judgment of a solicitor's supposed misdemeanours depends to a great extent on knowledge of normal practice in the solicitor's profession on complex and arcane matters, of which lay people are quite ignorant. I find that the difficulty in hearing evidence is in understanding what has been done and why it might be wrong. As I said, a judgment depends to some extent on normal practice in the profession. If lay people made up the majority of members of a tribunal, they would be faced with that difficulty and there would be a danger that justice would not be done.

Decisions are always reached by consensus—there has never been a vote in my time on the tribunal. Lay members' voices are always heard as much as those of the solicitor members. There is no difference and, indeed, one cannot tell who is a solicitor and who is a lay member on the tribunal.

The difference does not come across in any way, except when a lay member says that they do not understand a particular point.

On sentencing, let us assume that the decision is against the solicitor who has been complained about. Experience on the tribunal rather than whether one is a solicitor or a lay member informs one's perception of the appropriate sentence. I have detected no difference in that respect between solicitors and lay members, except that solicitors tend to be harder on their peers. If there is a bias, it is from the legal members of the tribunal against the solicitor who is before the tribunal. In the eight years or so that I have served on the tribunal, I have never witnessed any bias in favour of the solicitor who has been complained about.

Michael Matheson: Lay members are appointed by the Lord President. That raises a couple of questions. First, why are lay members appointed by the Lord President? Secondly, how are they identified?

Fraser Ritchie: Lay members are appointed by the Lord President because the Solicitors (Scotland) Act 1980 says that they must be. The clerk of the tribunal might wish to add to this, but I understand that the Scottish ministers seek names and sift through those that are submitted. They make a recommendation and the Lord President makes the appointment.

Michael Matheson: How is the list that is sifted arrived at?

Fraser Ritchie: That is not within my knowledge. The matter is dealt with by the Scottish ministers.

John Barton: I understand that the Scottish ministers interview potential lay members of the tribunal, but I do not know how the names come before the interviewing panel.

The Convener: That matter can be left for later.

Michael Matheson: Indeed. My next question is on the benefit of having a chairperson who is a solicitor. The tribunal can appoint two other solicitor members as vice-chairs. What is the balance in respect of lay members being either a vice-chair or chair? I understand the argument against a lay person being in the chair.

Fraser Ritchie: Currently, we have only one vice-chairman, although we had two for a short spell. We have a vice-chairman purely to divide the work load. In other words, the vice-chairman will sit as chairman—perhaps alternating with the chairman—at hearings of the tribunal. I do not chair all the hearings of the tribunal; that would take up a lot of my time. The idea is to divide the work so that the vice-chairman acts as the chairman on given days. That means not only that the amount of commitment that is given is divided, but that someone else is being trained to do the job. We had two vice-chairmen during the short spell to which I referred because we had a particularly heavy work load. If we have a case that involves having to sit for six or seven days—we had two such cases in the mid-1990s—that presents quite a problem to working solicitors, because the work takes them out of the office all day.

14:15

The Convener: I note that your tribunal was established in 1933 as the Solicitors Discipline (Scotland) Committee. Given the changing climate and the way in which people now view professionals, do you think that there is room for reformation of your organisation, particularly with regard to the balance of lay members and to the role of the Lord President?

Fraser Ritchie: I am not sure how much room for reform there is. Perhaps Mr Barton, the clerk to the tribunal, could help. He has had 35 years' experience—

The Convener: But not experience since 1933, I suspect.

John Barton: The climate has indeed changed radically. The first examination of the organisation was in 1949, when the Law Society of Scotland was formed. There were slight changes to the discipline tribunal, as it is now known. The major changes took place in 1958, when it was given its full powers. Before that, any heavy sentence had to be passed to the Court of Session to execute. Since 1958, the tribunal has had the extensive powers that it has now.

Reforms took place in 1965 and, to a greater extent, in 1976. In 1976, the name Solicitors Discipline (Scotland) Committee was dropped, as it caused confusion—people thought that the body was a committee of the Law Society. That is why the name was changed to the Scottish Solicitors Discipline Tribunal. Also in 1976, the two lay members were introduced. That number was increased to four; it is now up to eight. About 10 or 12 years ago, consideration of inadequate professional services was added to the tribunal's remit and powers. The examination and operation of the tribunal has been developing over the years.

The Convener: Do you envisage any role for further reform or development of the tribunal?

John Barton: Development is a natural thing.

Maureen Macmillan: The convener has already touched on some of this, but perhaps you could outline the jurisdiction of the tribunal in relation to relevant grounds of complaint. Exactly what do you deal with?

Fraser Ritchie: We deal with complaints of misconduct and of inadequate professional services. In the latter case, complaints tend to come to us more as appeals than as cases in their own right. Complaints of inadequate professional services may also come to us with a misconduct complaint.

We deal with applications for restoration to the roll, although those are very occasional. We can also deal with changes to a solicitor's rights of audience, although I cannot remember ever having to do that. Primarily, we deal with complaints of misconduct and with complaints about service, generally on appeal. Such an appeal is usually made by a solicitor against an award made by the Law Society.

Maureen Macmillan: It was indicated a moment ago that the tribunal's development is a continuing process. Would you like the scope of the tribunal to be broadened and do you think that its work will develop?

Fraser Ritchie: We deal with what we were set up to deal with. The question is more about how one sees the tribunal's work developing. We should not be usurping the jurisdiction of the civil courts and we do not exist to get involved in large awards of compensation or to decide on cases of negligence. That is not what a discipline tribunal is for. We would not envisage any increase in that sort of jurisdiction.

Maureen Macmillan: Do you think that your decisions set, or influence, professional standards? Does the tribunal have a role in that?

Fraser Ritchie: I will answer that question briefly, but perhaps Mr Barton should also answer it. The standards have been set over the years, but we must reinterpret them for each case, as each case has its own facts. Every now and then, a case will arise in which some new ground is reached or we may have to interpret a new rule or regulation. As with all courts of law, the process is on-going. The clerk to the tribunal, with the former vice-chairman, Ian Smith, put together a useful book on the reported cases of the discipline tribunal. Most of the law in this area is based on decisions that we have made.

Maureen Macmillan: So the tribunal has become an authority on professional standards.

Fraser Ritchie: Absolutely. However, it is often the pronouncement of the court of appeal—the Court of Session—that is really authoritative.

Maureen Macmillan: I will finish our questions on jurisdiction by asking under what circumstances a solicitor or firm of solicitors is referred to the tribunal. How does the referral process work?

Fraser Ritchie: The referral process starts with a complaint, which, in almost 99.9 per cent of cases, comes from the Law Society.

Maureen Macmillan: But complaints are not always from the Law Society.

Fraser Ritchie: Other people have the power to make complaints to the tribunal, but we seldom deal with complaints from any other source.

The Convener: Let us imagine that I am Joe Bloggs, a member of the public, and I think that my solicitor has embezzled my granny's estate, which I was supposed to get. Are you saying that I do not go to you to complain about that?

Fraser Ritchie: You would put your complaint to the Law Society.

The Convener: Does the Law Society undertake the initial investigation?

Fraser Ritchie: Yes. We are not geared to deal with the sifting of complaints from the beginning. We are staffed by a part-time clerk only, although we have a deputy at the moment, as our part-time clerk is due to retire at the end of the month.

The Convener: I will explain for the record that a complaint goes to the Law Society for investigation. The complaint is then referred to the tribunal, if it is—

Fraser Ritchie: A complaint is made to the tribunal, which starts the procedure.

The Convener: Could you define some examples of misconduct?

Fraser Ritchie: The circumstances in which a solicitor took their client's money would amount to misconduct.

The Convener: That was my example, but there must be a range of examples of misconduct.

Fraser Ritchie: Yes, there is a range.

The Convener: Can you give us some examples?

Fraser Ritchie: Misconduct happens when a solicitor acts when there is a conflict of interests or when all sorts of rules are breached.

John Barton: Gross delay in attending to business is a typical example, as is failure to reply to correspondence. A further example relates to the practice rules that have been promulgated by the Law Society with the approval of the Lord President. A breach of those rules is almost always regarded as professional misconduct.

The Convener: As there are no more questions on that subject, Michael Matheson will ask about your committee's powers.

Michael Matheson: You said that the vast majority of the complaints that you deal with arise

as a result of a process that is started under the Law Society. What powers does the tribunal have to command access to documentation and to call witnesses when it meets to deliberate on cases?

Fraser Ritchie: We operate in the same way as a court of law operates. It is for the parties to adduce witnesses and lodge productions. I think that I am right to say—our clerk will correct me if I am wrong—that if a party wants papers from the other side, we could operate in the same way as a court, in that we could make an order for papers to be produced.

John Barton: The analogy is with sheriff court criminal proceedings, in which the procurator fiscal carries out the investigation and prepares a complaint that is lodged with the court and served on the accused person. In the case of the legal profession, the Law Society appoints a solicitor, who acts as prosecutor. He prepares the complaint, which is lodged with the tribunal. When it is lodged with the tribunal, it is served on the solicitor concerned. In the case of a discipline tribunal, it is for the procurator to prosecute the complaint before the tribunal. The tribunal is in the same position as a sheriff. The tribunal hears evidence and it is for the procurator to call for further documentation and to lodge such documentation as is appropriate.

Michael Matheson: Is there someone to defend the solicitor?

Fraser Ritchie: The solicitor is entitled to representation, but does not have to have it. Representation has become much more common in recent years. The Legal Defence Union, which was set up by solicitors, will often have a solicitor to represent the accused solicitor. In our view, that has helped the process considerably.

Michael Matheson: What happens at the end of the process if the tribunal decides that the person is guilty and that the complaint should be upheld? The tribunal must arrive at some type of sanction. What range of sanctions is available to you? Are those sanctions sufficient?

Fraser Ritchie: We can strike a person off, we can suspend them, we can fine them up to £10,000, we can censure them and we can censure and fine them. We can also restrict their practising certificate. That is an important sanction; in some cases, it is all that we can do. The best remedy is often to say that the person is not suitable to practise on their own account at the present time. We restrict their practising certificate for three or five years or so. The person must then go back to the Law Society to ask for a full practising certificate.

Michael Matheson: Is the range of sanctions available to you sufficient?

Fraser Ritchie: Yes.

Michael Matheson: Would you like any changes?

Fraser Ritchie: I have not found a need for any changes. My colleagues might have suggestions. We can also award compensation where there is a service complaint. Those powers are the same as those of the Law Society.

Michael Matheson: How much compensation can you award?

Fraser Ritchie: Not a large amount—we can award £1,000. However, the sum can be much larger in another way. We can restrict or order the waiving of a fee, which could be a substantial amount. For example, in an executry, it might be a five-figure sum.

Michael Matheson: Could you explain how that would work?

Fraser Ritchie: If we consider it appropriate, we can order that there be no fee or that the fee be reduced by a half or some other amount. That would be of substantial benefit to the complainant.

Maureen Macmillan: Sometimes there will be a criminal prosecution. What is the relationship between your tribunal and any criminal prosecution, perhaps in the case of fraud?

John Barton: The criminal prosecution happens in two ways. Sometimes the solicitor is prosecuted first. In that event, there is a fast-track procedure under section 53(1)(b) of the Solicitors (Scotland) Act 1980. The solicitor's professional misconduct does not require to be established if the solicitor is convicted of an offence involving dishonesty or is sentenced to a term of imprisonment of more than two years. In such exceptional cases, the tribunal bypasses the question of professional misconduct and goes straight to consideration of the penalty. The only proviso is that, when the tribunal considers a penalty in such exceptional cases, it cannot impose a fine, although other remedies are available.

There are also cases where the solicitor for one reason or another has not gone before the criminal courts, but the matter has been reported to the tribunal by the Law Society in the form of a complaint. In such cases, the discipline tribunal will adjudicate in the matter and subsequently the solicitor or former solicitor might appear before a criminal court.

14:30

Maureen Macmillan: What happens when a solicitor appears before a criminal court but the case is dropped or he is found not guilty? Would you have to re-examine what the tribunal had done?

John Barton: There have been cases where that has happened. The court and the tribunal are entirely separate forums. The fact that a solicitor has been acquitted before the criminal court does not alter the question before the discipline tribunal, which is one of professional misconduct. Therefore, it would still be open to the tribunal to adjudicate on professional misconduct, irrespective of what has happened in the judicial proceedings.

The Convener: Presumably, civil proceedings might follow on from one of your findings.

Fraser Ritchie: I do not know if they would follow, but that could happen.

The Convener: An action for damages or something could follow on from your findings.

Donald Gorrie (Central Scotland) (LD): Your annual report and your notes have been helpful. However, to ensure that I have understood them and to allow you to get some facts on the record, I would like to ask a question about the volume of business. There is a decline in the volume of business between 1999 and 2000. Is that a general trend or does the level go up and down fairly randomly?

John Barton: The figures vary materially from year to year. In the year that you are talking about, the volume fell from 15 to 10 cases. However, in the 12 months to 21 October 2001, there were 13 complaints, which is the mean of the other two figures. The figure is generally in that region.

Donald Gorrie: On a lighter note, I noticed that the list of bad things includes a failure to respond to correspondence but not a delay in replying to correspondence.

John Barton: That is a matter of semantics. For our purposes, delay and failure are fairly close.

Donald Gorrie: I raise the issue simply because some of us find that the delays in responses from Government departments often constitute a failure to reply.

Fraser Ritchie: The discipline tribunal takes a strong view on solicitors who do not respond to letters from the Law Society. The Law Society has a role to play in the investigation of complaints; a solicitor who refuses to co-operate in that procedure frustrates the process and we treat that as a reportable item of misconduct.

Donald Gorrie: In general, how long does the complaint procedure take? Is yours an organisation about which people might legitimately grumble that the mills of God grind a bit too slowly?

Fraser Ritchie: Our procedure is laid down and, once the complaint is lodged, set periods have to pass to allow answers to be received and so on. Generally, the complaint is dealt with fairly quickly. I think that Mr Barton could give you figures.

John Barton: There is a practical limitation of six weeks—that is the absolute minimum—between a case being lodged with the tribunal and being heard. When the complaint is lodged, the solicitor is always given at least 14 days' notice of the complaint so that he can lodge answers. The procedural rules of the tribunal require parties to be given at least three weeks' notice of a hearing. Those two periods together require, effectively, the process to take a minimum of six weeks. In practice, the tribunal will deal with complaints in the same quarter as they are received or in the following quarter. The turnover is fairly smooth. When a decision is issued, the written findings are prepared and are normally issued to the parties within six weeks of the hearing.

Donald Gorrie: Presumably the majority of the cases come via the Law Society, which means that the lawyer will already have been doing battle on the issue, as it were.

Fraser Ritchie: The solicitor involved is usually well aware of the matter before it reaches us.

Donald Gorrie: You list complaints that are received directly from the public. Do they follow a slightly different time scale? Do some of the complaints reach you absolutely new or must the public approach the Law Society first?

Fraser Ritchie: The public can complain to us. A statutory procedure allows them to do that.

John Barton: Most people who are dissatisfied with solicitors go directly to the Law Society. Some members of the public are, for one reason or another, dissatisfied with the Law Society and approach the tribunal. Another category of people is unaware of the Law Society's provisions and comes straight to the tribunal. As the tribunal has no power of investigation, such cases are frequently remitted to the Law Society for investigation. That allows the Law Society to undertake investigations and, if it thinks fit, prepare a complaint, which is then presented to the discipline tribunal with suitable representation.

Donald Gorrie: On the cases that the Law Society deals with first, does it write to you and say, "We think that Mr Jones of Jones and Smith has been bad and you should do something about it," or does Mr Jones approach you and say, "The Law Society has been too hard on me"?

Fraser Ritchie: The Law Society lodges a complaint. The process is like a court process. The complaint must show a prima facie case of misconduct. We would not allow the complaint to proceed it if did not.

Donald Gorrie: Can an aggrieved solicitor who thinks that the Law Society has been too tough on

him appeal?

Fraser Ritchie: Yes. Once the process has been started with the lodging of the complaint, the solicitor involved is invited to lodge answers.

Donald Gorrie: The tribunal is a sort of appeal court. Do people appeal to the Court of Session against your decisions? Your annual report contains figures for appeals to the Court of Session. Are they appeals against your decisions?

Fraser Ritchie: Yes.

Donald Gorrie: You did not lose any appeals this year, so you have quite a good record.

The Convener: Is the evidence that is taken recorded?

Fraser Ritchie: Yes, in shorthand.

The Convener: I presume that there is a delay in publishing a decision while one waits for a possible appellate process.

Fraser Ritchie: Yes.

The Convener: Where are decisions published?

John Barton: Paragraph 14 of schedule 4 to the Solicitors (Scotland) Act 1980 merely directs that decisions shall be published. In practice, decisions are published 21 days after they have been issued to parties. That is the same number of days as are allowed for an appeal to be started. The tribunal publishes decisions, whether or not an appeal is made. That allows the tribunal to make it known that the decision in a case is being appealed against.

Decisions are published by lodging a full copy of the findings in the pressroom of the Court of Session. That acts as a press conference. That procedure has been followed for many years and has the Lord President's approval.

The Convener: Are decisions published in the *Journal of the Law Society of Scotland*?

John Barton: Yes. A synopsis of each decision is published in the *Journal*, too.

The Convener: Is that sufficient? I do not challenge the position.

Fraser Ritchie: We think that it is sufficient. You talked about the press. All the decisions are reported in some newspapers—*The Scotsman* and *The Herald* always report decisions. They are reported in abbreviated form in the *Journal*, and an annual report is also made—members have a copy of it. I am informed by the clerk to the tribunal that the annual report was introduced to help to pass on the word to the profession. All that information is readily available to anyone who wants to access it.

The Convener: Penalties may expire. If someone has a partial or limited practising certificate or is not allowed to practise for several years and the penalty expires, perhaps one should say that they have a clean sheet after that. Is any tracking done? That is not your role. Does the Law Society track solicitors after penalties expire?

John Barton: There are two distinct situations. One is that, if a solicitor is suspended from practice and the period of suspension, which is always finite, comes to an end, that solicitor is required under section 15 of the 1980 act to give a period of notice to the council of the Law Society that he seeks a practising certificate. The council of the Law Society has discretion in such circumstances on whether to give a practising certificate and, if so, under what conditions to give it. On some occasions, the council of the Law Society has declined to issue a previously suspended solicitor with a practising certificate.

When the tribunal imposes a restricted practising certificate on a solicitor, it invariably provides that, on the expiry of the minimum period of the restriction, the solicitor must return to the tribunal and satisfy it that he is fit to hold a full practising certificate. The tribunal considers such applications from time to time.

Lord James Douglas-Hamilton: What is the nature of the relationship of the tribunal to the Law Society, the Faculty of Advocates and the Scottish Conveyancing and Executry Services Board?

Fraser Ritchie: We have no connection with the last two. The Law Society funds us and provides some members.

Lord James Douglas-Hamilton: Do you have any comments on the complaints procedures that operate in the legal profession? Your views on best practice and areas of improvement would also be helpful to us.

Peter Rockwell (Scottish Solicitors Discipline Tribunal): We have no views on that.

Fraser Ritchie: We are aware of the concerns that complaints take some time to come through. Agents for solicitors are tackling that under article 6 of the European convention on human rights. They say that the trial is not fair because it has gone on too long. To consider the matter from another direction, I know that the ombudsman has been critical of the time that the Law Society takes. The Law Society will have to consider the matter from that direction.

Lord James Douglas-Hamilton: On complaints against lawyers by clients, is there a substantial case for clearer separation of the interests of the solicitor complained about and those of the complainer in the way in which the matter is handled from beginning to end?

Fraser Ritchie: I am not quite sure that I

understand the question. I know that some complainers feel that they never get an answer. In some cases, finding an answer is a genuine problem, because there may not be a remedy. However, where there is misconduct, it will be found out and prosecuted. The problems arise in the grey areas.

Donald Gorrie: As Mr Barton is about to retire, he is a good person to give us an unvarnished view of the procedure—not just that of the tribunal, but the Government aspect, about which we are about to hear, and that of the Law Society. A plain brown envelope would do if he does not want to comment now. If he has any constructive comments, that would be helpful.

John Barton: There is something exceptional about the legal profession, particularly financially. If one of our brethren goes down, that affects us all financially through the guarantee fund or professional indemnity. For that reason, the profession has a strong internal desire to seek and maintain the highest of standards. I have watched the tribunal over the years and I believe that it undoubtedly plays its part in ensuring that those members of the profession who fall below those standards are dealt with appropriately. The profession and the public are thereby protected.

Michael Matheson: I am not entirely sure whether "brethren" is a good term to use when we are considering these issues, given the public perception of how some of the matters are handled.

I note from your earlier remarks that you are funded by the Law Society. I return to my earlier comments on perception. Do you think that there is a need for the tribunal not to be funded by the Law Society, given that the vast majority of your complaints come from the Law Society?

14:45

Fraser Ritchie: The fact that the Law Society funds us does not mean that it can influence us. It will not stop paying because it does not like a decision; it has a statutory duty to fund us. Funding a judge in the Court of Session does not mean that that judge will not be able to issue justice. The Government has to pay for justice. The Law Society, as the regulatory body, has to pay for our function in the jurisdiction.

John Spencely: There are only two sources of funding—the profession or the state. The state has resolutely resisted the idea of funding the activities of the tribunal, with the exception of the lay members. The Scottish Executive pays the modest sum that I receive for attending tribunals, as happens for the other lay members of the tribunal.

Michael Matheson: I take on board what you are saying. The issue is one of perception more than anything; hence the inquiry. I take on board the fact that the Law Society has a legal responsibility for funding the tribunal. The question is whether that should continue. In the attempt to address some of the deeply held concerns about the system, we have to ask whether we should uncouple the tribunal and the Law Society and remove the tribunal's financial dependency on the Law Society. That is not because the Law Society will cut off funding if it disagrees with a decision; we are trying to address the perception that there might be a vested interest.

Fraser Ritchie: I do not think that any of my colleagues would mind whether funding came from the Law Society or another source. We are certainly not interfered with in doing our job and we would not expect the funding issue to arise in that context.

The Convener: I share Michael Matheson's view. I do not mean to impugn any of the individuals on the discipline tribunal, but it would be better if the funding was, as Michael Matheson said, uncoupled so that the perception as well as the fact would be that the money came from elsewhere.

John Spencely: The solicitor members of the tribunal attend the tribunal without any payment. Only the lay members are paid.

The Convener: I heard that. I was talking about the general funding, rather than salaries or payments.

I refer to something that you alluded to in your evidence. Members of the Law Society obviously serve on the tribunal, because solicitors have to be members of the Law Society. Are members of the council of the Law Society barred from sitting on the tribunal or can they sit on it?

Fraser Ritchie: Members of the council of the Law Society have sat on the tribunal in the past. Indeed, I was once a member of the council. However, I do not think that the Law Society would recommend that anyone on the council should sit on the tribunal. Any council member would be well advised to stay away from the tribunal. It is a long time since I was on the council, but under the European convention on human rights it would be unwise to have any connection between the two bodies.

The Convener: There is, in a sense, a self-denying ordinance.

Fraser Ritchie: It is recognised that the practice would lay the tribunal open to criticism.

John Barton: For the past 25 years, no sitting council member has served on the tribunal.

The Convener: You are a fount of information, Mr Barton. The tribunal will miss you. You frighten me with all your references to sections and schedules. I thank our witnesses very much.

I welcome Dr Alastair Brown, who is deputy head of policy at the Crown Office. I refer the committee to the Crown Office's submission, J1/01/34/3.

Lord James Douglas-Hamilton: I want to ask Dr Brown three questions. It may be simpler if I ask them all together. We understand that—

The Convener: Let me stop you there. It may be simpler for you, Lord James, but it may not be for Dr Brown. Would you ask one question and then move on to the others? I think that that would be easier.

Lord James Douglas-Hamilton: I will ask them one at a time.

Dr Alastair Brown (Crown Office): I was going to write them down, convener, but one at a time would be simpler.

Lord James Douglas-Hamilton: I was assuming a very high ability.

The Convener: I am sure that you were; I would not want to impugn Dr Brown's ability.

Dr Brown: That is the nicest thing that a parliamentary committee has ever said to me, convener.

The Convener: But it is all downhill from now on.

Lord James Douglas-Hamilton: We understand from the Lord Advocate's submission that procurators fiscal, assistant procurators fiscal and procurator fiscal deputes are subject to internal civil service regulations and to regulations by either the Law Society of Scotland or the Faculty of Advocates. The submission also mentions that complaints against members of the service are usually made to the service rather than to the professional bodies. It would be helpful if you could outline the process by which those complaints are considered and, in particular, if you could tell us how a complaint is defined.

Dr Brown: The definition of a complaint is quite wide; indeed, there is a move in the service to get away from the word "complaint". We are dealing with comment and information, usually from members of the public but sometimes from MSPs and official bodies, on the performance of the legally qualified members of the service. At present, we are reviewing the way in which we deal with complaints. An issue that has arisen is how we can take full account of all the comments that we receive—some of which are positive. It is appropriate that staff should get the credit for the positive as well as having the negative investigated.

In formal terms, the complaints procedure invites a member of the public who wishes to make a complaint to write to the relevant regional procurator fiscal so that we can introduce a degree of objectivity and ensure that there are no misunderstandings. The regional procurator fiscal will then ask for a report from the district procurator fiscal on what happened in his or her office. That fiscal will review the papers and get a report from the depute who was involved. I have sometimes heard that described as the person complained against investigating himself. It is not. It is that person being invited to explain themselves and to give their side of the story.

The district procurator fiscal will make a report to the regional procurator fiscal, who may discuss the matter with the district fiscal if anything is unclear. The regional fiscal will then reply to the complainant and send a copy of that reply to the district procurator.

In a minority of cases, the complainant will come straight to the Crown Office. Sometimes, the complainant will come to the Crown Office after the regional fiscal has dealt with the case. Once the matter comes to the Crown Office—usually in the form of a letter to the Lord Advocate, either from the individual or from an MSP who has been consulted—the matter will come to the policy group.

We will go through a procedure that is somewhat similar to that which the regional procurator fiscal has gone through which is to ask for a report. We know what the complainant says happened but we need to know what the fiscal says happened. We need to know the whole story. Once we have that report, we can take a view on the matter. In the case of a letter from an MSP, we will draft a letter for the Lord Advocate to send in reply. Otherwise, we will reply directly to the complainant.

That is the procedure. It does not describe the possible outcomes, but you asked about the procedure. Perhaps I should subside for the moment.

Lord James Douglas-Hamilton: When a complaint is made to the service, what is the process for determining whether it should also be referred to the Law Society or to the Faculty of Advocates?

Dr Brown: We have to remember that the complaints that come to the service tend to be of a different order from those with which the Law Society and, in due course, the discipline tribunal deal. In the case of a complaint to the discipline tribunal, the Law Society is dealing with professional misconduct. As I understand case law, that deals with the sort of conduct that most

solicitors would regard as professionally reprehensible. The kind of issues that come to the regional procurator fiscal or the Crown Office tend not to be of that order. Complaints tend to be about what you might call unsatisfactory performance.

The Convener: Can you give an example? That would be helpful.

Dr Brown: The complaints would concern matters such as insensitivity to a witness, not cross-examining properly and not making sure that a victim's interests are properly put before the court. Such matters are clearly of considerable concern to us, as they are about performance and the quality of the service that we provide. However, they do not amount to professional misconduct, cases of which would go the Law Society.

If we had a complaint that seemed to us to amount to professional misconduct, our internal process would kick in with employment law remedies. We would be thinking in terms of a warning, suspension or possibly dismissal of the person concerned.

The matter might have to be referred to the discipline tribunal; the Lord Advocate has the power to do that under the Solicitors (Scotland) Act 1980. However, as far as I can discover, that has never been done. The discipline tribunal has confirmed that. Anything I said about that procedure would therefore be speculative. The Lord Advocate would simply write a formal letter, probably to the clerk to the tribunal, referring the matter. We might well contact the Law Society at the same time.

Lord James Douglas-Hamilton: If a complaint to the service could be referred to the Law Society or the Faculty of Advocates, is it usually referred automatically? If not, is the relevant professional body at least notified of the existence of the complaint?

Dr Brown: As far as I can discover, there has been no such reference. I could therefore not say that such a complaint is usually referred.

We sometimes receive letters of complaint that allege serious misconduct on the part of members of the procurator fiscal service. We consider those carefully. In my experience, we have not found that the alleged misconduct happened. If we found that the misconduct had happened, we would obviously have to treat it very seriously as an employing organisation and we might well refer it.

Lord James Douglas-Hamilton: Would complaints cover a fiscal who has not called an extra witness in a case and has failed to obtain a conviction as a result? Would they also cover cases where the fiscal has not obtained a conviction or has not taken the case to trial, possibly because of insufficient evidence or for reasons that the Crown Office does not feel it necessary to divulge?

Dr Brown: We get complaints about almost every kind of decision that people take. For example, we get complaints that we have not prosecuted people who should have been prosecuted and that we have prosecuted people who should not have been prosecuted. We get complaints about the way in which people go about their jobs in every particular. It is sometimes said that the fiscal has failed to call a witness who could or should have been called; sometimes there is a complaint that the fiscal has called a witness who should not have been called. Everything that one does in what is after all a highly adversarial situation is capable of upsetting someone.

Lord James Douglas-Hamilton: Can you tell us roughly how many complaints are received in a year and roughly what percentage have some substance?

15:00

Dr Brown: The first part of that question is relatively easy to answer, as I had a check made in the Lord Advocate's private office. However, the figures relate only to the number of complaints that come to the Crown Office; I am not in a position to give you figures on the complaints that go to regional fiscals.

In the 11 and a half months since 1 January, 619 letters have been received in the private office, which are more or less equally split between letters from MSPs and letters from members of the public to the Lord Advocate. The letters from MSPs are by no means all complaints. I would guess that perhaps half of them raise a matter of concern to a constituent that could be described at least as a potential complaint. The other half relate to a wide range of other matters concerning the Lord Advocate's function. Probably the majority of the 300 or so letters from members of the public that have been dealt with at an official level are complaints of one sort or another.

It is much more difficult to work out the percentage of complaints that have substance. We might find that, although the complaint is about one matter, it raises a concern about something else. The complaint might be about a decision that has been taken or the way in which something has been done. When we investigate the matter, we might find that the decision was probably right or at least not one that we would disagree with. However, the way in which it was handled and the sensitivity with which it was communicated might have left something to be desired, if that is what a

complaint with substance is—there are too many of those. A small proportion might turn out to concern matters in which we think that the fiscal was plain wrong. Only a very few will result in an instruction to change the decision. That is partly because, by the time a complaint is made, it is too late. For example, a marking of no proceedings might have been intimated to the accused, in which case the matter is past praying for.

Lord James Douglas-Hamilton: I have another brief question.

The Convener: You seem to be leaping on to some of Donald Gorrie's questions, but go ahead.

Lord James Douglas-Hamilton: In a case of great complexity or immense sensitivity, would the fiscal consult either a senior fiscal or an advocate depute?

Dr Brown: In some categories of case, such as rape, the decision will always be taken at a high level on the procurator fiscal's recommendation. In a case that is in any way difficult, we expect the fiscal to take a view on what consultation is necessary. That is more likely to happen with someone who has been in the service for only a couple of years than with someone who has been in it for 15 or 20 years.

Decision making—particularly in the larger places—involves people sitting around a table and informally discussing cases. A case that was recognised as being sensitive or difficult is taken to a senior depute, an assistant fiscal or the fiscal for discussion. However, in my experience, that will not always prevent a complaint from being made; there have been complaints about decisions that I have taken in consultation with very senior colleagues.

Donald Gorrie: You helpfully gave us the figure of 619 letters that were received centrally. You obviously do not know the figures for complaints to regional fiscals. Are they likely to be more numerous in total?

Dr Brown: I speak from my experience as a senior depute in the Edinburgh office three years ago. This is a subjective impression, but I would say that the rate of letters from individuals to the Crown Office—about 20 a month—is probably about the same as the rate going to a regional office. However, I could be very far out on that. In reviewing the system for dealing with complaints, we will consider making such figures and the information that they represent available centrally so that we can spot good practice and bad practice, and disseminate one and try to eliminate the other.

Donald Gorrie: That would be helpful and important. If I lived in Oban and were dissatisfied with the conduct of a procurator fiscal, would I write in to the local chief of the prosecution service in Argyll in the first instance or would I complain to Edinburgh?

Dr Brown: You would write to the regional procurator fiscal who, in the case of Oban, is based in Paisley. You could write direct to the Crown Office. We would prefer you to write to the regional procurator fiscal because they are the line manager for the fiscal in Oban and they deal with the performance appraisal of the person about whom you are complaining. I did not mention earlier what happens as a result of complaints. Most frequently, the information that that gives us about the performance of the lawyer involved is reflected in the annual performance appraisal and the intermediate, six-monthly performance appraisal. In the case of a district fiscal, the regional fiscal really needs to know about that so that he or she can take it fully into account.

Donald Gorrie: If a more serious complaint were made, would the chief person in Paisley pass it on to Edinburgh for action or does he have complete jurisdiction?

Dr Brown: The way in which we operate as an employing organisation is that the line manager, who will be the regional fiscal, makes an initial investigation. If he or she considers that there is a matter requiring a disciplinary procedure, he or she makes a report to the head of the management unit at the Crown Office and the matter is taken forward by a separate investigation from the Crown Office and an internal disciplinary process if necessary. As interim fiscal in a district, I started off that procedure on one occasion, so I can speak with some certainty about how it happens.

Donald Gorrie: Are there more complaints about over-zealousness by procurator fiscals, for example prosecuting people they should not prosecute, or under-zealousness, for example not prosecuting people they should prosecute?

Dr Brown: There are more complaints about how a prosecution was conducted. There are three categories of complaints. First, there are complaints about the fact that we have prosecuted somebody. Those complaints usually come from a person who has been prosecuted, typically if they have been acquitted at trial. There is an understandable but erroneous belief that if a person got off they should not have been prosecuted in the first place. That does not necessarily follow. Secondly, there are complaints about cases that we have not prosecuted. Those complaints often come from victims or victims' organisations. The committee is well aware of the issues to do with giving reasons for decisions. That whole area lies at the root of many of those complaints. Another body of complaints is about the way in which somebody has gone about a

prosecution. I guess that that category is the largest of the three.

Donald Gorrie: That is very helpful.

The Convener: Are any documents or publications available at sheriff or district courts that tell people where to complain?

Dr Brown: In the entrance to every procurator fiscal's office there is or ought to be a notice prominently posted about the complaints procedure. It tells people what to do. The notice is posted at the entrance to each office because everybody who is a Crown witness—which includes most of those who are likely to want to complain—goes into the procurator fiscal's office to claim their expenses and should therefore see it.

The Convener: Do you think that the notice should be posted in corridors and witness rooms in the courts?

Dr Brown: I have not thought about that and I do not know whether I have a view on it. In many places the fiscal's office is in the court building. Where the fiscal's office is not in the court building, there is usually a fiscal's cashier's office in the court building. The notice is posted there. The information is available, although I do not know whether it is sufficiently widely available. We need to consider that issue as part of our review of the way in which we handle these matters.

The Convener: I do not think that the information is sufficiently widely available. From speaking to people, I know that people do not know where to complain or what information they are entitled to be informed of as witnesses. Many people come away from the court not knowing what has happened in a case, perhaps because of mumbling in the well of the court. People need to know whom they can contact and information needs to be publicised in places where people will see it casually, without having to look for it very hard.

Dr Brown: I am grateful for that information, which I will feed into the review process. You said that sometimes people are unaware of what has happened in the court. There should not be mumbling in the well of the court. If there is and people cannot hear what is being said, I would like to think that it is possible for them to get the information concerned. It is difficult for the depute prosecuting to communicate that information when he or she is on his or her feet in court. The victim liaison office that is being piloted and that will shortly be rolled out across the country may help to some extent in that regard.

Maureen Macmillan: I refer you to the last paragraph of the Lord Advocate's letter, in which he refers to complaints about professional conduct. He states:

> "In such a case, I recognise and support the right and duty of the professional bodies to take cognisance of the complaint and deal with it separately from the action which I would undoubtedly take myself if such a complaint were made and made out. The Law Society of Scotland and the Dean of Faculty have a wide discretion in these matters and I hope that in most cases they would regard the action taken by me as sufficient to deal with the matter."

From what you have said, it seems that the Law Society does not get involved in such cases.

Dr Brown: I was asked about references from the Crown Office to the Law Society. There is a category of cases in which complaints about procurators fiscal are made directly to the Law Society. There are few cases of that sort, but they do occur. As the Lord Advocate says in his letter, very often those complaints relate to issues that are outside the jurisdiction of the Law Society—typically, they relate to decisions about whether or not to prosecute, which are matters solely for the Lord Advocate.

Occasionally—I can think of one example of this in the past three or four years—a complaint is made about something that would, if it were proved, amount to professional misconduct. For example, in the conduct of a prosecution someone may have set out deliberately to mislead a court. If such a complaint were made—in the case that I am thinking about, it was clear that the complaint was not substantiated—we as an employing organisation would have to consider it very seriously.

My personal view is that that would be a species of misconduct that would warrant dismissal. I must emphasise that that is a personal view and does not prejudge any particular case. In those circumstances the Law Society would be entitled to proceed to the discipline tribunal and I would not be surprised if it did. If we sacked such a person—this is hypothetical—they would still have a practising certificate although, as a solicitor, I would not consider someone who has been found to have misled a court to be a fit and proper person to hold a practising certificate.

15:15

Maureen Macmillan: We understand that the professional bodies have an obligation to investigate a complaint, but can the dean of the Faculty of Advocates or the Law Society use their discretion to pass it back to the Lord Advocate?

Dr Brown: If we were dealing with a case in which the person complained against was a member of the service, the Law Society could take the view that it was properly a matter for the Crown Office as employers, rather than for the society as the regulators. I have no idea how the

Law Society would go about that and I cannot speak for it.

It is worth saying that there is a small proportion of cases—perhaps three a year—where the Law Society identifies criminal misconduct by solicitors who are not employed by us. It investigates those cases and reports them to us for consideration for prosecution.

Maureen Macmillan: I suppose it is academic because there are so few cases where you would need to draw the line between where it is left to the Lord Advocate to investigate and where it is left to the Law Society to do so. What procedures does the Lord Advocate use and how are they publicised?

Dr Brown: The procedure that the Lord Advocate uses is that of an employer. There is a well-established body of employment law on how to deal with disciplinary matters. It is not very different in the civil service. The cut-off point was set out in Sharp v Council of the Law Society of Scotland, in which the Lord President said:

"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct."

If the conduct of a procurator fiscal or depute fell within that category, we would expect the Law Society to pursue the matter. Fortunately, it has not happened so far.

Maureen Macmillan: So it is academic. Do most cases involve employment law?

Dr Brown: Yes.

Maureen Macmillan: All the constraints of employment law have to be observed, so the complainant has a right to be heard and there is a right to appeal against the Lord Advocate's decision.

Dr Brown: The Lord Advocate does not take the decision on the employment matter. The Lord Advocate has ministerial responsibility for the civil servants in the department. In common with other civil service departments, there is an internal disciplinary procedure, which involves the elements that Maureen Macmillan referred to, including a right of appeal to the head of the department, who is the Crown Agent. That is subject to review in an industrial tribunal if the person is aggrieved and considers that they have a right of action in that tribunal. That happens sometimes.

Maureen Macmillan: Sanctions range from dismissal to what?

Dr Brown: Dismissal is the ultimate sanction. At the other end, information is taken into consideration in the performance appraisal. We have a carefully worked out system of performance appraisals, which involves an intermediate appraisal halfway through the year and, towards the end of the year—about April—a detailed appraisal of the performance of everyone in the service against set criteria.

In writing appraisal reports, as a line manager, and as one who is reported on, it is my practice—as it is of everybody else I know who is involved—to keep a record of information about performance. That information is received from all sorts of sources. I have a file in which I have copies of letters of praise and letters of complaint about people who are under my management.

Those letters are taken into consideration in determining how people have performed. That determination informs a box-mark grading. The box marking is relevant in the determination of how much of a pay increase, if any, people are to get during the year. Someone who is complained about regularly and who is found to have performed poorly, but not as yet in a way that involves misconduct that might lead to a disciplinary process, will find that they get a poor box marking. The amount of money that they get at the end of the year will be less than it would have been if they had performed properly. There is a clear financial incentive to do the job well.

Maureen Macmillan: Would the box marking also affect their postings? Would they be sent to Outer Mongolia?

Dr Brown: I have friends in Outer Mongolia who tell me that it is a nice place. I am not conscious of someone being sent somewhere as a disciplinary posting. We do not have a Siberia in the fiscal service. Sometimes, someone might need to be moved into a new office environment.

Maureen Macmillan: Perhaps they might need to be given more supervision.

Dr Brown: Yes, it would be that sort of thing.

Maureen Macmillan: What sort of compensation do complainants receive if a case is brought?

Dr Brown: I am not aware of compensation having been paid.

Maureen Macmillan: What about redress of some kind?

Dr Brown: The redress would be an apology. It is possible to get into the detail of issues such as what duties are owed. We need to keep in mind that the procurator fiscal is the prosecutor in the public interest. The relationship that the procurator fiscal has with the victim is not the same as the relationship that a solicitor has with his or her client. The duties that flow from that relationship

are different. If the procurator fiscal has done something that is unlawful and somebody has suffered by that, under the law payments are made.

The Convener: Are you talking about a civil action, or a threat of civil action?

Dr Brown: Yes. We tend to settle such cases in advance, once we see that we are in that position. It happens occasionally. This summer, a case was reported in *Green's Weekly Digest* about an arrest that went wrong. Someone was deprived of his liberty when he should not have been. I cannot remember the name of the case, but a payment was made in that case.

In the case of unsatisfactory performance, a payment would not be made to a member of the public. That is because we do not owe that kind of duty to individual members of the public. If we did, and we had the kind of duty to victims that gave rise to a potential liability and damages, that would make a dramatic difference to the constitutional position of the prosecutor in Scotland.

If that were to be the case, it would have to be worked out very carefully as it would mean that we would be constrained in deciding whether we could mark a case as "No proceedings" or whether we could accept a plea to a reduced charge. I appreciate that people suggest that we should be constrained in that way. However, that is not the way that the system is set up at present. If there were to be a change in that respect, it would have to be thought through carefully.

The Convener: Are you saying that routes to compensation exist in the civil courts, but that people are otherwise given an apology?

Dr Brown: Yes.

The Convener: Is the apology ever a personal apology?

Dr Brown: Yes. The obvious example of that is the Chhokar case. That case is exceptional in all sorts of ways. There was a personal apology in that case. On occasions, I have offered apologies to people, usually in cases where someone in my staff has been much less sensitive than I would have liked them to be.

The Convener: You may not be able to answer this, but how have the complainants felt about that? Has that been sufficient?

Dr Brown: In the cases with which I have been concerned, it has come as a relief to the complainants that somebody has been prepared to put their head above the parapet and say sorry. In some of those cases, people have had to say sorry for the criminal justice system as a whole.

I remember going into a witness room in Edinburgh High Court when a child abuse case had been adjourned for the third or fourth time. The case involved child abuse that went way back. The victims were now adults and had been at the High Court several times. I was the High Court legal manager. I took the view that the Crown played only a limited part in that adjournment—we had opposed it—but, as I was representing the system, I apologised. Although the witnesses were unhappy about the adjournment, they were grateful and relieved that somebody had been prepared to say, "Sorry, it shouldn't happen like this, but it has done. We will try to ensure that it doesn't happen again."

The Convener: If members have no further questions, I thank Dr Brown very much.

I apologise for the temperature in here. Apart from Michael Matheson, who is young, fit and healthy, the rest of us are getting colder by the minute. Meeting in the chamber is marginally better than meeting in the Hub—which we could have been in—but we will need to do something about the heating. Some of us are beginning to feel the cold a bit much.

I welcome our witnesses from the Scottish Executive justice department: Valerie Macniven, who is the head of civil law in the access to justice and international group, David Stewart, who is the head of the judicial appointments and finance division of the courts group, and Mike West, from the civil law division. I refer members to the justice department's submission.

Lord James Douglas-Hamilton: Will our colleagues outline the Scottish Executive's role in the regulation of the legal profession? Are there plans to change that role in any way?

Valerie Macniven (Scottish Executive Justice Department): If I may introduce the issue briefly, the Scottish Executive performs three functions in its role of advising Scottish ministers. First, the Executive oversees the general framework of the legislation in which the whole procedure takes place. Secondly, the Executive has some functions in relation to the making of appointments. For example, appointments to the role of the Scottish legal services ombudsman are made by the Executive. Thirdly, the Executive has a role in the funding and general support of the offices of the Scottish legal services ombudsman and the Scottish Conveyancing and Executry Services Board.

To answer the second part of your question, part of the Executive's role is to keep the whole framework under review.

Lord James Douglas-Hamilton: Does the Executive have concerns about the duality of the role of the bodies that represent the legal profession? Those bodies are charged with the promotion both of the interests of the profession

and of the interests of the public. In short, is there a case for a greater separation of interests?

Mike West (Scottish Executive Justice Department): The duality of the role of the Law Society of Scotland was set out in statute in the Solicitors (Scotland) Act 1980. A royal commission considered the issues relating to the duality of its role in the run-up to the 1980 legislation. The view is that any conflict is more apparent than actual and that, in practice, the duality that is imposed on the role of the society enhances that role and allows the public to benefit from a different and wider approach by the society.

15:30

Lord James Douglas-Hamilton: Could you say a little more about the possibility of a greater separation of interests? I am thinking particularly about the complaints that are made. Allow me to give an example of what I mean. A member of the council considering complaints in the Law Society can act on behalf of the solicitor complained against, although the council must form a view on what to do with the complaint. Do you think that there is a case for a stronger, more decisive and more certain separation of interests?

Valerie Macniven: Some of the points that we are making this afternoon are about the facts of the system. It is a little more difficult for us to offer a view on the merits of a separation of interests. I do not know whether you intend to invite ministers back at a later stage to comment on the wider policy aspects.

There are a number of different roles, for which various layers of the complaints process are responsible. The role that has been held most firmly by ministers and the Executive has been the overseeing of the way in which the Law Society has handled the process. A number of years ago, a lay observer and, later, a Scottish legal services ombudsman were appointed to look at a range of procedures that the Law Society uses in the handling of complaints, to ensure that the system is as fair as it can be to all parties, including the complainer.

The Convener: I am trying to follow up cautiously what you are saying. I presume that the Executive is satisfied with the current complaints system that is operated by the Law Society. I hear what you say about perception, and we understand that. Are you content with the situation as it is?

Valerie Macniven: Mr West may have some figures that show—to the extent that figures are a barometer of effectiveness—that, as well as the cases that are taken to the Law Society, there are cases that are then reported to the ombudsman. People also write to Scottish ministers. Mr West will be able to give us some sense of the figures that have existed over a run of years. Whether or not they are a barometer of satisfaction is another matter.

Mike West: We keep an overview of how well the system appears to be operating from year to year. There are a number of litmus tests for information that is available, which we set out in our written evidence to the committee. The first test is the number of complaints that the Law Society receives each year. The second test is the number of complaints that the ombudsman receives each year, and her findings on the quality of consideration of the complaints. The third test is the volume of correspondence that the Executive receives from people who are dissatisfied with their solicitors; in the past few years, there has been an average of about 100 letters a year.

The 100 letters are one indicator of the state of public satisfaction or dissatisfaction with the legal professions. The other main barometer is the annual report of the Scottish legal services ombudsman, which is studied with care. It provides a good indication of how well self-regulation is working.

The Convener: I do not know whether I am any further forward.

Valerie Macniven: The number of such complaints and follow-ups has not shown any increase. A view can be taken on whether 100 is a large or small number, but over many years, the number of complaints has remained fairly static. However we might feel about how the system is working, the figures do not indicate that the situation is getting much better or much worse.

Maureen Macmillan: We have probably heard from you all that you are going to say about the complaints procedure. We will now consider quality assurance and best practice.

Have the bodies that represent the legal profession adopted a best-practice approach in ensuring the provision of high-quality legal advice and representation? Your submission states that the admissions procedures—the training that solicitors go through and so on—are of high quality. It also states that there is no performance appraisal system later on in the profession. Will you comment on both those aspects?

Mike West: We certainly think that quality assurance is important. The Scottish legal services ombudsman, in her most recent report, made a recommendation to the society about the value of quality assurance, and the society, in its response, indicated that it had initiated measures to introduce quality assurance in relation to its complaints procedures.

Maureen Macmillan: Apart from quality

assurance in the complaints procedures, how can general quality assurance for the members of the profession be monitored? Is it up to the public to decide whether a solicitor is good or bad?

Valerie Macniven: We are aware that the Law Society is reviewing some of the arrangements for the training of solicitors prior to qualification. We also know that the society has a system of continuing professional development, in which solicitors are required to take part to secure continued registration. As Mr West mentioned, the Law Society is considering several quality assurance measures, which it would be fair to say are about not only complaints procedures but the delivery of legal services.

Maureen Macmillan: Do you have an opinion on that?

Valerie Macniven: It is a matter for the interchange of the market. We are concerned about the quality of the systems that support admission and the continuing delivery of services. The existing system covers issues of misconduct and inadequate professional services, which were introduced as criteria for complaints a number of years ago. The role of the framework that I described is to protect the public interest.

I fall back again on the figures that we mentioned. The figures on correspondence to Scottish ministers, the Law Society or the ombudsman do not suggest that there has been a serious escalation of concern.

Maureen Macmillan: If there was more professional support for solicitors, in the shape of a slightly better system, the Executive would not receive 100 letters a year. Solicitors have CPD courses, but nobody asks those who attend the courses what they learn. There is possibly room for improvement.

Michael Matheson: Are the 100 letters that the Executive receives complaints about the system?

Mike West: The correspondence tends to consist of complaints against solicitors. The letters are not just individual complaints; there can be complaints about the system as well. By and large, the majority of the correspondence that we receive is from individuals who are complaining about their solicitor. We give them information on the appropriate mechanisms to follow.

Michael Matheson: I am not sure that your reliance on the 100-letter theory holds much water. It does not seem reliable to claim—on the basis that, on average, you receive 100 letters—that the number of concerns about the system or the way in which it is operating does not appear to be escalating. I would have thought that you would want to look at the system more systematically by getting behind the letters and examining any trends in the complaints. If you receive a persistent complaint, year in, year out, that will surely shed more light on where the problems might be. Do you look behind the letters?

Mike West: We study the correspondence that we receive, but it is not usually possible to discern trends. The complainants are concerned about the treatment that they have received from their solicitors. We do our best to point complainants in the right direction and to explain that Scottish ministers have no locus when it comes to complaints handling. It is not really possible to identify trends from the correspondence.

Michael Matheson: From a legislative point of view, you are responsible for the system that has been put in place. On the issue of quality assurance, I am not clear about what continuing monitoring process you undertake to ensure that the system is working adequately.

Mike West: The monitoring that we do consists of several tests. The Scottish legal services ombudsman is the statutory postholder who deals with the professional bodies and the people who are dissatisfied with complaints. We do not have a direct, hands-on role. The information that we receive about the efficacy of the system comes to us second hand. In our evidence, we referred to research exercises by the Executive and the Scottish Consumer Council. However, to assess how the system is progressing we must take a wide view and use all the information that comes into the department.

Valerie Macniven: I reinforce Mr West's point about the Scottish legal services ombudsman. The ombudsman has an office and staff, so there is substantial activity. Overseeing the process is the essence of the ombudsman's existence.

The Convener: We will come on to the legal services ombudsman. I ask Maureen Macmillan to follow through on the point about ministerial directions that we have been pursuing.

Maureen Macmillan: There is something that we want to clear up with you. In paragraph 18 of your submission, you refer to the recommendation of the ombudsman on a ministerial power to issue directions

"to the professional organisations with regard to the process by which complaints are determined and the role of lay people in that process."

That recommendation, which was made in 1996 and again in 1998, was not accepted because, as you state,

"To have accepted that recommendation would have meant that the whole complaints procedure would have had to be put on a statutory footing so that there would be a proper framework on which to impose such a requirement."

What would be the disadvantage in placing the

complaints procedure on a statutory footing?

Mike West: If the procedure was placed in a statutory framework, it would be much more difficult for the professional bodies to deal with complaints with any degree of discretion. They might feel unduly bound by the terms of the statute. The statute might form a constraint on complaints handling.

Maureen Macmillan: Can you give examples of what you mean about a lack of flexibility, and how that would work against the public interest?

15:45

Valerie Macniven: There might be an issue about the balance between self-regulation and a totally statutory framework. Nothing is ever ruled out, but a statutory framework would be a significant change for the legal profession, and indeed for the professional world as a whole. There is a question of how many minor changes could be made without changing the essence of the current approach, which makes use of self-regulation, the ability to feed back into the system and, as we talked about earlier, the ability to feed back into continuous professional development. Such a framework was considered, but such a move would represent a relatively large shift in the approach from self-regulation to statutory control and oversight.

The Convener: I think that the public would quite like to have a statutory foundation to the complaints procedure and to have lay people involved in it. The system, which has been operating for 20-odd years, is old. Further, the public would like an ombudsman who can enforce changes in procedures. I understand that, at the moment, the ombudsman can only recommend changes in procedures. Is that correct?

Valerie Macniven: Yes.

The Convener: We are concerned about the procedures, not the substance of complaints; that is another issue. Why should not the ombudsman or ombudswoman be able to say that they require the changes in procedures now? The role of ombudsman or ombudswoman could be toughened up.

Mike West: The experience to date is that recommendations that have been made in the ombudsman's annual report have been considered carefully by the professional bodies. In 1998, the ombudsman surveyed what had happened to his recommendations in recent years and worked out that he had made 27 or 28 recommendations, of which the professional bodies had accepted and implemented 22 or 23.

From that experience, it seems that there is good interaction. The professional bodies are receptive to what the ombudsman says. This year, the Law Society of Scotland's response to the ombudsman's recommendations is reactive, appreciates the points that have been made, takes them seriously and accepts them. In other words, the response on behalf of the professional body is self-critical.

The Convener: I understand that, but the public would like to know that somebody out there is fighting for them. We are back to the perceptions about the Law Society of Scotland being hand in glove with complaints procedures. I am not saying that it is; that is just the perception. Would not it be better if the legal services ombudsman's hand was strengthened, so that he or she could say, "These are the changes in procedures; they are mandatory; this is what I want to be done"? Would not people feel more secure if they felt that they had something like a campaigner on their behalf?

Mike West: Our research in 2000 took account of the views of complainers. The majority of the complainers in the survey said that they would like stronger powers for the ombudsman. For example, they thought that the ombudsman should be able to consider the merits of decisions as well as the way in which complaints are handled. We are aware of the public support for greater powers for the ombudsman.

The Convener: What is the Executive's response to that support?

Mike West: That is for ministers rather than officials to say.

Valerie Macniven: At the end of the inquiry, the committee will no doubt make recommendations. Ministers will want to take the committee's views into account along with the evidence that has come to us in the relatively recent past and the annual input from the ombudsman.

The Convener: You cannot speak for ministers, but what do you feel about the matter? Is giving further powers to the ombudsman a reasonable direction for us to consider?

Mike West: It is helpful to consider the 1999 research. The ombudsman at the time considered the research and criticised it slightly because the findings were a little distorted. I think that the criticism was in the "Annual Report of the Scottish Legal Services Ombudsman 1999".

The Convener: Perhaps we can leave that issue because it will be interesting to develop it in the evidence-taking session with the ombudsman.

Donald Gorrie: I want to continue questioning on some of the same issues. The witnesses might feel that it is not within their scope to answer some of the questions.

The submission contains various possible

developments and alternatives to the regulating system, which include an independent complaints body. The paper sets out a few of the problems with that, such as the cost and the fact that it might be no better than the present system. Would an independent complaints body be more efficient, or would it simply be seen as a better arrangement by the public? There are perception and reality. Would an independent body be better in reality and in perception?

Mike West: I do not doubt that the public perception would be more favourable. A lot of the correspondence that we receive mentions solicitors' lack of independence and the fact that they seem to close ranks around complaints. The public perception is that, because solicitors look after their interests and are soft on complaints, an independent body is desirable. The proposal must be considered carefully because of the expenditure implications and the uncertainty about whether it would be more efficient in practice than the existing system.

England and Wales have the experience of the Office for the Supervision of Solicitors, which is an arm's-length body that was set up by the Law Society of England and Wales. In two or three years, the office developed a large backlog of complaints—the number reached around 17,000 in 1999. Although I am sure that an independent body would be well received by the public, caution is required because it might be expensive.

Donald Gorrie: Paragraph 20 of your submission contains the interesting suggestion that the ombudsman could monitor the self-regulating system. The paragraph states that that

"would however shift the SLSO's role from arbiter of complaints handling towards that of a quality auditor for the complaints procedures."

Why should not the ombudsman do both? That is an interesting idea and is worth a look at least. We could keep the self-regulating system, but the independent agency would have a much tighter grip on how well the system was working. That seems to me to be worth pursuing, but your submission seems slightly unenthusiastic about such an approach.

Mike West: We have some doubts about the quality audit suggestion, from the point of view that the role of the professional bodies might be diminished if such an approach were taken. The principle of self-regulation, as we understand it, is that the professional bodies conduct the exercises themselves. However, the outcome of quality audit could be beneficial. The question is whether you want to undermine self-regulation or whether you want to erode it slightly and expand the powers of the ombudsman. Which approach would best serve the public interest?

Donald Gorrie: I would not have thought that the proposal necessarily removes the independence of the legal profession or its right to run its own thing. An outside body might say that each complaint takes at least a year and that that is far too long or that certain ways of dealing with complaints are not working. I do not understand why self-regulation should mean total independence from the rest of the world, which seems to be what you are suggesting.

Mike West: I agree with that comment. We are aware of a number of models, such as the system in New South Wales in Australia, where the ombudsman has an enhanced role. The ombudsman acts as the gatekeeper for complaints against the legal professions, distributing complaints to the professions, monitoring the process and intervening if a complaint is dealt with unsatisfactorily. We are also aware of adjustments that could be made to the system.

Donald Gorrie: A mid-winter trip to Australia, instead of a trip to Peterhead prison, would be attractive.

The Convener: Knowing the committee, I fear that we would have a video link.

I will move on briskly to the topic of compensation. Do you consider that there is a need for a thorough review of the penalties and levels of compensation that can be imposed when a complaint is upheld?

Mike West: The brief answer is that we think that there is a case for uprating the levels of compensation. They were fixed in statute in about 1988 and have not been uprated since. There is a good case for legislating for a power to vary the levels by order, so that they could be reviewed and increased periodically, particularly in view of inflation.

The Convener: Should the level of compensation take into account loss to clients as a result of distress and suffering, as happens in civil cases?

Mike West: The compensation levels were designed to complement the compensation that might be available from the courts in cases of negligence. They were designed as an expression of sympathy towards the complainer and as an acknowledgement that their complaint had been badly or inappropriately dealt with.

The Convener: Are you saying that that happens already?

Mike West: Yes.

The Convener: Should the costs that a complainant has incurred in pursuing their complaint be reimbursed separately from the other payments made?

Mike West: Yes.

The Convener: As might be the case in a court action.

Valerie Macniven: The costs for handling complaints have not been a particularly huge feature of the representations that we have received. Part of the range of possible penalties is having work done again, where work has been inadequate under the inadequate professional services category. There are a number of other ways to obtain redress, including having the fee waived. Compensation is awarded for the inconvenience experienced.

16:00

The Convener: That might involve phone calls—in some cases, long-distance phone calls. It is so cold that I have in mind someone complaining from outer Mongolia. The cost of hanging on the phone is considerable. Are people reimbursed for that? Do you think they should be?

Valerie Macniven: That has not been a major feature of the complaints that have come through the system. I am not denying that there is an issue with what you describe, but it has not been a major issue in the representations that we have received.

Michael Matheson: I want to turn to lay representation in relation to the disciplinary process. I am not sure whether you heard the earlier evidence from the Scottish Solicitors Discipline Tribunal. Paragraph 1 of schedule 4 to the Solicitors (Scotland) Act 1980, as amended, deals with the appointment of lay members. I understand that lay members are appointed by the Lord President. The representatives of the tribunal were unable to say how the list of names of people who could be put forward for lay membership was collected. Can you enlighten us about the process?

Mike West: The justice department conducts a targeted trawl of professional bodies and other interested organisations, inviting candidates to be nominated for the tribunal. Once the names of the candidates have been received from the professional bodies, they are all interviewed by a departmental official and a representative of the Scottish Consumer Council. The results of the interviews and the assessment are referred to ministers for clearance. The final stage is for ministers to write to the Lord President, recommending the successful candidates for appointment. The Lord President then considers the candidates who have been suggested and makes the appointments.

Michael Matheson: To return to your description of the beginning of that process, what is a "targeted trawl"?

Mike West: The targeted trawl involves identifying a list of non-legal professional bodies with members who have experience relevant to the work of the tribunals. We try to bring in as wide a range as possible of professional experience to the tribunals. That includes the building profession, the medical profession and actuaries. The candidates nominated are then sifted and interviewed.

Michael Matheson: Who decides which bodies should be targeted in the first place?

Mike West: That is decided by the justice department. Dialogue goes on within the department about the range of suitable bodies and about which bodies seem most likely to provide the most suitable potential candidates.

Michael Matheson: Let us say, hypothetically, that a given person is a suitable candidate, based on their background, but they do not happen to be a member of one of those targeted organisations. Would that prohibit that person from applying to be a lay member of the tribunal?

Mike West: That is a good question and raises issues highlighted in the Nolan report. Are you asking whether the appointments should be advertised?

The Convener: Yes.

Mike West: The view that has been taken to date is that advertisement of appointments to tribunals would be disproportionately expensive. Substantial costs and work would be involved in sifting the applications received.

Michael Matheson: Are you saying that the cost of advertising appointments would be disproportionate?

Mike West: Yes—the cost of the whole process would be disproportionate. It is relevant to point out that the lay members of the tribunal of the Faculty of Advocates are rarely called on. They may deal with only one or two cases during their four-year term of appointment. There is an issue of proportion. I have described the current method of operating.

Michael Matheson: If you had to advertise appointments publicly, would you not be able to scrutinise applicants to see whether they were appropriate? You may regard the costs of such a procedure as disproportionate, but how would you feel if it were introduced?

Mike West: You are asking for a personal view. I think that it would be possible to advertise appointments publicly and that that would produce good results. Such an approach would be entirely consistent with the recommendations of the Nolan committee.

The Convener: Michael Matheson may want to pursue that interesting issue with the minister.

Michael Matheson: In the final paragraph of your submission you recognise that

"It is necessary to review these processes regularly to ensure that self-regulation is working in the public interest and attracts public confidence".

There is public concern about the way in which the system operates at present. Do you think that it is working in the public's interest and that it has the public's confidence?

Mike West: You are asking officials to give an opinion on an issue. It might be more appropriate for the member to put his question to ministers. Our focus is on fact rather than on opinion. I emphasise the points that are made in the final two paragraphs of our submission. It is important to keep the system under regular review, to avoid complacency and to be self-critical. That is why we welcome the committee's inquiry and intend to study with great care the report that the committee produces.

Michael Matheson: I would like to ask one final question.

The Convener: It must be your last question, as I am getting cold.

Michael Matheson: In June this year, Jim Wallace, the Minister for Justice, announced that the functions of the Scottish Conveyancing and Executry Services Board are to be moved to the Law Society of Scotland. What is the reason for that decision?

Mike West: The proposal to abolish the Scottish Conveyancing and Executry Services Board and to transfer responsibility for its functions to the Law Society was announced in June. The board was set up to provide competition for solicitors. Since it started active registration of practitioners in 1997, only 13 practitioners have registered. Only one of those is an independent practitioner and only that practitioner represents competition for solicitors, as the other practitioners are employed by solicitors firms. The Executive's view is that the original policy intention behind the establishment of the board has not been achieved.

Another consideration is the expense to the taxpayer of running a board that costs about £130,000 a year and has registered only 13 practitioners. It is disappointing that the policy has not succeeded more, as it has in England and Wales, where there are about 700 licensed conveyancers. The balance is in favour of preserving the profession of conveyancing and executry practitioner, but transferring responsibility for that to the Law Society, and freezing the registration of independent conveyancers with effect from the transfer date. That is the proposal that was announced in June and a final decision has not been announced yet.

The Convener: That is something else to follow up with the minister.

Lord James Douglas-Hamilton: It would be helpful if Mike West could explain whether he thinks that the number of conveyancers will increase in the next five to 10 years or whether there is a difference between the markets north and south of the border. Perhaps because the service that the Scottish solicitors offer is a lot more competitive and less expensive, there is less call here for independent conveyancers.

Mike West: One relevant consideration is the fact that the board's estimates for registrations over the next five years indicate that, in five years' time, there will be only 20 registered practitioners compared with 13 at present. In other words, the board is not optimistic about the future uptake of registration.

I agree with what Lord James Douglas-Hamilton said about the differences in the legal services markets north and south of the border, although that is only my personal view. Solicitors in Scotland have become competitive following the practice of advertising solicitors' property centres.

Lord James Douglas-Hamilton: Is it fair to say that the low number of practitioners should be taken not as implying criticism of independent licensed conveyancers but as a tribute to the great service given by Scotland's solicitors to their country?

The Convener: I will be delighted to hear this answer.

Mike West: I must express personal agreement with that view.

Lord James Douglas-Hamilton: I should point out that I am not a solicitor.

The Convener: Thank you for giving evidence. We have no further questions.

Items in Private

The Convener: I ask members to agree that, at our meeting on 19 December, we will consider in private our draft stage 1 report on the general principles of the Freedom of Information (Scotland) Bill. I ask members also to agree that, at future meetings, we will consider in private lines of questioning in our inquiry into the regulation of the legal profession. Is that agreed?

Members *indicated agreement.*

The Convener: Our next item of business, which is consideration of our work programme, will be conducted in private. I ask members of the public to leave.

I notify members that I have arranged to have the temperature in the chamber taken as it will be the subject of a complaint.

16:12

Meeting continued in private until 16:42.

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