JUSTICE 1 COMMITTEE

Wednesday 19 December 2001
(*Morning*)

Session 1

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JUSTICE 1 COMMITTEE
35th Meeting 2001, Session 1

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

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

*attended

WITNESSES

Colin Campbell (Faculty of Advocates)
Linda Costelloe Baker (Scottish Legal Services Ombudsman)
Alistair Sim (Marsh UK Ltd)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 1

Scottish Parliament

Justice 1 Committee

Wednesday 19 December 2001

(*Morning*)

[THE CONVENER *opened the meeting in private at 09:47*]

09:56

Meeting continued in public.

Legal Profession Inquiry

The Convener (Christine Grahame): Good morning. I must declare an interest in that I am a member of the Law Society of Scotland, although I am not a practising solicitor. I welcome to the committee Linda Costelloe Baker, the Scottish legal services ombudsman. Should I say ombudsperson?

Linda Costelloe Baker (Scottish Legal Services Ombudsman): I am an ombudsman.

The Convener: Good for you. I welcome Anne Millan and Carolyn Pithie, who are complaints investigators from the office of the Scottish legal services ombudsman. I refer the committee to the submission, which we are grateful to the witnesses for providing.

The objective of the session is to update the committee on the evidence that we received from you prior to the start of our inquiry and to understand your role and powers within the current regulatory framework. We also want to explore your views on the scope for improvement in the system. I know that you have firm ideas on that.

In June, you told us that the office comprised the ombudsman and two complaints investigators, although one complaints investigator post was about to be filled after a gap of about five months. Do you now have a full enough team to deal with the work that comes before you and do you have sufficient resources?

Linda Costelloe Baker: At present the resources are adequate. I have two full-time complaints investigators—they are here today—a part-time secretary and I, too, work part-time. I have taken certain steps to ensure that the office is in a position to deal with any sudden peaks in demand, a member of staff leaving or falling sick.

As members will see from my annual report, last January, when one of the complaints investigators left, I appointed three part-time sessional case workers on a temporary and ad hoc basis. That meant that we could keep on top of the work load and not let a backlog build up. That initiative was extremely successful and I have taken steps to put it on to a more formal footing. Appointments of my staff are made by Scottish ministers and they have recently agreed that I can appoint part-time sessional supervisors on a more permanent basis. I hope to do that in January 2002. I would like to have a team of four people on whom I can call when the need arises.

The Convener: Where do the sessional advisers come from? Are they lay people? Do you advertise?

Linda Costelloe Baker: I am weighing up whether to advertise. It is a question of whether the benefits are outweighed by the costs involved. I would prefer to advertise and may still do so. However, I have approached the public appointments unit, which has already put an advert to the general public asking for people who are interested in public service. The public appointments unit is checking whether there are appropriate people who have already applied for public posts.

The Convener: Would you prefer to advertise?

Linda Costelloe Baker: I would prefer to, but I must consider whether that is a good use of time and resources, given that a large number of people would be interested.

The Convener: You said in June that you had managed to achieve a significant reduction in turnaround times for complaints that came to you for the issuing of opinions and that you aimed to issue an opinion within three to 13 weeks, depending on the complexity of the case. Is that still the same?

Linda Costelloe Baker: Yes. Some complaints that the Law Society of Scotland has refused to investigate have been dealt with in just under three weeks. Three weeks is certainly the target and we have not exceeded three to four weeks. The turnaround time for complaints that the Law Society has investigated fully—which means that there is a large amount of paper to go through—is, I think, 11 weeks. It is certainly less than 13 weeks.

10:00

The Convener: When you have dealt with a complaint, where is the opinion that you have formed publicised? Is it publicised in your report?

Linda Costelloe Baker: Not necessarily. I summarise briefly a sample of cases in the annual report. The opinion is sent to the person who made the complaint, to the legal practitioner who

was the subject of the complaint—a named person or a firm of solicitors—and to the professional body: the Faculty of Advocates, the Scottish Conveyancing and Executry Services Board or the Law Society.

The Convener: It is not publicised in any of the legal journals.

Linda Costelloe Baker: No.

The Convener: Ought it to be?

Linda Costelloe Baker: There was some suggestion a couple of years ago that the ombudsman should write a case study for the professional journals. I understand that the suggestion was not well received.

The Convener: I was not thinking about a case study, but just your decision, where you have taken a view that a case has not been handled properly by a firm of solicitors or by the Law Society. Is that publicised in any of the legal journals and do you think that it ought to be?

Linda Costelloe Baker: Given that the rules under which I operate state that I cannot identify the firm of solicitors or the complainant, the annual report perhaps offers the benefits of publicising more general information. I send a copy of the report to all firms of solicitors, which is an expensive exercise. However, it is proper that I do that. We get feedback that shows that solicitors take note of what is said and study the points that I raise in opinions.

The Convener: We will perhaps come back to that later.

Michael Matheson (Central Scotland) (SNP): Good morning. In paragraph 3 of page 1 of your written evidence, you highlight the fact that regulation covers "a great deal more" than handling complaints. You say:

"Complaint handling is the public face of regulation and acts as an open measure of effectiveness."

Will you explain what you mean by an open measure of effectiveness?

Linda Costelloe Baker: Parts of the remaining bits of the regulatory framework are carried out very much behind the scenes. The approval of new entrants, the supervision of training courses and the law reform group of the Law Society of Scotland are aspects that the public tend not to see. There is no measure to ensure that the Law Society protects the public interest and the professional interest effectively, as it is required to do. Complaint handling is the one measure that is accessible to the public. The Law Society, the Faculty of Advocates and the ombudsman publish figures that allow the public to see whether regulation by complaint handling is effective.

Michael Matheson: Is the present complaint-handling system a fair, efficient and effective system for the public?

Linda Costelloe Baker: No.

Michael Matheson: It is not. Why not?

Linda Costelloe Baker: There are two reasons. First, the legislative framework is unhelpful—it is more than 20 years old. In other professions and commercial organisations, expectations and practice have changed considerably in that time. The second issue is how well the professional bodies and my office work within that framework. You will know from the report that I found that 50 per cent of the cases that I looked at have been handled adequately, fairly and thoroughly. That leaves a large proportion of cases in which the professional bodies are not working as well as they could and should, even within the framework, which has its own problems.

Michael Matheson: Why are they not handling effectively 50 per cent of cases?

Linda Costelloe Baker: They do not approach the process in a way that is friendly to the consumer or client or complainer. The professional bodies consist of lawyers, who regard a complaint as a legal issue or battle to be pursued along the same lines as a court case. That approach misses the point about complaint handling, which I think of as an alternative form of dispute resolution rather than a court-based form.

The second issue is that the complaints process is based on a disciplinary code, practice rules and a code of conduct. That means that the complaint must be fitted into those disciplinary rules and codes. What happens often—we see it every day—is that the complainant's concerns are lost sight of in the great welter of exchanges of paper correspondence. What the complainant puts before the Law Society—it is principally that body that is involved—to start with does not come out, and is not addressed, at the other end.

Michael Matheson: You are saying that part of the problem is the system, but the culture that runs alongside the system is also part of the problem. There is a lack of awareness within the legal profession that it is a service provider. Is that what you are saying?

Linda Costelloe Baker: Absolutely. Yes.

Michael Matheson: Is it fair to say that the legal profession often regards a complaint as a professional criticism?

Linda Costelloe Baker: A complaint is regarded as a professional criticism and a personal criticism. From my earlier work in complaint handling I know that there are areas in which people are particularly resistant to dealing

constructively with complaints. One is where there are life-and-death decisions, which principally involve medics, because it is so dreadful if one makes a mistake. Another area is where people provide the service from their brainpower, which very much applies to the legal profession. The reason for the resistance to complaints is that the criticism is taken almost as personal criticism. That comes strongly off the page when I look at legal service complaints.

Members will remember that I see a small proportion only of complaints, but in those that get as far as being referred to me I find a defensiveness by the solicitors. The attitude is, "How dare people say that?". That is the sign of somebody taking the criticism personally, rather that saying, "I am required to provide a good professional service. I am in a service industry, with particular expertise. Let me be open to seeing what people think about what I do."

Michael Matheson: In your written evidence you state that solicitors do not have formal quality standards against which complaints about the quality of service can be tested. On the basis of what you have said, what standards would you like to see?

Linda Costelloe Baker: Can I answer the question in a broader sense to start with and then look at some detailed standards?

Michael Matheson: Sure.

Linda Costelloe Baker: The lack of formal quality standards is a good example of the cultural difficulties, because the Law Society and the Faculty of Advocates regulate at the moment by a pressed-down-by-rules approach rather than by a pull-up-by-standards approach.

I find it difficult to understand how any complaint about quality of service can be investigated properly unless one knows the standards by which one is going to judge that complaint. Part of the cultural slowness of the professional bodies is that, 20 years on, they are beginning to think in the same way that commercial organisations were thinking 20 or 30 years ago—that quality measures and standards are important. It is possible to set a turnaround time for replying to correspondence. That is not a matter of law and does not require legal expertise or a legal expert to assess whether it is being done. That is a simple approach.

Going back a good number of years, I had a peripheral part in the assessment of a large firm of solicitors in England, which was the first such firm to apply for the British Standards quality standard. The process was getting a firm of solicitors to categorise its service in a way that could be clearly measured. Far more could be done on that basis.

Michael Matheson: Who should set the standards?

Linda Costelloe Baker: It should be a joint exercise between the professional and the consumer. The Office of Fair Trading and the National Consumer Council have set standards for good complaint handling. One of those is that standards are set by joint dialogue and by learning from consumers.

The Convener: That is easily said, but how would that be done? An organisation such as the National Consumer Council does not exist for legal matters. How would people who use the legal service tap into that dialogue to contribute to the standards? Do you have an organisation in mind?

Linda Costelloe Baker: No. The professional bodies could take responsibility. Commercial organisations run focus groups and fund research. A huge amount of information is available in complaints. People say on paper—because a complaint must be on paper—what they think is wrong. That might be a failure to give advice, delay, or a failure to address the issues. Even without discussion with a single consumer—although I do not suggest no discussion—the information exists. It is not being used constructively, proactively or to set standards. It is used reactively to deal with a complaint.

Michael Matheson: Do the professional bodies deal with complaints in a reasonable time scale? Do they handle them efficiently or do they take too long at times?

Linda Costelloe Baker: It is fairly well known that I think that they take too long. I recognise that the bodies are taking steps to improve their position, but the most up-to-date figure that I have is that fully investigated complaints that proceed to the ombudsman from the Law Society take an average of 90 weeks. It is 90 weeks from the complainant producing a letter of complaint to the complainant being notified of the Law Society's decision. I do not include in that figure any period when the investigation is halted because of concurrent legal action.

Michael Matheson: You say that 90 weeks is the average. What is the longest time that you have encountered?

Linda Costelloe Baker: Four years.

Michael Matheson: A complaint has been handled by a professional body for four years before you received it.

Linda Costelloe Baker: Yes. That case is summarised in my annual report. The Law Society accepted my recommendation to pay the maximum compensation, which is £1,000.

Michael Matheson: What should be done to speed up the process?

Linda Costelloe Baker: I have proposed that the ombudsman's powers should be strengthened or a complaint-receiving body should be established. They do not have to be alternatives. Both those proposals could be achieved in one role. If an organisation could set standards for the professional bodies, it would be possible to say that complaints should be dealt with in six months, as I recommended in my annual report.

I have modified that recommendation, because I do not think that the Law Society can achieve six months at the moment. I have set a target of a nine-month turnaround time. At the moment, nine months is the minimum time that it takes to deal with the complaints that I see.

The wider point is that it might be possible not for the Government to set targets, as the Lord Chancellor's Department has done for the Office for the Supervision of Solicitors, but for an independent body to set standards. I make recommendations and the Law Society chooses whether to accept them.

Michael Matheson: Is the level of lay involvement in the complaints process at the Law Society stage and at the Scottish Solicitors Discipline Tribunal stage adequate?

Linda Costelloe Baker: Steps have been taken in the right direction to increase lay involvement, but wider proposals for complaint handling recommend that 75 per cent of members of a body that deals with complaints should be lay. The Law Society's council, for example, could be 50 per cent lay people. The committees could be 75 per cent lay and could have lay conveners. There are all sorts of possibilities that have not been considered with as open a mind as they might have been.

I turn to the Faculty of Advocates. Its proposed new disciplinary code includes increased lay involvement, which is, similarly, a step in the right direction.

Michael Matheson: Some of the evidence that we have taken suggests that one of the reasons for not having lay members as conveners of some of the committees is that it is beneficial for the convener to have a legal background. Do you think that that is a reasonable argument?

Linda Costelloe Baker: I do not think that it is necessary for the convener to have a legal background, but legally qualified people certainly have to be there. That brings us back to some of the restrictions of the legislation. The legislation requires that decisions be made about what a competent, reasonable solicitor would do. The legal profession has to make those decisions. The convener does not have to be the person who has all that knowledge.

10:15

The Convener: I refer to a statement that you made to us in your submission. In paragraph 44 you said:

> "In 36% of the cases referred to the Ombudsman after a full Law Society investigation, I concluded that the Law Society had not investigated the complaint adequately or fairly, and in 26% of cases that there had been mismanagement."

Will you explain the mismanagement?

Linda Costelloe Baker: Mismanagement is avoidable delay. It is failing to answer letters promptly, which is something that can build up over an investigation. It is failing to send the correct notifications out to people or losing a file for six months. It is not having a reporter available to take the case at the right time and having to search round and approach three, four or five reporters. Principally, mismanagement is avoidable delay rather than failing at the end of the day to consider the complaint that was made.

I have tried in the annual report to put my recommendations in terms of the legislation, as we do in opinions. I can do a range of things. Some of them overlap a bit and they can appear confusing. If I say that something needs to be reconsidered, I think that the investigation was reasonable, but the decision may have been perverse or somebody's representations may not have been taken into account. If I suggest investigating further, that means that the complaint was not addressed.

Paul Martin (Glasgow Springburn) (Lab): What are your views on the maximum compensation that is available when a complaint is upheld?

Linda Costelloe Baker: Are you referring to compensation that I can request the professional bodies to pay, rather than the compensation that the professional bodies can request the solicitor to pay?

Paul Martin: I would like to hear your views on both.

Linda Costelloe Baker: I think that £1,000 is reasonable, but the compensation has to be uprated in line with inflation. I do not think that, when a level is set, it should stay the same for years on end. A five-year step is reasonably appropriate, but it might not be if inflation were different. I have suggested to Scottish ministers that the £1,000 that I recommend be uprated; steps are being taken to do that. The compensation that the Law Society can order solicitors to pay has never been uprated and is now certainly not in line with the intentions of the legislation.

Paul Martin: Are you satisfied with the Scottish Executive's recommendations in that respect?

Linda Costelloe Baker: I acknowledge that solicitors' compensation is a matter that requires primary legislation and that the Parliament has a busy legislative timetable. I am pleased that, under the act that created my position, the increase can be made by order and so can be done quickly. I do not think that the £1,000 limit was awarded until last year, when I recommended it five or six times. On one occasion, the Law Society refused to pay compensation; on another occasion, it agreed to pay £850; and on the other occasions, it agreed to pay the full sum. The compensation level is not a boundary that is being knocked against constantly. Those were particularly bad investigations. In the interests of fairness, the level should be uprated at intervals.

Paul Martin: In your written evidence, you refer to tension in the complaints-handling system, caused by the fact that the system is used both to provide consumers with redress and as a means of enforcing professional discipline. Can you expand on that point? How does it impact on the effectiveness of the system?

Linda Costelloe Baker: A neat example is that, under the legislation, the Law Society divides complaints into those about a solicitor's conduct—professional misconduct—and those about the service that has been provided by the firm of solicitors, although the Law Society is considering investigating the service provided by an individual solicitor.

The Law Society deals more seriously with complaints about conduct. There is no possibility of consumer redress with those complaints. Complainants often want their complaint to be about professional misconduct, because they think that that is more serious. However, in such cases, there is no possibility of compensation, of the Law Society requiring a solicitor to take a certain course of action or of fees being abated. Complaints about service can attract all those elements of consumer redress.

The root cause of the division is that the Law Society is working with two sets of legislation: one about a code of conduct and the other about provision of an adequate service.

Paul Martin: Could legislation be introduced to deal with that issue?

Linda Costelloe Baker: Yes. Complaints about professional misconduct ought to be in the minority. Most complaints should be capable of being dealt with under the requirement to provide an adequate professional service.

Paul Martin: That is helpful. How could the current complaints system be changed to make it more accessible to the public?

Linda Costelloe Baker: One of my principal concerns about the Law Society is that about 1,200 letters a year that its client relations office receives are not categorised as complaints, which acts as a barrier to entry into the complaints system. That part of my work is rising. When I previously gave evidence, I told the committee that we received an average of 120 complaints. Over the past year, the figure has gone up to about 170, which is the highest that it has ever been and is a marked increase over the previous year. The big rise is in the number of complaints about solicitors in response to which the Law Society has said that it will not carry out an investigation. Worryingly, in 10 per cent of the cases that come to me, I find that the Law Society has failed to recognise a complaint that, by law, it is required to investigate. Part of the reason for that is that the Law Society is trying to keep complaints to a manageable level, especially now that they all have to go to council, but that policy has misfired and means that a lot of valid complaints are not getting aired.

Paul Martin: Do you believe that the system would be more accessible if that aspect of it was improved?

Linda Costelloe Baker: It would be more accessible if a more flexible response to complaints were possible. Some complaints may not need to be fully investigated and go through all the formal procedures, but if every complaint that a member of the public made was counted as a complaint and responded to as such in a friendly, accessible, user-friendly, quick and informal way, that would improve the system no end.

Paul Martin: Would it be helpful for one person to be responsible for complaints about all legal services?

Linda Costelloe Baker: I hope that they would have some help. Not exactly—I am proposing a single gateway, rather than that one organisation should be responsible for investigating complaints. I feel strongly, for two reasons, that the professional bodies should be responsible for putting time, effort and attention into dealing with complaints. First, as I have said, lessons are learned from complaints. If complaint handling is removed from the professional bodies, they will not learn the lessons that complainants can teach them. Secondly, complaint handling is part of professional responsibility.

I do not propose that responsibility for investigating complaints should be removed from the professional bodies. I propose a single door of entry, which would solve some of the overlap problems to which I have referred. People at that door could post the complaint to the right person, have a monitoring and oversight role and even

investigate the complaint themselves if they were not confident that the professional body could do so adequately.

I will give an example of my concerns. The convener referred to the number of complaints that I returned to the Law Society because it did not investigate them properly—they needed to be investigated again. I understand complainants' lack of faith in the Law Society's ability to undertake a fair and full investigation if it has not done its work properly in the first instance and has been pushed into investigating a second time. That is a question of perception. I am not saying that the reinvestigations are unfair, but they take a long time—reinvestigation of a complaint can last for a year or two years. There is a perception that someone is simply being put back into the same paper-churning exercise. Whatever new arrangement comes out of the review, it would be helpful if someone else could consider the complaint afresh.

Paul Martin: You may have touched on this issue, but do you think that the jurisdiction of the professional bodies in respect of complaints should be extended and that there should be a broader definition of what a complaint is?

Linda Costelloe Baker: There are a number of widely accepted definitions of what a complaint is. In my office's complaint policy, I define a complaint as any expression of dissatisfaction about the service provided by the ombudsman's office. Such a definition is used fairly widely. I do not think that it is the responsibility of the professional bodies to decide what a complaint is—it is up to the complainant to decide. The professional bodies must have a flexible range of responses rather than simply answering no or putting the complaint into a formal pipeline.

Paul Martin: Should we provide definitions of a complaint for the legal profession?

Linda Costelloe Baker: I would like the legal professions to use the same broad definition.

Paul Martin: So you believe that there should be a more prescriptive definition—with flexibility—of a complaint. The legal professions may make the point that no guidance is available to them.

Linda Costelloe Baker: The professional bodies argue that, although something might be a complaint, they do not have powers to investigate. Sometimes they are right about that, but not always.

Paul Martin: In June, we discussed self-regulation with you. You had doubts about whether legal service consumers are satisfied with self-regulation in respect of complaint handling. How can public confidence in the profession be increased? Should there be a move away from self-regulation?

Linda Costelloe Baker: I do not favour a move away entirely from self-regulation—that is part of the professional bodies' and the profession's responsibilities. However, I support a tighter oversight of complaint handling, although preferably not directly by Government. The legal profession must be and must be seen to be separate from Government. We tend to take that for granted in this country. I propose an independent body that has the power to monitor, regulate and oversee.

A number of research studies support that view. The Scottish Consumer Council's research study, for example, is based on 1998 information, but I do not think that the picture has changed particularly since then. A study into the working of my office proposed that the ombudsman should have greater powers and the recently published "Paths to Justice Scotland", by Alan Paterson and Hazel Genn, considers how people resolve justiciable complaints. There is a feeling in that work that there needs to be a tighter regulatory framework. All the consumer views point in that direction. As far as I can see, there is some, although not terribly dug-in-heels, resistance from the professional bodies. They certainly seem to be reasonably open to the ombudsman's office having more powers.

Paul Martin: To put it bluntly, is not there the view that, whatever you do for the public, there will always be dissatisfaction and complaints about the role of solicitors? Do you think that taking the action that you describe would increase public confidence in the legal profession?

10:30

Linda Costelloe Baker: I hope that there will always be complaints, because I think that they are a healthy thing.

Paul Martin: As MSPs, we say that as well.

Linda Costelloe Baker: An organisation that receives a lot of complaints is not a bad organisation—it is one that is open to receiving consumer feedback. Complaints are nothing to be frightened of. Part of the legal profession's way of dealing with complaints is to go a bit stiff and prickly. I am not saying that any changes would reduce the number of complaints. Complaints should be made and should be listened to and addressed. Greater independent oversight would increase consumer confidence.

Paul Martin: On the role and remit of the ombudsman, you noted in June that you are contacted by people with a wide range of complaints, some of which fall outside your remit. Will you expand on the main types of complaint with which you are not able to deal? Do they relate

to the actions of people who are not covered by the ombudsman or are they not relevant to the handling of a complaint by the professional bodies?

Linda Costelloe Baker: Our experience of dealing with general complaints underpinned my recommendation for a single gateway. In some ways, we already act as that, although our powers are limited—we can only refer people on.

The word "ombudsman" is well known and is, I hope, well respected. People understand what an ombudsman does, so when they find the legal services ombudsman in the "Yellow Pages", they tend to feel that I can do most things about every problem under the sun. That means that a wide range of complaints is made to us.

Putting on one side those that are nothing to do with legal services—of which we receive a good number, including insurance complaints—we get complaints about judges and sheriffs, because people think that a legal services ombudsman will deal with that. We say simply that, at the moment, there is no formal complaint mechanism. However, we give them some idea about where they could and should address their concerns.

The largest group of complaints that we receive relates to people who want to complain about their solicitor. We inform those people of the Law Society's helpline number, which is a good way of entering the Law Society process, and we provide them with a name and address. More rarely, we pass on details of the Faculty of Advocates.

We try to resolve there and then some of the telephone complaints about solicitors that we receive by encouraging the complainant to go back to their solicitor to deal with the query. I will give a brief example. A few weeks ago, someone who was engaged in a civil litigation phoned. She had received, quite suddenly, a bill for a large amount of money. She had not been told by the solicitor how and when she would be billed. Although she was absolutely appalled, she did not want to lose her solicitor—she thought that he was good and wanted him to go ahead with running the court action. I proposed that she should meet the outlays by sending a cheque, along with a letter to the solicitor in which she should ask how his charges had been made up and the reasons for them, explain that she did not want to fall out with him or contest his actions but express surprise that he had sent her the bill without letting her know. The problem was solved. Although, technically, that action was outwith my remit, it represented a flexible way of resolving someone's problem.

Paul Martin: Do the complaints highlight areas in which an increase in your remit might increase public confidence? Can you identify specific areas in which extension of your remit could help your role as an ombudsman?

Linda Costelloe Baker: I have referred several times to complaints that the Law Society refuses to investigate. I will give another example, because examples are useful things on which to pin theories. A young woman who was injured in a car accident made a complaint. She had received a significant amount in damages, which a firm of solicitors invested for her. Several years on, she complained to the Law Society that she had not received all the money, but the solicitors said that there was nothing left. I think that members might be as surprised as I was to hear that the Law Society refused to investigate that complaint.

The complainant came to me and I recommended that the Law Society should investigate her complaint. The Law Society has replied, saying that it will not investigate. At worst, I can publish an announcement, but I do not think that that will achieve anything for the complainant. I do not think that such action would be fair on the firm of solicitors, which in that case would not be given the opportunity to clear its name. The firm might be totally blameless and it has not had the opportunity to establish that.

In that circumstance—the matter is current—I would want to investigate the complaint.

Paul Martin: Do you believe that we should legislate to ensure that the ombudsman has the right of veto, or the right to go further than making an announcement?

Linda Costelloe Baker: That would be helpful. My colleague, the ombudsman in England and Wales, has the power to investigate the original complaint but does not use it frequently. She uses that power as I would use it. Only when the Law Society refused to investigate or made a complete mess of a complaint investigation would I want to use the power to investigate the original complaint.

Paul Martin: Approximately how many such incidents take place?

Linda Costelloe Baker: There were probably no more than two or three in the past year. Those were cases that I felt sufficiently strongly that I wanted to investigate, and that the Law Society refused to investigate and refused a recommendation to investigate. The Law Society normally accepts my recommendations.

In one year, there are probably no more than half a dozen fully investigated complaints that I think have not been investigated adequately and must be re-investigated. Such cases are those in which I think that the complainant's confidence in the fairness of any re-investigation has been undermined.

Paul Martin: That is helpful. Thank you.

The Convener: I return to the 36 per cent of cases that are referred to in your submission. In those cases you concluded that

"the Law Society had not investigated the complaint adequately or fairly".

How many such cases were there and of how many would you then have said that you wanted to investigate them? I am trying to get an idea about numbers.

Linda Costelloe Baker: At the moment, that 36 per cent comprises 40 to 45 cases.

The Convener: When you have recommended that the Law Society re-investigate a case and it refused to do so, how many such cases have you investigated?

Linda Costelloe Baker: I felt that somebody who is independent needed to investigate a small number of the fully investigated cases that went back for re-investigation.

The Convener: I am trying to understand where we are going in relation to what you thought your role ought to be. I understand the single gateway, which could take in broad justice issues or merely concentrate on the legal professions. I understand that you see your office as a legal gateway. I take it therefore that you see your role as being initially to send out to the legal bodies complaints under your wider definition that a complaint is a complaint because somebody has made it. However, you leave yourself with the option to investigate the complaint if you want to. I should say "the ombudsman" instead of "you".

Linda Costelloe Baker: Yes, I prefer to talk about the ombudsman rather than about myself.

There might be a complaint that the ombudsman thinks from the outset ought to be dealt with by the ombudsman's office. Ombudsmen worldwide who operate similar systems have the right to deal with complaints from the beginning. There might be particular reasons why that would be necessary and the power is used with great care and discretion. Most cases would be referred to the professional body. A person would have the right to go back to the ombudsman to ascertain whether the investigation had been fair or reasonable. If it had not been, my preference would be for most such investigations to be referred back to the professional body. It is the responsibility of such bodies to put things right, although the ombudsman should have the reserved power to say that the investigation should be taken over by an independent investigator. Does that make sense?

The Convener: Yes—although it is early in the morning for me.

Gordon Jackson (Glasgow Govan) (Lab): I have a couple of thoughts to draw together. You talked about independence and the obvious need for any legal system to have some independence from the state. The written submission from the Faculty of Advocates, from whom we will take evidence in a wee while, mentions something that you said in previous evidence to the committee. I am interested in hearing your comments on that. I will read to you the relevant section, which is long and contains many points. It states:

"In the course of her evidence … the Scottish Legal Services Ombudsman stated that she was 'the only truly independent person in the whole complaints process'. The accuracy of this claim is questioned. The Ombudsman is appointed by the Scottish Executive for a limited term, and she and her staff receive administrative assistance and, it is believed, legal advice from that source. In addition, the Ombudsman is accountable to the Parliament and requires to submit an Annual Report justifying her activities. In relation to the Parliament and the Executive, therefore, the Ombudsman does not share the independence of any self-employed member of the legal profession. As regards the treatment of complaints, the Ombudsman is no more and no less independent than (i) a member of the Faculty's lay panel or (ii) the Dean or any other member of the Faculty participating in the disciplinary process."

The suggestion seems to be that it is the Faculty of Advocates that is independent of Government.

The Convener: Gordon Jackson was late because he was held up in traffic, so I remind him to declare an interest.

Gordon Jackson: For those who are in any doubt, I am still a member of the Faculty of Advocates, but I am not interested as much in that as I am in the independence question. I come back to what you said about leaving the legal profession independent, but having another body supervising it. The Faculty of Advocates suggests that, in reality, anything with which you replace self-regulation will somehow be more related to Government than will the Faculty of Advocates.

Linda Costelloe Baker: That is absolutely right. In saying that I am independent, I meant that I am independent of the legal service professional bodies that deal with complaints. My definition of independence related to my role, as opposed to the wider definition to which the Faculty of Advocates referred.

Gordon Jackson: How would one put something in place of self-regulation without making it less independent of Government? We all understand why the legal profession in general needs to be independent of Government. I find that striking the balance is difficult.

Linda Costelloe Baker: The inquiry limited itself to complaint handling. If the statutory oversight about which I am talking is about complaint handling, that will not prejudice the independence of what professional bodies do with the rest of

their remit of education, entrance and law reform. Statutory oversight is light-handed and relates only to part of the function of the Faculty of Advocates, rather than its being statutory oversight of the faculty's whole regulatory function.

Gordon Jackson: We will, no doubt, ask the faculty about that when we take evidence from it. Do you see that oversight as being in danger of compromising the independence of the faculty? We all acknowledge that there is a good reason for that independence.

Linda Costelloe Baker: No, I do not see that danger. Complaint handling is not about making determinations on matters about which people go to solicitors or instruct advocates in the first place. That is where there is the greatest need for absolute independence and an ability to put the clients' interests first. Complaint handling is slightly separate from that.

Gordon Jackson: I refer to another point that the Faculty of Advocates raised about what you said and about which I am curious to hear your views. The faculty has at least read your evidence—I will say that for it. The submission states:

"The Ombudsman also suggested in her evidence that inter alia the Faculty's complaints system was 'based on disciplinary measures and not on dealing with complaints'. She also suggested that every complaint had to be 'broken up and translated into a list of alleged disciplinary failings'."

The faculty says simply that that is not fair, but I am not entirely clear about what all that means, to be honest.

Linda Costelloe Baker: The faculty's handling of complaints allows no consumer redress, so it is based entirely on an internal disciplinary code. The faculty can fine an advocate who transgresses the code. My understanding is that that fine goes to a charity. There is nothing that provides redress for the complainant; there is no compensation. There is no requirement to get advocates to rectify—at their own expense—matters that are within their power to rectify. The faculty's handling of complaints is very much an internal mechanism to see whether the faculty is living up to its standards.

Gordon Jackson: When you used the phrase "not dealing with complaints", did you mean complaints about redress or did you mean that complaints should be examined to see whether they are justified? Half the trouble is that we are at cross-purposes with you.

Linda Costelloe Baker: No. With respect, the two are not the same. Redress applies only in a proportion of complaints. Redress does not have to be financial redress or anything big—it can also mean an apology. It is possible to examine all complaints with an open mind. Perhaps, in a small proportion of cases, redress is appropriate. The difficulty with the Faculty of Advocates' handling of complaints, as I understand it, is that that is not possible.

10:45

Gordon Jackson: Forgive me if I am being really dense but, if the faculty examines discipline or what a member has done wrong, how can that mean that the complaint is not dealt with? I do not follow the distinction that is being made.

Linda Costelloe Baker: The faculty deals with complaints only when they affect the faculty and the complaints are about advocates. It does not consider the effects on complainants.

The Convener: Is that because there is no compensation?

Gordon Jackson: Or because nobody even says sorry?

Linda Costelloe Baker: There is no compensation. I have not yet seen anyone say sorry, but I am sure that they do.

Gordon Jackson: I, too, am sure that they do.

Linda Costelloe Baker: There is no possibility of requiring an advocate to go back to put something right if it has gone wrong. The argument is that that must be done through a negligence action in the courts. People get trapped in the complexity and expense of court actions when they feel, in particular against an advocate, that they—

The Convener: Surely you cannot have many complaints from the public about advocates. Surely most of the public's contact must be with solicitors.

Linda Costelloe Baker: Last year, the Faculty of Advocates received 20 complaints. That was in addition to complaints that it did not classify as complaints, which were principally about fee levels. This year, we have had two or three complaints about the way that the faculty has handled complaints. It is true that the numbers are small. To put the numbers in proportion, there are 8,500 solicitors and 425 advocates. One would therefore expect the number of complaints to be small.

The Convener: Do those complaints come from the public or from firms of solicitors?

Linda Costelloe Baker: I have not seen a complaint from a firm of solicitors about an advocate.

The Convener: No—they would deal with such a matter differently.

Gordon Jackson: Usually they would shoot them—

The Convener: Never instruct them again—

Gordon Jackson: Or cut off their money.

Can I finish my line of questioning?

The Convener: Sorry. Yes.

Gordon Jackson: I am not speaking for the Faculty of Advocates; I have simply read its stuff and I am trying to tease out its position in my own mind. The faculty does not like the complaint handling side of things because it believes that the investigatory method is not suitable. It believes that once people get into an investigation, the system is adversarial. That means that an advocate would have a right to silence, as in any other investigation. You must have seen those arguments, or am I being too legalistic?

Linda Costelloe Baker: The complaints that I have seen about the faculty have not gone through that process. In my time in office, I have never seen a fully investigated Faculty of Advocates complaint. In the cases that I have seen, the dean of the faculty has made preliminary inquiries and has responded to the complainant in what I think is a very flexible, fair, helpful and well-constructed way. I have always been satisfied with the quality of the response. The dean has always addressed exactly the point that the member of the public has made and has not pushed people into the formal complaint process. I have been critical of the faculty when it has put stuff in the wrong filing cabinet and forgotten about it for a year.

Gordon Jackson: A year? That is not bad.

The complaints procedure exists. I know of occasions when the faculty has set up a full investigating committee. That does not happen very often, but it has been done. The argument seems to be that the system does not also lend itself to complaints redress. Do you accept that argument or is there nothing in it?

Linda Costelloe Baker: I do, but, once a complaint has gone through that process and has been upheld, we must remember that there is a complainant who started the process—the faculty is not alone in that. We must ask whether there is a way in which the complainant can be put back into the position they would have been in had the service that they wanted been provided or the conduct about which they are complaining had not happened. The fundamental issue about complaint-handling systems is that they must put matters right.

The Convener: Can we move on?

Gordon Jackson: Yes, all right.

Michael Matheson: In today's evidence, you said that you can only make recommendations to the professional bodies. You also covered that issue when you gave evidence in June. You said that if a professional body failed to take on board a recommendation on a serious matter, you would consider publicising that failure. Although from what you said it appears that the majority of recommendations are accepted, would you like the power to direct, or greater powers than you have now?

Linda Costelloe Baker: That would be helpful. I am not opposed to the system of making recommendations because it is a useful discipline for my office and for me. We must argue our case well and be persuasive and convincing—generally, we are. In recent months, there has been a reduction in the number of cases in which the professional bodies have refused to accept recommendations. I suspect that that is partly because regulations are under the spotlight because of the Justice 1 Committee.

If I receive a refusal from the professional body—I do get some—my immediate reaction is not to go to the newspapers, but to start negotiating. At the moment, there are two or three cases in which I am whittling away at the amount that the Law Society refuses to do. Ultimately, if the Law Society refuses to do something that I believe is important, the only measure that I can take is to publish an announcement. However, as Mr Jackson pointed out, that does not provide redress for the consumer; it is no use to a complainant and does not solve the problem to have a notice in three or four local newspapers. Something is missing—in that situation, I do not have the powers to investigate the complaint and to do something to put the problem right.

Michael Matheson: Will you give examples of recommendations that the professional bodies have refused to accept?

Linda Costelloe Baker: I mentioned the case in which the Law Society refused to investigate a complaint that solicitors had hung on to some money that they should not have hung on to. The Law Society recently refused a recommendation to have the chief accountant of the society inspect the books of a firm of solicitors. The complaint about the firm was threaded through with concerns about inaccurate records. The Law Society also refused to accept a recommendation about some conveyancing that had not been investigated properly. I asked the Law Society again to investigate the matter, but it refused. The recommendation was negotiated and—because I felt strongly about the matter—I threatened to publicise it, which made the body change its mind.

My colleague Anne Millan has reminded me of a case that is described fully in my annual report. That one got to within 48 hours of publishing a notice in a newspaper before the Law Society changed its mind and said that it would

investigate. However, it merely continued with informal inquiries for months, until I repeated my threat to publicise the matter if a formal investigation was not started. The investigation continues.

Michael Matheson: I gather from what you are saying that you must often deploy a carrot-and-stick approach. You must try to persuade the professional bodies to accept your recommendations. You can threaten to publicise matters, which sometimes makes the body change its mind or accept part of your recommendations. A benefit of the recommendation system is that you must try to persuade the bodies and negotiate with them. Your relationship with the professional bodies would be different if you were able to direct them. Would you like to change that relationship so that you could direct them more? Might there be problems with that?

Linda Costelloe Baker: That would depend how it was done. The power of direction might mean that I could say, "You must do that", or it might mean that I could say, "I would like you to do that", while giving certain reasons. In that situation, the body would know that I had the power to give an order rather than make a request. It would depend very much on the way in which that relationship was managed.

This morning, we have concentrated on the problems in the current system, but I want to give credit to the people who deal with complaints at both the Faculty of Advocates and the Law Society of Scotland. The working relationship between us is very good. We are not close or cosy—there is a degree of formality in our relationship—but we can talk to each other openly and constructively. Without that relationship, I would achieve far less than I do. My work depends on our maintaining that very good working relationship, which I am pleased to say has existed for a number of years with different people. Both sides recognise that they have a job to do and that they must manage the relationship carefully.

I am not certain that there would be a huge change in that situation if the ombudsman were given decision-making powers. In part, that would leave me open to judicial review—I understand that I cannot be judicially reviewed at the moment—so my arguments and reasons would still have to be as well supported as they are now. However, it is vital to have a good, open and constructive working relationship; that would have to continue.

Michael Matheson: That issue would have to be considered carefully if we were to think about changing the powers that you have at present. Do you receive certain types of complaints regularly, which you do not have the powers to investigate although you would like to?

Linda Costelloe Baker: Only those that I have mentioned, which are complaints that are made directly to me by members of the public who do not feel confident about approaching the Law Society of Scotland. I refer those complaints on. As I have explained, even if I had the power to investigate those complaints, my normal approach would be to refer them on in a helpful way so that the complainant would be reassured that it was openly accepted that there was a complaint to be investigated.

The Convener: I have a couple of final questions. Would you like to have a power similar to that of the ombudsman in Northern Ireland to examine all or any of the complaints? How would you access professional files?

Linda Costelloe Baker: That power would be included in any power to monitor the complaints-handling procedures. My colleague in Northern Ireland finds that extremely useful. Because he has the powers to do so, he can simply ask the professional bodies to provide information. He receives a list of complaints and picks one in 10 or one in four and the professional bodies send him the files. I had a discussion with him recently in which he said that he finds that information to be eye opening, because it gives a very different picture from that which he gets simply by looking at complaints that are referred to him.

People get fed up with the complaints process and do not always want to take the extra step of approaching the ombudsman because the process has been grinding on for so long. I receive only a small proportion of complaints and my work is not a typical example of complaints handling. If I were given the powers to audit complaints handling, I would be able to do that. The audit is the element that is missing both from the ombudsman's powers and from the way in which the principal bodies deal with members of the Law Society of Scotland. Those bodies do not quality-audit solicitors. Once solicitors have received their practising certificates, that is it. There are financial inspections, but there is no audit. I am proposing that the Law Society of Scotland should be able to audit practitioners for quality and competence and that any independent body should be able to audit the professional bodies for quality and competence in complaints handling.

The Convener: You mentioned legislative constraints and solicitors' operating within the disciplinary rules. Are there any specific legislative changes that we should consider?

Linda Costelloe Baker: Yes. The Solicitors (Scotland) Act 1980 and the Solicitors (Scotland) Act 1988 should be changed to leave one piece of legislation to cover the wide range of complaints, rather than two pieces of legislation that split the complaints into the categories of conduct and

service, and to ensure a wide definition of a complaint that has to be investigated. I know that the Law Society is taking fresh opinion on what constitutes somebody with an interest, because I have been quite critical of the fact that it operates too narrow a gateway. However, that could be addressed in legislation.

11:00

The Convener: I see. Thank you.

I welcome our next witnesses from the Faculty of Advocates: Colin Campbell, the dean; Neil Brailsford QC, the treasurer; Eugene Creally, the clerk; and Shona Haldane, an advocate and member of the Faculty of Advocates.

I refer members to the submission. In this session we are seeking to understand the role, remit and powers of the Faculty of Advocates and the dean in relation to the handling of complaints against advocates. We hear that there are few such complaints.

Gordon Jackson: Do I need to declare an interest again, convener?

The Convener: Not really. However, if you feel vulnerable, Gordon, you are welcome to repeat your declaration.

Gordon Jackson: In the present climate one should be very careful. I declare a formal interest in that I am a member of the Faculty of Advocates and, I suppose, subject to the disciplinary procedures of the dean and others. As far as I am aware there are no complaints outstanding against me. However, one can never be entirely sure.

The Convener: None so far.

Colin Campbell (Faculty of Advocates): I am not aware of any such complaints.

The Convener: Can you outline the role and jurisdiction of the faculty with respect to dealing with complaints against advocates?

Colin Campbell: First, I would like to say that we welcome the opportunity to assist the committee in its inquiry. We would be happy to help in the later stage of the investigations in any way that the committee considers appropriate. I was elected dean of faculty only recently and I speak with very little direct experience of the procedures, although I have some general awareness, having spent four years as vice-dean. I will do all that I can to answer your questions.

In so far as the role and jurisdiction of the faculty is concerned, since time immemorial—as lawyers are fond of saying—the faculty has been entrusted with the jurisdiction of disciplinary matters in general terms. The dean has prime responsibility for setting, maintaining and enforcing standards of professional conduct within the faculty. The complaints aspect is merely one facet of the dean's overall jurisdiction in that regard. That is now overlaid by the statutory provisions that require the faculty to deal with complaints in relation to professional misconduct and inadequate professional services.

The Convener: Can you give us examples of professional misconduct and of inadequate professional services?

Colin Campbell: Turning up in court under the influence of drink is a good example of professional misconduct, as is failing to display honesty and integrity in dealings with colleagues. Inadequate professional services might involve lengthy delay in responding to instructions, turning up in court unprepared to deal with the business of the day or even failing to turn up in court for no good reason.

The Convener: Could you outline the role and jurisdiction of the courts under such circumstances in dealing with complaints against advocates?

Colin Campbell: The court has no role in relation to such matters—but let me take a step back for a moment before continuing with that answer, convener. For a very long time, the court has delegated to the Faculty of Advocates the responsibility for training and regulating the admission of intrants to the bar. The faculty therefore takes responsibility for intrants at that stage.

The office of advocate is a public office. The advocate, having been trained and having satisfied the requirements of the bar, will be presented at the end of that period to the court. The court will then admit the advocate to the public office of advocate. Similarly, the court takes no role in relation to membership of the faculty. To take an extreme example, if a faculty member is suspended or expelled from membership, the court then has a role, by way of a petition procedure, in removing the advocate from the office. To my knowledge, the court has not—at least not for centuries—sought to interfere with the faculty's role and jurisdiction in relation to disciplinary matters or to matters of conduct.

The Convener: We are also trying to understand advocates' duality of role in having a duty to the client and a duty to the court. It would be useful for the purposes of the public record if you could clarify what that duty to the court is.

Colin Campbell: It is a difficult concept to sum up in a few words. An example might be helpful. An advocate has an overriding duty to the court not to mislead the court in any way and to ensure that the court is best equipped to do justice in the case. For example, if I was aware of a binding legal authority or precedent that is adverse to my

client's case and that is not brought to the attention of the court by my opponent, my duty to the court—in contrast, one might think, to what my client might perceive as his or her interests—is to bring that legal precedent to the attention of the court, so that it does not fall into error in disposing of the case.

The Convener: I understand that the relationship between an advocate and the client is not contractual, which can be a difficult thing for people to understand. Perhaps you could explain that—to me as well. People have a contractual relationship with their plumber and with other parties. People think that they are getting a service and a contract when they instruct an advocate for an opinion. That is, however, not the case.

Colin Campbell: That is indeed not the case. That is for historical but still good, up-to-date reasons. Let me make it clear at the outset that I cast no aspersions on my colleagues within the legal profession, namely, solicitors who do have a contract with clients. Historically and traditionally, an advocate is given a mandate to act as he or she thinks best in the interests of the client. A consequence of that is that advocates are not bound to accept their client's instructions in a matter; rather they are invited to bring to the client's case an independent and professional service.

That means that, in circumstances in which various duties to the court and client might conflict, an advocate will always be free to act as he or she sees fit in the best interests of the administration of justice. It also means that we cannot sue for our fees; we rely on other arrangements with the Law Society of Scotland to do that. I was conscious that that issue might be raised and am happy to discuss it further. I am not, however, convinced that it is directly relevant to the issue of discipline or complaint.

The Convener: Indeed not. I do not think that the public at large understand that the relationship that a client has with a solicitor differs from that which they have with an advocate. That is relevant because, if you were suing somebody, the basis on which you were doing so would differ depending on whether you were represented by a solicitor or an advocate.

Colin Campbell: Quite.

The Convener: I will leave my comments at that. I noticed that point in your submission and it occurred to me that the public might not be aware of it. The relationship is odd because, if clients instruct an advocate to give an opinion, they might reasonably assume that they have a sort of contract with the advocate, but that is not the case.

Michael Matheson: I understand that, in 1998, you published the "Guide to the Professional Conduct of Advocates". What status does that document have?

Colin Campbell: It is a guidelines document rather than a legislative document. It is not a code that covers all the rules and it should not be understood that, if something is not prohibited in the book, it is allowed. The book attempts to give flesh to the bones of an advocate's duties to act in a manner that does not bring the legal profession into disrepute and to be honest, decent, trustworthy, diligent and dedicated to the administration of justice.

The document also attempts to deal with practical issues such as priority of instructions, namely, how to deal with difficulties that might arise from an instruction to be in one place at the same time as another place. It obliges advocates to seek the advice of office bearers if they have any questions about ethical matters. It is under review. It is not a secret document and I would be happy to provide the committee with a copy of it if that would be of assistance.

Michael Matheson: That would be helpful.

Colin Campbell: I think that the committee has already been provided with a copy, but I can provide another one.

Michael Matheson: What sanctions can be applied if there is a breach of that code?

Colin Campbell: If I become aware of such a breach, and I think the matter sufficiently important, I have the power to initiate disciplinary proceedings. I am not limited to responding to complaints from third parties. Before initiating disciplinary proceedings in relation to a less serious matter, however, I might speak to the advocate concerned to see whether there was a satisfactory explanation.

Michael Matheson: Could you clarify that advocates' professional code of conduct is different from the Faculty of Advocates' disciplinary rules that you mention in paragraph 10 of your submission?

Colin Campbell: That is correct.

Michael Matheson: I presume that if a breach of the professional code had been highlighted to you, the next stage would involve the disciplinary rules.

Colin Campbell: Possibly but not necessarily. It would depend on the seriousness of the breach.

Michael Matheson: Could you detail the disciplinary rules?

Colin Campbell: I would be happy to provide the committee with a copy of them. They are under review at the moment.

Before I deal with the rules in detail, I would like to explain something to the committee as it is important that you are aware of this. The current disciplinary rules are in a document that is called the green book, for obvious reasons. The rules were promulgated towards the end of the 1980s, around 1987 or 1988. The document has been under review recently. If you read it, please be aware that it is about to be changed significantly. I will give details of the changed procedures and highlight how they differ from the previous position if that would be helpful.

The Convener: That would be helpful.

11:15

Colin Campbell: At the moment, if a complaint is made to the dean, the dean has various powers. He can decide that the complaint is vexatious, unreasonable and obviously not a matter for the faculty and dismiss it at that stage. Under the new procedures, that decision could be taken only by a complaints committee, which would include at least one lay representative and two members of the faculty, one of whom may be the dean.

If the complaint is not dismissed at that stage, the next question is whether investigating and establishing the facts is necessary. If the answer is yes, at a minimum, the counsel who is complained against will be informed and asked for their comments. If it looks as if the matter can be disposed of at that stage without further investigation, the old rule was that the dean could deal with the issue or remit it to the Faculty of Advocates disciplinary tribunal, which is chaired by a retired House of Lords judge. That second alternative would have been used for serious matters in which expulsion, suspension or a substantial fine were likely to be involved. Under the new procedures, that decision will go to the complaints committee about which I talked and which will involve a lay representative.

The decision will not be dealt with solely by the dean. If investigation were required, the complaints committee—previously the dean—would remit the matter to an investigating committee that was composed of members of the faculty to investigate and report.

I am sorry if this all seems somewhat complicated.

Michael Matheson: A flow chart would be helpful.

The Convener: I am picturing your flow chart. I am ahead of you.

Colin Campbell: If the matter could be resolved at that stage without further ado, previously the dean, now the complaints committee that I have mentioned, would deal with it, with a range of possible disposals, from admonition to a fine of up to £5,000. Anything above that would be a matter for the disciplinary tribunal.

Michael Matheson: How enforceable are the sanctions?

Colin Campbell: The sanctions are extremely enforceable. If an advocate failed to comply with them, that would be the most serious disciplinary matter that I can think of.

The Convener: Gordon Jackson is muttering, "Totally, totally".

Colin Campbell: The ultimate sanction is expulsion from the faculty and loss of the ability to earn a livelihood as an advocate.

Michael Matheson: You mentioned that two reviews continue on the disciplinary rules and on the professional code of conduct. When did those reviews start? It sounds like they are quite advanced. When do you expect them to be completed?

Colin Campbell: I accept that the review of the disciplinary rules has continued for too long. It has been on the go for three to four years. I am determined that it will be finalised early in the new year. The bones of the new scheme have been discussed with the Minister for Justice, so he is familiar with the proposals and with the ombudsman. I expect the rules to be finalised early in the new year. They are already being operated informally.

The review of the code of conduct has not made as much progress as one might have wished. As dean, I intend to push that through quickly. That review has continued for at least five years, and I accept that that is too long.

The Convener: Something may have slipped by me. You mentioned discussing the review of the rules with the Minister for Justice. What is his role in this? Why would you discuss these matters with the Minister for Justice? I do not understand.

Colin Campbell: I am not aware that there would be anything wrong in doing that, convener. These are matters in which he has taken an interest and, as a matter of courtesy and good communication, they have been discussed with him.

The Convener: Discussed? Does he have an input?

Colin Campbell: No. He has no formal role, no decision-making role, no veto and no guiding hand or anything of that nature. However, for understandable reasons, both he and the ombudsman have taken an interest in these matters. The matters have been raised from time to time in the ombudsman's reports, in which I imagine the Minister for Justice has taken an

interest. I have not been directly involved in such discussions—they took place before my time as dean—but that is the context in which the minister has been consulted.

The Convener: Consulted or informed?

Colin Campbell: Informed would be a better word.

The Convener: So, if he took issue with something, that would not be relevant to you because it would be a matter for the faculty. What I am trying to get at is the separation of powers.

Colin Campbell: There is a separation of powers. It is for the faculty to determine its disciplinary procedures.

Paul Martin: I want to ask Mr Campbell about the complaints procedure within the faculty. What procedures are in place? What is your role in dealing with complaints?

Colin Campbell: My role is pretty much along the lines that I described to Mr Matheson, but I will elaborate a little. At the moment, the role of the dean would first be to establish whether the complaint fell within the jurisdiction of the dean and the faculty. Some do not—they are complaints against solicitors or solicitor advocates and have to be referred. If the complaint were within the jurisdiction, the dean would take the initiative in progressing the complaint: bringing it to the attention of the counsel complained against, co-ordinating the responses, seeking the response of the complainer to those responses, making decisions on procedure and determining at what stage it may be necessary to go to a disciplinary tribunal or an investigating committee.

Paul Martin: How do your procedures relate to the Law Society of Scotland's procedures? Are they separate and distinct, or do they overlap? Can advocates be subject to both procedures?

Colin Campbell: They are completely separate. An advocate is not subject to the jurisdiction of the Law Society or to a disciplinary tribunal for solicitors, and vice versa. There is no overlap or duplication.

Paul Martin: I want to focus on the definition of complaint and the responsibility of the faculty to investigate. What requirement, if any, is placed on the faculty to investigate and report on complaints? How do you determine whether a complaint should be pursued?

Colin Campbell: For as long as one can remember, the faculty has understood and accepted the responsibility of investigating any complaint about the conduct of an advocate and of reporting back to complainers. That responsibility is accepted and well understood—but I am not sure that I am dealing with your point.

Paul Martin: Let me put it another way. Is there any legislative requirement for you to investigate a complaint?

Colin Campbell: Yes. Under sections 33 and 34 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the faculty has a statutory duty. The faculty has accepted that duty for a long time, and would accept it even without the legislation.

Paul Martin: Will you clarify whether, any time that you receive a complaint, you always pursue that complaint? Have there been no past instances in which you have not pursued a complaint? I am not cross-examining you.

Colin Campbell: Speak to me again when I have been in office for a year and I will be able to speak from direct experience. If a complaint of professional misconduct is made against an advocate, unless it is patently vexatious or frivolous, it will be investigated and the complaint will be dealt with.

The Convener: I will stop you and ask something that crossed my mind. You talked about solicitors and advocates. Are solicitor advocates under the rules of the Law Society of Scotland?

Colin Campbell: Yes.

The Convener: So the Law Society of Scotland disciplines them.

Colin Campbell: Yes.

Paul Martin: Will you define the complaints that the Faculty of Advocates will consider? Are there complaints against advocates that the public may consider to be legitimate but that are not covered by your definition? What does the definition exclude?

Colin Campbell: That is a difficult question. I would like a little time to put together a comprehensive definition of professional misconduct and inadequate professional service. Anything that brings the faculty or our branch of the legal profession into disrepute potentially falls within the definition of professional misconduct, including one's conduct in personal life as well as in professional life. I hope that inadequate professional service explains itself.

The Convener: You explained that inadequate professional service might include failure to read papers properly before appearing.

Paul Martin: Yes, that was helpful.

Who is able to bring a complaint against an advocate? Can an instructing solicitor or another advocate bring a complaint?

Colin Campbell: A solicitor can bring a complaint. Likewise, the client can bring a

complaint. There have been examples of other people bringing complaints. A judge, another member of the faculty or a law officer could also bring a complaint.

The Convener: Do you have figures for the number of complaints that the faculty has received over the past year?

Colin Campbell: My understanding is that, in the last year in which the ombudsman—

The Convener: I mean complaints to the faculty, not the ombudsman.

Colin Campbell: No, indeed. There were 20 complaints. This year, up to earlier this month, I think that the number of complaints was 21. I will check those figures for you.

The Convener: Perhaps you could let us know at some point the breakdown of those complaints into complaints from solicitors, complaints from members of the public and complaints from judges. It would be interesting to know the composition. We do not have that information.

Colin Campbell: I will be happy to provide it.

Lord James Douglas-Hamilton (Lothians) (Con): I declare an interest as a non-practising member of the Faculty of Advocates. I also express regret that I was not here at the outset of the meeting. I am also on the Standards Committee, which, unfortunately, is meeting at the same time as this committee.

I would be grateful if you could outline the role and constitution of the faculty's disciplinary tribunal and advise in what circumstances complaints are referred to that tribunal.

Colin Campbell: The disciplinary tribunal is made up of a chairman, a retired judge—at the moment, a retired House of Lords judge—two lay members, who are chosen from the panel of lay members that the First Minister nominates, and two practising advocates. I mention that the panel of lay members whom the First Minister nominates has recently been increased in size from three persons to five persons. Only two lay members sit on the disciplinary tribunal. There will therefore be five people in total on the tribunal.

A matter can be referred to the disciplinary tribunal for one of two reasons. The first is to impose a penalty when a complaint has been determined as justified, previously by the dean and now by the complaints committee, which I dealt with before Lord James Douglas-Hamilton arrived. The second is to deal with a determination as to whether a complaint is justified and, if it is justified, to impose a penalty.

11:30

Lord James Douglas-Hamilton: What is the role of the dean in the complaints process?

The Convener: We have covered that.

Lord James Douglas-Hamilton: What sanctions or penalties can readily be applied when a complaint is upheld?

Colin Campbell: If a complaint is upheld by the dean and/or the complaints committee, penalties range from admonition through censure to repayment of all or part of the fees paid or eventually to the imposition of a fine of up to £5,000. The dean or the complaints committee cannot suspend or expel a member from the faculty. If the matter is sent to the disciplinary tribunal, all those disposals are available but, in addition, the disciplinary tribunal can impose a penalty of suspension or, in the most extreme case, expulsion from the faculty.

Lord James Douglas-Hamilton: Is it correct to say that there is no right of appeal against the decision of the tribunal?

Colin Campbell: No. Under the current procedures, which, as I explained, are about to be changed, there is a right of review by the dean. The committee might find that odd. I confess that the faculty is no longer happy that there should be any right of review by the dean of a decision by the disciplinary tribunal. That right of appeal or review will be removed under the new procedures. Thereafter, the only review will be judicial review.

Lord James Douglas-Hamilton: Are complainants given any assistance in pursuing their complaints?

Colin Campbell: The faculty gives complainants whatever assistance is required. In addition, the faculty has accepted a recommendation made in last year's ombudsman's report that, as a matter of form, all complainants should be provided with a brief summary of the procedures, possible outcomes and target time scales. That was a very good recommendation, which I have been happy to accept.

The Convener: On the list of sanctions, we know that compensation can be paid by the Law Society to a complainer. Is it not appropriate that compensation should also be paid by the faculty to a complainer? The complainers get nothing at the end of the process. They have made the complaint and they may see something happening to the advocate, but there is nothing for them.

Colin Campbell: I think that such compensation would not be appropriate. If it were introduced, we might be in danger of straying into a completely different area. If compensation were to be paid, it would be paid by the individual counsel

concerned, rather than by the faculty. At the moment, the faculty does not have power to award compensation. That is a matter that is dealt with through the courts system. If we were to introduce compensation, I fear that we would run the risk of intermingling two quite different issues: the monitoring and regulating of professional standards, conduct and ethics by the faculty; and the redress of loss sustained.

The Convener: I may be very ignorant about this, but surely it is still open to someone who has been paid compensation by the Law Society to sue a solicitor. I cannot see how one excludes the other. It is not the case that because the person has received compensation they cannot also sue the solicitor. The compensation might be set by statute, limited in some way or even take the form of an order for something that is not monetary. Why do you think that it is not appropriate for the individual advocate to pay compensation to the complainant? It is rather hard to tell them that they have had a rotten deal, but that they have to go to court and raise another action to get any money. That is not the best thing to say to people who are already dissatisfied with the legal service that they have received and whose complaint has been upheld.

Colin Campbell: At the moment—the system might not survive a change—the dean and the faculty as a whole have always enjoyed the knowledge that any complaint that is brought against a counsel will be responded to fully, frankly and openly by the counsel. You may ask why that would change if compensation were at issue, but I would be anxious that the ethos and atmosphere of the system might change if complainers viewed the procedure as a way of obtaining redress for loss. At the moment, the faculty's jurisdiction is to maintain, enhance and monitor professional standards, not to trespass on the role of the court in adjusting losses and dealing with compensation or damages.

The Convener: A person might suffer a loss if they have to wait a long time for an opinion. Let us say that the counsel or his clerks told a client that the opinion would be delivered in a month or two—I pluck a figure out of the air—and it was made plain in the instructions that it was essential that the opinion be delivered in that time. If the opinion were not delivered in time there would be an impact on the client and it might affect the decisions they take. In that case, the faculty would find that there had been a failure to deliver properly professional services. In those circumstances, would it not be appropriate to award compensation for a delay that had a cost to the client? I am sure that the public would see that. Would that not be better than saying that the person would have to sue the advocate if they want any monetary redress?

Colin Campbell: All that I can do is repeat my concern that that would introduce a new element into the function and role of the faculty. Over many centuries the faculty has not exercised such a function—and with good reason.

The Convener: The public sometimes feel that advocates are untouchable. There is a sense that there is little that a member of the public can do if an advocate delays or does not read papers properly.

Colin Campbell: There is the repayment of fees. Perhaps you consider that an inadequate response.

The Convener: I heard that it was possible to reduce the bill. We will leave that point just now.

Gordon Jackson: I want to go back to why we are here. We are holding the inquiry because there is a perception in some places that, rather than being full, frank and open, self-regulation is not in the public interest. People feel that self-regulation means not so much being judged by one's peers as being judged by one's pals.

In general terms, how can that perception be dealt with? I have a suggestion. Even in my practising life, the role of the dean has changed greatly in such matters. The dean's role has diminished already and you have said that changes are afoot to increase the lessening of the role, as it were. Is there a case for taking the dean of the faculty out of the process completely, so that he is nothing other than a postbox? Perhaps he should have nothing to do with disciplinary matters at all, bearing in mind that he is elected by his peers—often because he asks them to elect him.

Colin Campbell: The faculty may take a different view but, speaking personally, I think that there is a case for what you suggest, which I intend to consider closely over the next while. So the real issue to be considered is the extent to which the dean should retain the sole or the primary responsibility in the traditional sense. There are arguments both ways, but the main criticisms of the faculty's procedures in recent years have related to the amount of lay involvement. We have taken steps to address that by increasing the involvement of lay representatives in the system.

Gordon Jackson: If the dean no longer had a role, other than as the person to whom people send their letters, what would happen? Would everything just be referred to the existing complaints body?

Colin Campbell: I hope I can respond to the thrust of your point. There are perhaps two issues: self-regulation and the role of the dean. The critical issue is self-regulation. The extent to which

the dean should be involved in that self-regulatory process is separate from the much bigger question. If self-regulation were removed, the power and moral authority of the leaders of the profession to insist on good standards of ethical and professional conduct would be diminished. Also, the internal consensus that professionalism should hold sway over commercialism might be diluted. That is the big issue that you have touched on. I urge the committee to think carefully before saying or doing anything that might diminish the independence of the profession, which is a precious feature of our public life in Scotland. Such features are rarely recognised or valued until they are gone. Within the self-regulatory regime, the place of the dean as opposed to the role of lay members is an important issue, but it is subsidiary to the bigger point.

Gordon Jackson: I take the point that you are interested in the principle of self-regulation. I raised the role of the dean because, if self-regulation is to survive, how it is done is important. There has to be a method of self-regulation that is not open to criticism as the role of the dean might be. I see that as relevant to the issue. However, the faculty's paper majors on the need for the legal profession to be wholly independent of Government and on the independence of the legal profession not being valued until it is gone. I understand that, but other witnesses have suggested that increased consideration of your complaints procedure from the outside would not necessarily undermine that independence. In other words, you are majoring too much on the point that the complaints procedure will undermine independence; it does not undermine your independence in a whole range of other ways. That may be the gist of what the ombudsman said to us.

Colin Campbell: The present system, with appropriate lay representation and scrutiny by the ombudsman of the efficiency and fairness of our procedures, is a reasonably good model that operates in the public interest. How the faculty deals with complaints is not in itself a threat to our independence. I did not mean to give the impression that it was a threat.

The Convener: To add to what Gordon Jackson has said, the point is about not only the substance but the perception. Has the faculty considered having a system like that in England and Wales, where I understand there is an independent complaints commissioner?

Colin Campbell: We have not given specific consideration to that.

11:45

The Convener: I know that you are reviewing your procedures, so you might want to look at that matter. Much of the evidence that we have received suggests that there is great difficulty—rightly or wrongly—for the public when complaints about a professional body or its members are dealt with by that body or its members.

There are tangled roots here. The problem is separating the complaints issue from the other issues in which you are independent, such as representation in the courts. The complaints issue is a separate one. I ask members to confirm that that is our view.

Gordon Jackson: I have lost my thread. Frankly, you just interrupted me.

The Convener: I am sorry. I was thinking about what you said about independence. You said that the committee should be careful about intervening in the independence of the Faculty of Advocates, but I do not see how changing the way in which complaints against members of the faculty or solicitors are dealt with can be regarded as intervening in the independent action of the professional bodies. I regard the complaints issue as completely separate from that.

Colin Campbell: Independence is a precious thing, which is rarely recognised until—perhaps slowly and incrementally—it is gone. At the moment we have a system of self-regulation, which includes lay involvement. The legal services ombudsman also scrutinises the fairness of our procedures. If the ombudsman or another outside organisation were given responsibility for the investigation, determination and disposal of complaints, our independence would necessarily be threatened.

You might think that I am pitching this too high, but it is fair to say that self-regulation is one of the primary guarantees of independence. If one thinks of self-regulation in the context of MPs' conduct and standards, that might strike a chord. As soon as the investigative process is given to another body, the independence of the regulated body is at risk.

One could envisage an advocate—who is required to be fearless in his or her independence and objectivity when dealing with many difficult, stressful and complicated issues that sometimes involve arguments against Government, local authorities and powerful organisations—being influenced, consciously or sub-consciously, by the knowledge that his or her conduct will be subject to review by a Government body or whatever. You might think that that is tilting at windmills but, with respect, I say that it is not. That is what could happen once the professional body loses independent responsibility for its own conduct and

standards. I am sorry if I am rambling a little, but I think that this matter is important and that we are getting to the heart of it.

One of the strengths of our professions in this country—I hope that the legal profession can be counted among them in this regard—is that we take extremely seriously ethical conduct and professional behaviour. Our responsibility, as leaders and as members of the profession, for those matters is a powerfully motivating feature that enhances the professional system. If that responsibility is taken away from the profession and given to another body, it might become more difficult for the leaders of the profession to battle with business and commercial considerations within the profession. At the moment the leaders of the profession can stand up for and maintain ethical professional conduct. Removing that responsibility from the profession would damage it.

The Convener: I understood from the legal services ombudsman that, even if her role and powers were increased, she would not investigate every complaint. She would have the powers to investigate, if necessary, the substance of a complaint, irrespective of whether the complaint was against a solicitor or a member of the faculty, but in the main, complaints would be referred back to the professional body. Only in certain extreme cases would the ombudsman take on an investigation.

Colin Campbell: Either there is a principle of self-regulation or there is not. Once that principle is eroded and there is only limited self-regulation, it is gone.

The Convener: Right—that is your position. Thank you.

Lord James Douglas-Hamilton: I have some brief questions about quality assurance and monitoring. Does the Faculty of Advocates keep records of complaints, whether or not they are upheld?

Colin Campbell: Yes.

Lord James Douglas-Hamilton: In what circumstances can the faculty order an advocate to take action in respect of a complaint?

Colin Campbell: Will you elaborate on what you mean by "order an advocate to take action"? If a complaint is brought to the attention of the faculty, I can require the individual to respond fully, frankly, openly and honestly. If I have cause to believe that he or she has not done so, that, in itself, would be a separate disciplinary matter, which I would take seriously.

Lord James Douglas-Hamilton: If a complaint arises in the middle of a case because there is dissatisfaction about how the case has been handled, can you give advice or guidance?

Colin Campbell: Yes. You touch on a point that Mr Jackson mentioned. The role of the dean is multifaceted. One of the dean's principal functions is to provide advice and guidance, both during and after cases, on any matter. The dean and other office bearers can, and do, provide such advice and guidance. That may be one reason why the number of complaints is relatively low.

Lord James Douglas-Hamilton: The figure of 20 complaints for last year was mentioned. Are some of those complaints against only one person?

Colin Campbell: I would need to check that information.

Lord James Douglas-Hamilton: It is only a minor detail.

What processes has the faculty put in place for monitoring and reviewing the effectiveness of the complaints system?

Colin Campbell: I cannot point to a formal procedure—we are such a small organisation and such matters lie in the hands of so few people. The ombudsman meets us regularly to discuss complaints. I do not consider the absence of a procedure to be a deficiency, but I would be happy to consider the matter further.

Lord James Douglas-Hamilton: Will you outline the process by which you monitor complainants' satisfaction with their experience of the complaints system? What formal feedback mechanisms exist, if any? If no such process is in place, can you explain why? Are there benefits in instigating such a process?

Colin Campbell: There is no formal or informal process of that kind, other than the information that is given to complainants at the end to inform them of the role of the ombudsman, should they wish to complain about how the matter has been dealt with. I stress that I have been in office for just over a month, so my experience of complaints is relatively limited. If, in the course of making a complaint, a complainer is unhappy with the way in which the matter is being dealt with, they will say so—I suspect that they do say so and they are certainly not discouraged from doing so—and any such concerns will be taken seriously.

Lord James Douglas-Hamilton: Is it the case that there are very few complaints in comparison with the huge number of cases that pour through the Court of Session and that complaints are very much the exception rather than the rule?

Colin Campbell: Yes.

The Convener: Thank you very much.

I welcome Alistair Sim, associate director with Marsh UK Ltd, the insurance brokers. Who is accompanying you?

Alistair Sim (Marsh UK Ltd): I apologise for the absence of any notice, but the reason why two of us are sitting here rather than just one is that I am accompanied by legal counsel Michael Dean of MacLay Murray & Spens. As agents for the Law Society of Scotland, we are bound by considerations of client confidentiality and there may also be issues of commercial sensitivity. We are, of course, pleased to have been invited to assist the committee with its inquiry and we will be as helpful as possible, but I may have to confer with legal counsel should particular issues arise.

The Convener: We understand that from your paper. It would have been better to know in advance that there would be two of you, but I do not think that the committee has any problems with that.

I refer the committee to papers J1/01/35/4, which is the Marsh UK submission, and J1/01/35/5, which is supplementary evidence to that submission. We are endeavouring to explore how the insurance policy that covers solicitors operates and to understand the role of the broker and insurers in investigating complaints and compensating complainants and the relationship of the insurance policy to the internal complaints procedures of the profession.

Paul Martin: Good afternoon, Mr Sim. We understand that all solicitors in private practice must be covered by professional indemnity insurance. What situations would such insurance cover and what payments would be made in respect of the master policy?

Alistair Sim: The master policy provides cover for losses suffered by clients of solicitors as a result of a solicitor's negligence or equivalent breach of contract or of certain acts of dishonesty by solicitors or any member of a solicitor's staff, provided that there is an innocent principal in the practice who is entitled to be indemnified. That is a basic principle of insurance. In the event of there being no innocent principal in the practice who is entitled to be indemnified, which would be the case if a sole practitioner committed a client account fraud, recourse would be to the Scottish solicitors guarantee fund, subject to its terms and conditions.

The cover is wide. It is what is described in insurance terms as civil liability. Some insurance policies for professional advisers extend only to negligence—negligent acts—but the master policy is written on a civil liability basis, which is a more extensive form of cover.

12:00

Paul Martin: That is fiercely technical. Without breaching client confidentiality, can you give us an example of a situation that such insurance would cover?

Alistair Sim: It would cover allowing a client's claim for unfair dismissal or personal injury to become time barred.

Paul Martin: That is helpful.

What are the main terms and conditions with which the master policy must comply?

Alistair Sim: The policy must be underwritten by authorised insurers. The terms of the statute that gives the Law Society of Scotland authority are permissive rather than mandatory. The society is not required to put in place insurance or other arrangements for the protection of the profession and the public. The statute allows the society to put in place a master policy, such as the one that we have; an approved insurers arrangement, which is currently the arrangement in England and Wales; or a mutual fund.

Paul Martin: In your written submission, you state that the master policy currently provides cover of up to £1.25 million on any single claim. Are you able to provide us with figures for how much has been paid out in recent years under the master policy?

Alistair Sim: I would have to confer with the society about that and provide the committee with the information separately in writing.

The Convener: We are content with that.

I ask Maureen Macmillan to make a declaration of interests.

Maureen Macmillan (Highlands and Islands) (Lab): I have a husband who is a solicitor—that sounds as if I have more than one husband. [*Laughter.*] My husband is a solicitor and a former member of the council of the Law Society of Scotland.

I have not had time to read all of your submission. Will you give us an idea of what happened before there was a master policy? Was that a satisfactory state of affairs?

Alistair Sim: In the dim and distant past—

Gordon Jackson: I had one of those.

Maureen Macmillan: I ask the question because I believe that there used to be problems.

Alistair Sim: Yes. Until the 1960s, relatively few firms had professional indemnity insurance, even at a very low indemnity limit. At that time there was a completely different claims culture. Increasingly, solicitors saw that they needed professional indemnity insurance. They discovered that, because of the peaks and troughs in insurance market conditions, from time to time they were unable to get the cover that they needed at acceptable premium rates. In response to a call

from the profession at large, the society held a symposium on the subject of professional indemnity protection, which led to the creation of the master policy.

Paul Martin: Can you provide us with information about how much solicitors pay for policies?

Alistair Sim: We could provide that information separately, subject to the Law Society's approval.

Paul Martin: Does insurance for the legal profession cover inadequate professional services?

Alistair Sim: Theoretically, it does. If professional services are inadequate, there is the potential for a maximum award of £1,000. For most firms, that would be within the excess—the self-insured amount—under the policy. Therefore, in practical terms, inadequate professional services are not covered. However, to ensure that no complainer who goes through the Law Society's complaints process and receives a monetary award finds that it is not paid because of the solicitor's intervening insolvency, the master policy will pay without regard to the self-insured amount.

Gordon Jackson: We are discussing these issues because a lot of people have made representations to the committee about them. One of the complaints that we get is that solicitors have a financial interest—their premiums—in keeping down the payments from the master policy. Another complaint is that the Law Society makes it difficult for clients to get money from the master policy—the allegation is that it is not quite at arm's length. Will you comment on that?

Alistair Sim: It is a no-brainer that solicitors have an interest in keeping down the cost of insurance, because any compensation arrangement is paid for by solicitors. They meet claims themselves—they meet claims within the self-insured amount from their own pockets. They pay premiums for the provision of cover that reflect the level of claims experienced. That is fundamental to the risk management approach that the society and the profession have pursued eagerly for a number of years, with the objective of keeping the number of claims down. The factor that they cannot control is the quantum of any claim, because that is a matter of law. The courts and the operation of the law will determine it. The level of awards cannot be influenced in the way that is being implied.

Gordon Jackson says that a number of representations have been made to the committee, but I am not aware of that level of dissatisfaction—it is not necessarily what we have found. We conduct satisfaction surveys to establish the level of satisfaction, at least with the service. We survey the solicitor profession—those who receive the benefit of the protection of the policy—and claimants' agents. The surveys indicate a high level of satisfaction with the process.

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

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

Gordon Jackson: You mentioned that you monitor insurers' performance.

Alistair Sim: Absolutely. We check their claim files to ensure that, in relation to satisfying claimants, there is compliance with a claims-handling philosophy. That philosophy cannot go so far as to say that we will accede to claimants' every demand, but it can say that we will perform in accordance with reasonable rules of fairness on matters such as speed of response, not stonewalling, being proactive and finding ways to bring about resolution of the claim as quickly as possible.

That might mean promoting the idea of alternative dispute resolution as an alternative to the otherwise inevitable litigation. For a number of years, insurers have had, as an objective, to speed up settlement. That has been part of the continuous improvement process in the performance of the master policy and the level of satisfaction.

The society is not in a position to influence settlements. The society puts in place certain checks and balances or, at least, approves the checks and balances that have been put in place. It then steps back and the claims are handled at arm's length.

Lord James Douglas-Hamilton: Can you give us any guidance as to what percentage of cases result in compensation being paid? A rough-and-ready indication would do.

Alistair Sim: Of the claims intimated by claimants that are dealt with by the master policy insurers, I think that I am right in saying that the figure is approximately three fifths, or 60 per cent.

Lord James Douglas-Hamilton: Are those successful claims?

Alistair Sim: They involve some payment. Statistics are always difficult, because there are all sorts of caveats and qualifications.

Lord James Douglas-Hamilton: Do you find that complaints are made against the same firm more than once, or are they spread evenly throughout the profession?

Alistair Sim: Are we talking about negligence claims rather than complaints?

Lord James Douglas-Hamilton: Yes.

Alistair Sim: There are instances of individual firms incurring a series of claims, or repetition of claims. Again, it is dangerous to extrapolate any conclusion from that.

Claims sometimes arise many years after the alleged error or omission; that is one of the features of professional negligence claims. Looking at a firm's current claims experience does not necessarily inform one of how well things are being managed currently by that firm.

Gordon Jackson: I want to return to what I was saying about influence. I am trying to tease out the thought in my own mind. Normally an insurer takes over—I have forgotten the legal term.

Alistair Sim: Subrogation.

Gordon Jackson: Yes.

If I hit someone in my car and the insurance company takes over, I frankly do not care whether the company pays that person. If the insurer pays and there is an admission of liability that I was naughty, I do not care, as long as I am not prosecuted.

A solicitor is different. A charge of negligence against a solicitor matters big time to that solicitor. He does not want anyone to say that he was negligent. One could therefore understand that a solicitor would have far more interest than I would in the outcome of the claim. I do not really care what the insurers do with a claim against me. That might be why it is thought that solicitors and the Law Society, which is the big provider of such policies, have greater influence. If I could put it this way: there is rather less subrogation than there might be normally.

Is there anything in the idea that, in settlement, more account might be taken of solicitors' views than my insurers would take of my views if they are settling a claim for a wee bump from my motor?

Alistair Sim: You are talking about financial interests.

Gordon Jackson: No, it is not just about financial interest. A solicitor's interest in not having claims made against him is not just about his insurance premium going up; it is more subtle than that. It is about the sense of being negligent and having a finding against him as a professional person. It is not just about money. If somebody finds that I am a bad driver, who cares?

Alistair Sim: Once a claim has been intimated to the master policy insurers by a solicitor, with a request for indemnity to be provided, the matter is in the hands of the insurers, who then have an incentive to get that claim settled on appropriate terms as quickly as possible.

12:15

Gordon Jackson: Are you saying that there would be no more come-and-go, as it were, or influence by the solicitor in the settlement of a claim that would be professionally damaging to him than there would be in any other subrogation situation? That is important. Normally, an insurance company settles financially. If an insurance company is settling my motor claim, whether it thinks that I am to blame or not, it is sometimes cheaper simply to pay. That means that there will be a finding against me, but the company does not care. Is the same done with solicitors? Does money rule to the same extent? Do you understand the point that I am trying to make, convener?

The Convener: Yes—you are talking about a professional finding against a solicitor.

Gordon Jackson: Is the fact that a solicitor will not be happy about having a finding against him taken into account?

Alistair Sim: We should remember that we are not talking about a finding. Few negligence claims are pursued through the courts to an ultimate conclusion and decree.

Gordon Jackson: I did not intend to be technical. I understand that we are not talking about a finding, but most solicitors whom I know would have a niggle with even an implied admission that they were negligent.

The Convener: If a claim is settled against a solicitor—

Gordon Jackson: If a claim is settled against a solicitor, he will not like it.

Alistair Sim: I will not pretend that solicitors are never resistant to the insurer's settlement or proposed settlement of a claim.

Gordon Jackson: How can solicitors make that resistance? If there is total subrogation, what is the mechanism for making their lack of happiness felt? I have no mechanism if there is a bump in my car. The insurance company will not even talk to me any more—it will simply take my claim and I will drop out of the scene.

Alistair Sim: Many claims against solicitors are

extraordinarily complex. The insurers indicate that they consider that about 40 per cent of claims are straightforward and the rest are in the complex or very complex category. Many cases are absolutely not black and white. There can be two expert opinions on one side and two on the other. Commercial practicalities come to the fore and insurers must take a commercial view. That is in the nature of contentious practice in general. Insurance does not necessarily alter the position.

Insurers are accountable to the insured practice to the extent that the insured practice could object that the insurers are not exercising their rights of subrogation reasonably and justifiably. Insurers therefore risk the possibility that the individual firm of solicitors will take the matter to arbitration.

Gordon Jackson: Do solicitors sometimes play that threat card?

Alistair Sim: Yes, but relatively rarely. I cannot say what the relative extent is—the insurers would have to answer that. However, I believe that it is relatively unusual that the solicitor is not absolutely on side with the insurers in making a settlement.

Gordon Jackson: That interests me. You said that solicitors sometimes resist settlements. What is the mechanism for that resistance? I do not have any mechanism with my insurers. They do not even tell me that they are paying out a claim on my policy—they just do it. What is the mechanism whereby solicitors can have influence?

Alistair Sim: The insurers expect to have their insured on side with them in every aspect of the conduct of the claim. If the insurers are providing indemnity, they have the absolute right to settle the claim by virtue of the conduct and control provision in the policy wording, but that is subject to their acting reasonably and being able to justify their actions. That means that they have to take solicitors into account.

Gordon Jackson: That sounds slightly different from any other kind of insurance. For example, my car insurer, whoever he is, does not have a tuppence-worth of interest in keeping me on side if I have a claim. In fact, he usually does not tell me anything. As far as I can see, in many reparation claims, the insurers are not interested in keeping the foundry, or whatever the industrial concern is, on side.

Alistair Sim: I am not altogether sure that the insurance position would be any different.

Gordon Jackson: But you give the impression that the insurers are interested in keeping the solicitors on side, which gives the solicitors a greater than usual interest in subrogation situations.

Alistair Sim: As the master policy is to protect the legal profession, there is a desire not to fall out with your insured client.

Gordon Jackson: Well, okay.

The Convener: That is interesting. The original point was that the financial interest that solicitors have in minimising the level of payments might become a professional interest in the sense that Gordon Jackson has been trying to tease out. The fact that a settlement against a solicitor could be seen as an indictment of that solicitor is more important than any financial aspect. As a result, complaints to the effect that you obviously act in the interests of solicitors have some merit. As Gordon Jackson has illustrated, solicitors will not step back from the matter, because they are very interested in not having a settlement of any kind against them.

Alistair Sim: Unashamedly, solicitors have the self-insured amount at stake, which means that insurers are committing the insured practice's self-insured amount—in effect, their own money.

The Convener: Thank you very much.

Item in Private

The Convener: I ask members to agree to consider the committee's final report on the general principles of the Freedom of Information (Scotland) Bill in private at our next meeting, which will take place on 8 January. The item is the only one on the agenda and the meeting should last for about an hour. Are members agreed?

Members *indicated agreement*.

The Convener: The fourth item on today's agenda is consideration of our draft stage 1 report on the Freedom of Information (Scotland) Bill, which we have already agreed to take in private.

12:23

Meeting continued in private until 13:15.

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