

# **JUSTICE 1 COMMITTEE**

Tuesday 22 January 2002  
(*Afternoon*)

Session 1

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## JUSTICE 1 COMMITTEE

† 2<sup>nd</sup> Meeting 2002, 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) (LD)

\*Maureen Macmillan (Highlands and Islands) (Lab)

Paul Martin (Glasgow Springburn) (Lab)

Michael Matheson (Central Scotland) (SNP)

\*attended

### THE FOLLOWING ALSO ATTENDED:

Dr Richard Simpson (Deputy Minister for Justice)

### WITNESSES

Martyn Evans (Scottish Consumer Council)

Graeme Millar (Scottish Consumer Council)

Sarah O'Neill (Scottish Consumer Council)

### CLERK TO THE COMMITTEE

Lynn Tullis

### SENIOR ASSISTANT CLERK

Alison Taylor

### ASSISTANT CLERK

Jenny Goldsmith

### LOCATION

Committee Room 2

† 1<sup>st</sup> Meeting 2002, Session 1—held in private.



## Scottish Parliament

### Justice 1 Committee

*Tuesday 22 January 2002*

*(Afternoon)*

[THE CONVENER *opened the meeting in private at 13:46*]

13:56

*Meeting continued in public.*

### Item in Private

**The Convener (Christine Grahame):** I convene the Justice 1 Committee's second meeting of 2002. I ask members to turn off mobile phones and pagers and offer apologies for Michael Matheson, who is on his sick bed. I suspect that Paul Martin is at the Audit Committee. Obviously, that makes it difficult for him to be here.

Does the committee agree to discuss agenda item 8—witness expenses—in private?

**Members** *indicated agreement.*

## Legal Profession Inquiry

**The Convener:** Agenda item 3 is our inquiry into the regulation of the legal profession. I ask members to declare any relevant interests. I know that that seems nit-picking, but we must do that on every occasion.

**Maureen Macmillan (Highlands and Islands) (Lab):** My husband is a solicitor and a former member of the council of the Law Society of Scotland.

**Lord James Douglas-Hamilton (Lothians) (Con):** I am a non-practising Queen's counsel.

**Gordon Jackson (Glasgow Govan) (Lab):** I am a member of the Faculty of Advocates and have a great many close personal friends in both branches of the legal profession.

**The Convener:** I look forward to the story developing in the coming weeks. I am a member of the Law Society and a non-practising solicitor.

From the Scottish Consumer Council, I welcome to the committee Graeme Millar, who is the chairman, Martyn Evans, who is the director, and Sarah O'Neill, who is the legal officer. I refer the committee to the council's written submission—its reference is J1/02/2/2—and invite members to put questions to the panel.

**Maureen Macmillan:** The Scottish Consumer Council's evidence states that research on consumers' experience found widespread concern that the body that represents solicitors' interests—the Law Society of Scotland—also has statutory responsibility for investigating complaints against its members. You recommend the establishment of an independent body to deal with complaints about solicitors. Where are you coming from? Do you want no solicitors to be members of such an independent body? Some have made the case that, if the body is to be truly independent, no solicitors should be involved. Would solicitors continue to have a role in the operation of such a body, if it were independent of the Law Society? We must bear it in mind that the Law Society uses lay people at present.

**Martyn Evans (Scottish Consumer Council):** We envisage that the independent body that would oversee the process of complaint handling would not have solicitors on it. There would be a principle of local resolution. In other words, if someone had a complaint against a solicitor, it would be appropriate to go to that solicitor to try to resolve the complaint in the first instance. Also, the Law Society would be responsible for ensuring that its members had handled that complaint properly and would review that complaint as solicitors. However, the independent body would oversee

that process. It would not deal with every complaint but would refer some to the Law Society, which would be able to refer the case back to the local solicitor.

14:00

It is common sense to have a system that tries to ensure local resolution for complaints in the first instance. If the problem was not resolved to the complainant's satisfaction, the Law Society would have a clear role in ensuring that its members dealt with the complaint properly, that the process was appropriate and that guidance was given to solicitors. Overseeing that would be an independent body that we do not envisage would have any solicitors as members.

**Maureen Macmillan:** Not even to give legal advice about legal details? Would the independent body be entirely focused on the process?

**Martyn Evans:** If the body felt that it needed to, it could take independent legal advice. However, in relation to the process by which decisions are made on complaints, our view is that solicitors would not be represented on the independent body because it would be overseeing a process in which most of the work had been done by the Law Society.

**Maureen Macmillan:** How would that differ from the role of the ombudsman at the moment?

**Martyn Evans:** The ombudsman does not have the powers that we think necessary, which are to undertake independent investigation of the process; to direct the Law Society to give guidance and advice; and to review cases that have not been referred to the ombudsman by a complainant. The role of a regulator would be more apparent and the powers would have to be commensurate with that role. If the legal services ombudsman were to act as the independent body, we would have no problem with that as long as their powers were significantly enhanced.

**The Convener:** I am concerned about the fact that there would be no solicitors on the independent body. Where would the expertise about what the solicitor ought or ought not to do come from?

**Martyn Evans:** We envisage that the independent body would review the complaints system. The rules and the standards of the system are clearly set out and there is no reason to think that the members of the body might not understand them, just as the lay members of the current body who gave evidence to this committee can understand the system.

We see no need for having a formal solicitor presence in that process. Solicitors would have been involved in the initial decision on the

complaint against a business and solicitors, as representatives of the Law Society, would have been reviewing the complaint.

**The Convener:** Are you saying that the Law Society would still have a role in reviewing the complaint and that, further up, there would be an independent body that would review the actions of the Law Society?

**Martyn Evans:** Yes.

**The Convener:** Who would appoint the members of the independent body?

**Martyn Evans:** We do not have a view on that.

**The Convener:** But that is the difficult part. Someone has to appoint them.

**Martyn Evans:** We see two options. One is to enhance the powers of the current legal services ombudsman and carry on with that same system of appointment, which is done by the Government. The second, which was suggested by our colleagues in the National Consumer Council, is to have a wider-ranging board, which would be appointed through the normal process of public appointments.

**Gordon Jackson:** You use words such as "review" and "oversee" almost interchangeably to the extent that I find them meaningless. What does "oversee" mean, for example? What precise sequence of events are we to understand by that word?

**Martyn Evans:** I am sorry if my words are confusing. I am trying to describe the range of powers that an independent body would have to have in order to ensure that a system of complaints handling was undertaken, without making that body undertake all complaints handling. Such a body would have to have powers to direct how complaints should be handled—either at the local office stage, by a solicitor, or by the Law Society at the second stage. It would need the power to investigate how complaints were being handled without needing to have a complaint made to it. In other words, it should be able to take a sample of complaints and investigate how they had been handled by the intermediary body—the Law Society. The body would need power to give direction to the Law Society or to the individual solicitor about how to deal with a complaint and, if the independent body felt that it had not been dealt with satisfactorily, which outcome should be different.

We could outline the range of powers in writing if I have not expressed myself clearly. Those powers would take on a role that is quite common. Professor Alan Paterson referred in his evidence to the powers taken by the legal services commissioner in New South Wales—the equivalent of an ombudsman. They are powers

that would be necessary in order to undertake that job.

**Gordon Jackson:** I am not against beefing up the powers of the ombudsman. However, I get the impression from your comments that beefing up those powers might be enough—we would not need a separate quango.

**Martyn Evans:** The convener asked who would appoint the body and how would it work. We have two options: to beef up the powers of the current ombudsman or to appoint an independent body. We do not have a view on which is the better option. We are saying that there must be an independent body with sufficient powers to oversee the process of complaints handling. We accept that that could be brought about by increasing the powers of the current ombudsman. The alternative is to appoint a board, following Nolan. That is what our colleagues in England have proposed. We have no evidence to suggest which option is better.

**Gordon Jackson:** Let us assume that it is better to expand the powers of the ombudsman. What relationship would he have to the disciplinary tribunal, which is the ultimate sanction for solicitors? The tribunal sits in judgment over a solicitor and sometimes throws them out. Would those tribunals continue? Would the ombudsman have the power to refer cases?

At the moment, many people have the power to refer cases to the Scottish Solicitors Discipline Tribunal, although as far as I know, no one but the Law Society uses it. The tribunal is the ultimate sanction.

**Martyn Evans:** Our basic criticism of the current system is that it does not focus as well as it could on redress to the consumer. The disciplinary tribunal is about disciplining the professional member. We see no reason why the discipline of professional members should not be dealt with by the profession; however, we are concerned about complaint handling and redress to the consumer.

**Gordon Jackson:** You are separating those elements. I understand that.

**Martyn Evans:** Some of the evidence that we have heard is that people feel that when a matter goes to the disciplinary tribunal—where the solicitor is disciplined—that does not address their complaint. Rather, it addresses the professional competence and future of that solicitor. We understand that there should be a disciplinary process, but we want the complaints handling system to be focused on the consumer. If the complaint is upheld, there may well be a case for the professional body, with appropriate supervision, to take disciplinary action against one of its members. At the moment, those elements are mixed up.

**The Convener:** That could be reversed. Presumably if something came up during a complaints procedure that may or may not require disciplinary proceedings, it could be routed that way.

**Martyn Evans:** I think so. Most of us have experience of employment law and we try to keep the two elements separate. If there is a complaint against an individual, we deal with the complaint. If the complaint is upheld, we go through a different process to find the appropriate action to take against the individual. The mixture of the two elements creates confusion and difficulties.

**The Convener:** We might have pre-empted Donald Gorrie's questions.

**Donald Gorrie (Central Scotland) (LD):** No, not at all.

I did not gather from your written submission that you envisage the Law Society of Scotland being involved in the second stage of the complaints procedure. I thought that your new body was to replace that body in that role.

You are interested in the public perception. Would not that still be that the complaints procedure remains a fix by the lawyers, because the first stage is that a local lawyer has to put right the matter of complaint? You have constructive things to say about that. However, the second stage of the procedure involves the Law Society of Scotland. So again the perception is that the lawyers are sorting themselves out, and your board and ombudsman are somewhere in the mist a long way away.

**Martyn Evans:** There is a danger of the general public seeing a role for the legal profession as being a continuation of a conflict of interest. Therefore, the independent body, which might be the ombudsman or another body, must be sufficiently robust in its dealings to create confidence as necessary. The downside of missing out that middle stage is that a large and complex organisation would deal with complaints that might be routine and which could be dealt with by and referred back for local resolution. We see no reason to create a large public body to do that. We have confidence that complaints can be dealt with in that way by the Law Society.

We are suggesting that an independent body will oversee that process, to create the perception of the process's independence. However, our view is that it would be entirely wrong to take complaints handling out of the commonsense business of trying to resolve a problem. A professional body should assist in resolving problems, not merely fight against the complainant before an independent body. We worry that that would happen if we took the Law Society out of the equation. Its energies would be on the side of its

professional member, arguing their case in front of an independent body. We think that that would be an enormous waste of resources.

**Sarah O'Neill (Scottish Consumer Council):** We think also that it is important that the Law Society still has a role in the regulation of the profession in regard to complaints, because that is the only way in which the Law Society would be aware of problems that exist within the profession and the only way in which it could help to maintain and improve standards within the profession. It is important that the Law Society maintains its complaints role for that reason.

**Donald Gorrie:** If we accept your model, is it really sensible to have your sort of supervisory board and the ombudsman? Is not the solution to give the ombudsman more staff and powers? Politically, to invent yet another quango is an unattractive but not impossible position.

**Graeme Millar (Scottish Consumer Council):** We are perfectly aware of the difficulties of trying to create another organisation. That is why, in some respects, we put forward two possible models to express independence. From where we sit, the ultimate model would be the independent body that—for clarification—could take advice from lawyers about matters that it looked at, but it would not necessarily have lawyers as members: the independent body would be able to take legal advice. That closes the loop a bit on the convener's earlier question.

However, if you are suggesting that we have to find a way forward that expresses that independence in such a way that the consumer gains more confidence in the process—to be fair, the Law Society has gone some way towards that, but there is still the perception of conflict—clearly the ombudsman would, with more powers and a greater degree of expressed independence, probably suffice in that respect.

Ultimately, however, you would expect us to say that there should be an independent body overall, because even the ombudsman can be perceived as being close to—or perhaps closer to and on one or two issues uncomfortably close to—the legal scenario rather than the views and expressed desires of the consumer.

**The Convener:** I want to clarify that. You said that an independent body and the ombudsman were alternatives. You now say that you pitch for the independent body.

**Graeme Millar:** No. I am saying that we have put forward two alternative ways of expressing independence. Where we are coming from is probably consistent with many other views: to express independence in the clearest way possible and to get the maximum amount of confidence, we must have a totally independent

body. However, if that is not possible, our position is that the ombudsman's role should be enhanced.

**The Convener:** So your preference is for the independent body. That is my point.

**Graeme Millar:** Ideally, our preference would be for the independent body. We are saying that we have locked too much into that way of helping to express independence, but we are not hidebound to that as the ideal. We are saying that independence can move between one concept and the other.

**Lord James Douglas-Hamilton:** I have three questions. First, if an independent body were established, how do you envisage it being funded?

**Sarah O'Neill:** We do not have a definite view about that. However, it must be borne in mind that the existing system, which is funded by the legal profession, costs a lot of money. I understand that the current cost of the Law Society's complaints department is around £386,000 a year.

**Lord James Douglas-Hamilton:** How much?

**Sarah O'Neill:** The cost is around £386,000. One option for funding an independent body might be to ask the legal profession to pay for at least some of the cost of running that body. We like also the new financial ombudsman service's model, which proposes that the financial services industry fund its work by a combination of a general levy on all firms—as the Law Society currently does—and a "user pays" element, which means that if a firm has a complaint against it, it has to pay. We see attractions in that model, but we have no definite conclusions on how the body would be funded.

14:15

**Lord James Douglas-Hamilton:** Is the underlying assumption that the profession would have to bear the extra cost, not the Scottish Administration?

**Sarah O'Neill:** The profession might have to pay at least part of the cost, on the model of the financial ombudsman service. However, there are other possibilities and we have not come to a conclusion on the matter.

**Lord James Douglas-Hamilton:** I see. When and how did you carry out the research? Was the research based on a questionnaire, telephone polling or interviews?

**Sarah O'Neill:** The research was based on a questionnaire and was carried out in 1998. Questionnaires were sent to everyone whose case was closed by the Law Society between February 1997 and February 1998—we sent out a total of 1,229 questionnaires, of which 415 were returned. That is a response rate of 36 per cent, which is good for such research.



**Lord James Douglas-Hamilton:** How did you update the research? Did you find that the Law Society was supportive when the research was carried out? Did it give you the necessary information, if you required any? What problems were highlighted by the evidence that you received from those inquiries?

**Sarah O'Neill:** The Law Society was fully involved in the research from the outset. It had two members on the research advisory group that we set up and was fully involved in the design of the research. The Law Society sent out the questionnaires for us, because for reasons of confidentiality it could not give us the complainers' names.

As regards what we discovered, we can say only that that is what people's experience of the complaints procedure is. We cannot say, "Well, this is how we think the procedure actually functions." We can say only how people found it.

The most significant finding was that 50 per cent of those who responded said that they felt that their complaint had not been dealt with fairly. It was apparent from people's comments that the main reason for that was that they thought that the Law Society was protecting the solicitor, rather than looking out for the complainer.

Even 30 per cent of people whose complaint was upheld said that they did not think that their complaint had been dealt with fairly, and they were unhappy with the outcome.

**Lord James Douglas-Hamilton:** Did you update your research after you had the initial replies?

**Sarah O'Neill:** No. We are aware of the fact that the Law Society has significantly changed and improved its procedures since that time in a number of respects. I think that there are fewer delays than there were at that time. The Law Society has improved its consumer information, which was one of our recommendations. It has introduced a helpline for complainers and increased the number of lay people on its complaints committees. We welcome those changes.

We have not updated our research, but I suspect that if we carried out the same research now, we would find similar results on overall perception. I am constantly inundated with phone calls from members of the public who know that we did that research. People who were not involved in the research make the same complaints.

**Graeme Millar:** Our understanding is that the Scottish legal services ombudsman's observations are also that people's perceptions have not changed much, but she recognises that the Law

Society has gone some way to address questions that were raised as a result of the research.

**The Convener:** You have admitted that the difficulty lies in perception and that you cannot comment on substance. I suspect that none of us here can do that. I do not underestimate perceptions. Every politician knows the value of them.

Your proposal is that, if we decided to have an independent body, the Law Society, as well as funding its complaints procedure, should put a proportion of funding towards that independent body. Is that correct?

**Sarah O'Neill:** We are saying that that is one possibility, given that solicitors are already paying a subscription to the Law Society to cover the complaints procedure.

**The Convener:** Would that be your proposal if you were making a proposal? Is it just a suggestion?

**Martyn Evans:** It is a suggestion at the moment. We have not examined the detail of how an independent body might operate in Scotland in these circumstances.

We have put before the committee our views on what the options are. Those options relate to the idea that the profession should pay for the supervision of its own quality. The choices are either that the whole profession pays a levy, or that those who are more frequently complained about should have to pay more—the legal services approach. On balance, we favour the latter, because it has a regulatory impact. If someone is more often subject to complaint, they have to pay more often.

**The Convener:** Would they have to pay, regardless of whether the complaint was upheld?

**Martyn Evans:** We have not gone into the detail.

**The Convener:** Does not that seem a bit unfair? I am playing devil's advocate. There could be complaints about a large firm of solicitors and none might be upheld.

**Martyn Evans:** We can put forward only the consumer view. There might be other points of view. Our view is that the system should be operated and paid for by the firms. Ultimately, that comes back to the costs that the consumer has to meet. At the moment, we believe that the way that we suggest is the fairest. We think that those who are called to answer a complaint should pay an amount. We have not done any specific work in the area of independent legal services, so we have only a general view on that.

**Maureen Macmillan:** I am still unsure about the size of what you propose. You talked at one stage

about sampling and about keeping an eye on everything that is going on, from solicitors firms sorting out problems that arise locally to the Scottish Solicitors Discipline Tribunal. How hands-on do you expect an independent body to be? How many members do you envisage? If the body is to duplicate what the Law Society is doing, it will be rather large.

**Martyn Evans:** I agree. We have not brought a specific idea of how an independent organisation might operate and what it might cost. We are bringing a criticism of the current system and have asked the committee to review that system. The next stage, from our point of view, is to say that if the committee concludes that more independence is needed, we will consider that.

As a representative of a research organisation, I would try to answer the committee's questions by examining similar types of organisation that operate in other jurisdictions and by seeing whether comparisons of cost could be made.

I return to the example that we gave in our evidence, and which Alan Paterson gave in his written evidence, of the ombudsman service in New South Wales. I have also read what the Scottish ombudsman said to the committee about the increased powers and requirements for loading on her current job. She thought that more powers could be introduced without more staffing.

I am not saying that there should be no change. We would go and look at other areas to try to find a comparative cost. In looking for more powers, the current ombudsman has said that more staff are not needed. That is how I read the evidence.

I can answer your question only in terms of research in other jurisdictions.

**Maureen Macmillan:** May I move on?

**The Convener:** Does anybody want to follow that up, or will we move on?

**Gordon Jackson:** Is Maureen Macmillan going on to something completely different?

**Maureen Macmillan:** No. I just wanted to try to broaden out why the witnesses wanted an independent body to be established. They identified the lack of public confidence in the present service and the lack of focus on the consumer, as they see it. Do they want to mention other factors?

**Sarah O'Neill:** Our major concern is that consumers should have confidence in any body that deals with complaints. That means that the body has to be independent and has to be seen to be independent. Regardless of whether the current procedure is fair and independent, people do not see it that way. They see it as being unfair and biased toward the solicitor. That has to be the

most important consideration.

**Gordon Jackson:** I would like to tease that out further. Personally, I am interested not so much in an independent body but in increased powers and all kinds of things for the ombudsman as the gatekeeper. I am not entirely clear—it is my fault—about the role that the Law Society would be left with. At present, it has a complaints committee, to which people send complaints. A squad of solicitors—perhaps as many as six full-time solicitors—at the Law Society do nothing but go through complaints and put recommendations to the council. Complaints are dealt with by the council and, nine times out of 10, the recommendations are carried. Thereafter, a complaint either goes to the Scottish Solicitors Discipline Tribunal or does not.

Do you envisage that the Law Society will continue to investigate complaints in that way, with the ombudsman—assuming that the ombudsman's present role continues—having the power to oversee the system and to examine selected cases? Alternatively, do you envisage that the role of the Law Society will completely change?

**Sarah O'Neill:** Let me go back to the beginning. The most important part of our proposal for the process and how it should be run is that solicitors should try to sort out complaints at the initial stage. We do not think that that happens at present. Our evidence is that many people did not get a good service from their solicitor when they complained. We found that about four in 10 people said either that the solicitor or the firm refused to investigate their complaint or that their complaint was ignored. That was how people perceived the system. We think that a practice rule that requires firms to have a complaints procedure, with a delegated person to deal with complaints, should be a fundamental building block of a new regime. Such a practice rule does not exist at present.

**Gordon Jackson:** Most solicitors would support such an approach. However, I want to tease out what happens at the next stage.

**Sarah O'Neill:** I am just coming to that. Beyond the initial stage, the Law Society should have a role in ensuring that firms comply with a practice rule. We hope that that would mean that fewer complaints reached the next stage. The vast majority of complaints are about lack of communication and delay. If those issues could be resolved at the initial stage—before they became complaints—fewer complaints would get as far as the Law Society stage.

We still think that the Law Society should be the first port of call for the complainer, but we suggest that the complainer should also have the right to approach the independent body directly first, as an

alternative to approaching the Law Society. The independent body might decide to refer the complaint back to the Law Society, but we believe that people should have that option. The Law Society would have to ensure that the firm had investigated the complaint properly. If the complaint could not be resolved in that way, the Law Society would have to investigate the complaint, which is what happens at present. Thereafter, if the complainer was unhappy with the result or if the complaint was not resolved at that stage, it would be reviewed by the independent body.

**Gordon Jackson:** Therefore, the Law Society's present role would continue, to an extent. Your proposal is to put in place an option for a review body to ensure that there is an independent oversight of the system.

**Martyn Evans:** The key is user confidence, which our evidence suggests is very low. Part of the reason why user confidence is low is that people think that a conflict of interests exists. We think that an independent body should oversee the middle part of the process—how the Law Society operates—as that would increase consumer confidence without drawing anything away from the Law Society's role.

On your more detailed question about what the procedure would be like, we hope that it will not mirror some of the aspects of the existing procedure. The Law Society has argued that it would like delegated powers to be introduced, which would take away the council's ability to decide certain matters. We understand why people think that the system is unjust. At present, the council decides complaints and, in the circumstances in which the complaints committee goes against a solicitor, the solicitor can make representations to a council member, but the complainant cannot.

**Gordon Jackson:** Are you in favour of the Law Society's suggestion to delegate powers to a committee that includes lay people?

**Martyn Evans:** I think that the Law Society has made a very sensible suggestion. It feels constrained by its interpretation of the law, which is that complaints must be decided by the council. That raises issues about the unequal treatment of the complainant and the solicitor who is complained about.

**The Convener:** I am interested in, and think that there is much to be said for, firms having a structure for dealing with complaints. I suspect that many firms do not have such a structure—there is no standard structure. The problem might start with the question: "What is a complaint?" We heard evidence that suggested that a complaint arises when someone complains, which is true. If I

complain, I am making a complaint. However, as I understand the position of solicitors, that is not their point of view. Are not there strictures on what they can accept as a complaint?

**Sarah O'Neill:** Not as far as I am aware. Dealing with dissatisfaction promptly is good practice in any business or profession. If a customer or a client raises concerns, one should try to deal with those at the outset.

**The Convener:** I understand that, but I do not think that that is the position at the moment with solicitors. Complaints must be about specific matters, such as time delay and professional misconduct, before solicitors will deal with them. We have heard solicitors comment that they cannot deal with a complaint because they do not know precisely what someone is complaining about. The fact is, however, that those complaints still express dissatisfaction. I want you to address that problem.

14:30

**Graeme Millar:** That is partly addressed by our support, which I think that you have acknowledged, for the idea of having someone responsible within a law firm for assessing the overall way in which comments or complaints are handled. It would be that individual's responsibility to decipher whether a complaint is a true and meaningful one or one that could be solved within the legal practice or by an individual.

That individual would decide what would be likely to go forward as a formal complaint in the same way as that is done in many other sectors. The responsible individual, however, would also advise colleagues on how to handle people who do not understand why they are unhappy and need to have that articulated for them. For example, the matter might not be a complaint, but a search for further information.

Some good legal firms have a person who is responsible for handling complaints procedure, so there is good practice out there. That is not an innovation to allow firms to avoid complaints, but one that expresses their desire to have a good relationship with their consumers. It gives the firm a market advantage, apart from anything else.

**The Convener:** If there is a sole practitioner or if there are only two lawyers in the firm, they might have to do that job themselves.

**Graeme Millar:** That is right. In that case they would try to get some advice. It is hoped that the Law Society could advise such an individual.

I want to go back to the role of the independent body. The issue is not that it could be a large, unwieldy, expensive organisation, but that it could advise the Law Society on its complaints handling

and be a check and balance. The independent body could articulate a vote of confidence, on behalf of the consumer, that the Law Society is conducting well its complaints-handling process.

The issue is not about looking at every complaint, but about considering complaints that have bypassed the Law Society because the complainant is unhappy or dissatisfied; or it could be, as happens in other sectors, that the Law Society refers a complaint to the independent body for resolution because there is an impasse or lack of understanding. The impression has perhaps been given that the independent body would be a large, overarching, expensive, new type of quango. That is not necessarily what we envisaged, but we did not get into the detail of what the independent body should be.

**Donald Gorrie:** I found the last part of Mr Millar's reply helpful, but I am still not entirely clear whether the new authority, whether it is a beefed-up ombudsman or a new, fairly small body, is to be a court of appeal where people who are unhappy with the Law Society's decision about their complaint can go one stage further or whether it is merely a general regulatory body that sets out good practice.

**Graeme Millar:** We suggest that if a complaint cannot be resolved formally with the Law Society, that complaint can be taken to the independent body. To that extent, that body would be a final form of appeal.

**Martyn Evans:** We also suggest that that body not only considers the procedure for complaint handling and how that operates, but has the power to consider the substance of the complaint. The body would be an enhanced ombudsman or independent organisation which complainants could go to when they had a finding against them lower down in the complaints process. The body would consider not only the complaints-handling process, which the ombudsman can do, but the substance of the complaint and would be able to hear that complaint if it thought fit to do so.

**Donald Gorrie:** The present ombudsman deals with advocates as well as solicitors. Do you envisage that a beefed-up ombudsman or new regulatory body will do likewise?

**Martyn Evans:** We try to base our advice and evidence on our research. We have done no research about advocates. We can give evidence to you about solicitors only, so we are silent on advocates. That might or might not be a good situation.

**Donald Gorrie:** You condescend to talk about judges. Did you have evidence about judges?

**Martyn Evans:** We based our comments on our consumer principles about complaints. We

understand the issues about complaints against judges, but anybody who has been in contact with what they consider poor performance should be allowed to use a complaint mechanism about that. That is a matter of principle. Nothing exists at present and, as a matter of principle, something should be in place. A complaints system against advocates is available. Whether or not an advocate is involved, we have not investigated whether the system should be changed or incorporated into another system. I take your point.

**Lord James Douglas-Hamilton:** Your evidence says that the Office of Fair Trading would be a more appropriate body to regulate qualified conveyancers and executry practitioners, as opposed to transferring them to the Law Society. Is that necessary, given the small number of licensed conveyancers and the extremely small number—it is a single figure—of complaints involved?

**Martyn Evans:** I cannot say that we would die in a ditch about that. As a matter of principle, we supported the establishment of the Scottish Conveyancing and Executry Services Board. We have no objection to its disbandment, because of what has happened. Although that body has not succeeded in creating a large number of people to compete in the market with solicitors, it was nevertheless established to encourage competition against solicitors, so we find it difficult to accept that it should become part of the solicitors regulatory body. The Office of Fair Trading should have more presence in Scotland anyway.

We entirely accept your point about size. We say: "Here is the board's history; here are its antecedents." It is difficult for us as a consumer organisation to see a body that was founded to create more competition against a profession—solicitors—subsumed by that profession. That is a matter of our logic. However, your practical points are well taken.

**Lord James Douglas-Hamilton:** Your submission says that there is a need for

"a clear procedure for court users to make a complaint about the conduct of a judge or sheriff".

Does it follow that you would like the offence of murmuring of judges to be removed?

**Graeme Millar:** I will have to be helped to answer that question.

**Martyn Evans:** Me too.

**Graeme Millar:** We refer you to the lawyer.

**Sarah O'Neill:** I confess that I have never heard of such an offence, so I am not sure whether I can help.

**Maureen Macmillan:** It does exist.

**The Convener:** The deputy convener and I missed that. We were not blethering; my deputy convener was communing with me about an issue. I beg your pardon.

**Graeme Millar:** If we were playing ping-pong, I would bat the question back to Lord James.

**Lord James Douglas-Hamilton:** I asked a question that was possibly on a slightly light-hearted note. As the council's evidence asks for

"a clear procedure for court users to make a complaint about the conduct of a judge or sheriff",

does it follow that the council would like the offence of murmuring of judges to be removed? The presumption was that it would, but that was not very definite.

**Maureen Macmillan:** I would like to return to discussing what the enhanced ombudsman might do. The witnesses talked about the need for firms to be more alert to how they might deal with complaints. Beyond that, as the convener mentioned, the Law Society feels that perhaps many complaints fall outwith its remit and that it cannot deal with them. That annoys complainants. Would it be a good idea for the body that you propose to be the gate for complaints and able to assess what is appropriate for the Law Society to deal with? That would remove much of the annoyance that people who think that lawyers are ducking the issue feel.

**Martyn Evans:** We have considered that. We would not constrain consumers from approaching a particular body with a complaint. We would not say, "You must go there". We take a commonsense attitude. If a person approaches their local solicitor or the Law Society and is happy with the response, that is fair enough. A body should encourage complaints and promote how best to complain. That body should push complaints to the most appropriate place in the system and have the authority to follow a complaint through and not lose sight of it.

In our view, it would be appropriate for an enhanced legal services ombudsman or an independent body to have that authority. The new body not only would be one gate for people to go through, but would be a gate that was charged with promoting the idea of complaining; a gate that would follow things through if it referred a complaint on; and a gate that would be open and well publicised. I hope that that clarifies things.

**Graeme Millar:** We are not encouraging people to complain. However, when people have a concern, we want to help them to articulate it in such a way that the solicitor concerned will be able to address the complaint in the practice. For many members of the public or consumers, the law is

difficult to understand. The same could be said—if I wear a different hat—of the national health service. We have to help people to understand exactly what they want to complain about and then help them to articulate it.

Helping in that way will not necessarily increase the number of complaints; often it will reduce the number, because it will increase the number of resolutions at, if you like, the front gate. If people are frustrated by the process—or lack of it—or by its timing, or if they feel that their views are not respected, the process becomes prolonged.

We also want to find a way of helping the Law Society of Scotland to assist its members to understand that a complaints mechanism would be useful. Perhaps an individual in each firm should have responsibility for that. The consumer must be helped to articulate their concerns.

**Sarah O'Neill:** We see the Law Society as having a very important role in promoting to firms of solicitors the importance of dealing with complaints promptly and of having a written complaints procedure. Various pieces of research have shown that many dissatisfied people do not complain. Recent research carried out by *Which?* in England showed that almost half the people who were dissatisfied with their solicitor had not complained—usually because they did not think that it would do any good. Research has also shown that dissatisfied people will tell more people about their experience than satisfied people. It is therefore in a firm's interest to sort out problems before people tell all their friends not to use the firm because they were not happy. If problems are sorted out early, it will cut down the number of complaints made about the firm to the Law Society.

**The Convener:** I have had the opportunity of seeing the brief of the New South Wales ombudsman. If I am right, not only can he refer complaints directly to the legal firm or to the equivalent of the Law Society of Scotland, but he has the power to take on the case himself, either from the start or by intervening at some point. I may have missed it, but I do not think that you spoke of such a power. You said that the independent body or a beefed-up ombudsperson would do.

**Martyn Evans:** We cannot have expressed ourselves clearly. We would like the beefed-up ombudsman or the new body to have the power to take over cases if it was felt appropriate. However, we want to avoid everything having to go to the ombudsman—for the reasons that we gave—or the ombudsman having to refer everything back. If a case is sufficiently serious, a powerful regulator should be able to take it up from day one.

**The Convener:** Committee members, was that

matter raised previously? No response. Did the witnesses raise the matter earlier?

**Martyn Evans:** If we did not, we would like to make it clear now that there should be such a power.

**The Convener:** That is an important point. Does anyone want to ask about the issue, now that I have raised it in the dying moments? No?

**Graeme Millar:** We thought that we had raised it.

**The Convener:** I may have missed it.

**Graeme Millar:** The power should exist, although it would be used only in very unusual circumstances. The power may be used at the behest of the Law Society of Scotland. We foresee the new body working in close partnership with the Law Society. We are not talking about an overarching inspectorate, but about allowing the public to have more confidence in the Law Society and in solicitors. There may be occasional cases that have to be handled only by the independent body—perhaps at the behest of the Law Society.

**The Convener:** Or the ombudsperson.

**Graeme Millar:** Or the ombudsman. When I said independent body, I meant the beefed-up ombudsman or the separate organisation. There could be complicated scenarios involving lots of solicitors. I cannot think of a particular set of circumstances, but I am sure that a professional could.

**The Convener:** Or a client may be dissatisfied in a scenario that involved several firms, three sets of solicitors, God knows how many counsel, several advocates, perhaps the odd Queen's counsel and even a judge. That is quite a package.

14:45

**Maureen Macmillan:** Might the independent body simply become an automatic court of appeal for everyone whose case was dismissed? Might they immediately turn to you to try to get the decision overturned?

**Martyn Evans:** The evidence that we have about how consumers behave suggests that that would not happen, although professional and trade bodies often worry that it will. However, people try to use common sense and, if they secure a reasonable solution to their problem, a recognition of fault, an apology or are told that their solicitor behaved reasonably, they will not pursue the matter further.

In case our evidence makes us sound as if we are negative about solicitors, I should point out that I am aware that there are significantly fewer

complaints about solicitors in Scotland than there are in England—one in eight Scottish solicitors has had a complaint made about them whereas only one in five English ones has. Our research has uncovered positive ways in which solicitors have responded to complaints about them but, as is usual in such circumstances, some of our more negative findings received more attention. I do not want to give the impression that we find the solicitors' complaints-handling system to be universally poor. As Graeme Millar said, we found some of it to be extremely good.

**Graeme Millar:** The evidence from other professions, such as the medical profession, shows that few complainers take matters to the n<sup>th</sup> degree. For that to happen, the problem has to have been extremely severe. The system is geared towards preventing that situation occurring. We do not place blockages in the system but try to resolve the situation as early as possible. The Law Society has a major role to play in that. Whatever the independent body looks like—in other words, in whatever way its independence is articulated—it will have a major role in helping consumers deal confidently with their solicitor because they will be able to articulate separately their view about the complaints-handling process and will be more able to check and balance the processes among the firms within the organisation.

The Law Society has a huge job and we do not want to take anything away from the efforts of the Law Society, but we believe that the independent body will close the loop and will go a long way towards stopping a lot of the jokes about solicitors not being trusted. That perception of solicitors is, in most cases, unjustified. We do not believe that the independent body would be a massive drain on resources.

**The Convener:** I thank you for your attendance.

## Budget Process 2003-04

**The Convener:** Item 4 is consideration of the budget process. It has been decided that the two justice committees should consider the budget together. The paper before us asks us to consider whether we want to appoint an adviser. We were unable to do that last year as we were too slow off the mark. We will have to move quickly this year.

Some support will be available from the Finance Committee's adviser, Professor Arthur Midwinter, who is covering the whole of the budget process. Some subject committees will appoint their own advisers.

Do we agree to seek permission from the Parliamentary Bureau to meet jointly with the Justice 2 Committee?

**Members** *indicated agreement.*

**The Convener:** Do we agree, in principle, to the appointment of an adviser to assist with the budget scrutiny, assuming that we can find a suitable person?

**Members** *indicated agreement.*

**The Convener:** We will draw up a shortlist and bring it to the committee at a later date.

## Subordinate Legislation

### Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2002 (Draft)

**The Convener:** We move to item 5 on the agenda. I refer members to the note on the regulations. I welcome the new Deputy Minister for Justice. This is his first appearance before the committee. On the face of it, we are kindly persons. I ask the minister to move and speak to motion S1M-2608.

**The Deputy Minister for Justice (Dr Richard Simpson):** I thank the convener for her kind words. I welcome the fact that members are kind people and will treat me kindly on the subject of legal aid, which is a complex issue and one to which I am sure we will return. I understand that the committee does not want introductory remarks.

**The Convener:** If you wish, you can say a few words.

**Dr Simpson:** I have some lofty and lengthy sentences to read. The important point about the regulations is that they complete the committee's historic piece of legislation, the Protection from Abuse (Scotland) Act 2001, which we welcome. The act will come into force on 7 February and will provide legal aid for those arrested under it. That honours the commitment Jim Wallace made to the committee last year.

The regulations should be read in conjunction with the Legal Aid (Scotland) Act 1986 (Availability of Solicitors) Regulations 2001, which Jim Wallace signed on 17 December and which also come into effect on 7 February. They ensure that the duty solicitor will provide the representation that is required in the custody courts.

The purpose of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2002 (Draft) is to ensure that any person who is detained and brought before a sheriff under section 5 of the Protection from Abuse (Scotland) Act 2001 or section 17 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 has representation in the custody court. That representation will be provided in the form of free assistance by way of representation—known as ABWOR.

During the passage of the Protection from Abuse (Scotland) Bill, the Scottish ministers agreed to provide representation under the legal aid scheme to those arrested under the new act. In addition, ministers agreed to deal with a lacuna in the existing arrangements for the Matrimonial Homes (Family Protection) Scotland Act 1981.

The regulations deal with both those types of procedure.

I move,

That the Justice 1 Committee recommends that the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2002 (Draft) be approved.

**Lord James Douglas-Hamilton:** I have a question about a small detail. I applaud the purpose behind the regulations, which is to ensure that a duty solicitor is available to represent a person in court. What happens if the duty solicitor does not turn up because of illness, a car crash or some act of God? Would the case be postponed?

**Dr Simpson:** There is a roster of duty solicitors, so another one can be called fairly rapidly. In such cases, duty solicitors do not have to prepare; they simply provide representation in the custody court. Therefore, it is feasible to call another duty solicitor.

**Lord James Douglas-Hamilton:** Are you saying that the person concerned will be represented by a duty solicitor at the first available opportunity?

**Dr Simpson:** Absolutely.

**The Convener:** If there are no other comments, I will put the question on the motion.

The question is, that motion S1M-2608, in the name of Mr Jim Wallace, be agreed to.

*Motion agreed to.*

**The Convener:** The committee is now required to report to Parliament on the affirmative instrument. Our report need only be short and formulaic. Should I submit the report to members by e-mail?

*Members indicated disagreement.*

**The Convener:** Perhaps the minister will stay to hear us while we deal with the next item, which is a negative instrument that is connected with the SSI that he has just addressed.

**Dr Simpson:** I do not particularly desire to stay, but am perfectly happy to do so if required.

**The Convener:** As the minister would prefer his visit on this occasion to be brief but happy, I thank him for his attendance.

**Dr Simpson:** Thank you.

### **Legal Aid (Scotland) Act 1986 (Availability of Solicitors) Regulations 2001 (SSI 2001/464)**

**The Convener:** Item 6 on the agenda is the Legal Aid (Scotland) Act 1986 (Availability of Solicitors) Regulations 2001, which is a negative instrument. I refer members to the clerk's note J1/02/02/8. If no members wish to comment on the instrument, shall we simply note it?

*Members indicated agreement.*

**The Convener:** My only concern is with the number of amendments that are being made to the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 1997. I believe that the regulations are to be consolidated at some point. I hope that that occurs shortly, as there have been so many amendments.

If no members want to make any comment, that is item 6 dealt with.

**Lord James Douglas-Hamilton:** We should note that the sums concerned in the amendments to those regulations are very small. There seems to be a tightening up of the provisions.

**The Convener:** I hope that the clerk managed to catch that.



## Convener's Report

**The Convener:** Item 7 is my report. I suggest that members may take advantage of the coffee and tea that is available while we go through the report.

**Gordon Jackson:** Will this item take long?

**The Convener:** No, although I know you are agitated about this item, Gordon.

**Gordon Jackson:** No.

**The Convener:** It is good that you are not agitated, as there are a few matters that I want to raise and on which it is important that the committee makes a decision.

**Gordon Jackson:** If item 7 is to be short, I say that we carry on. If it is to take longer, we should adjourn.

**The Convener:** One or two issues need to be dealt with, so the item will take about 10 to 15 minutes. Will we break for a short adjournment so that we can get coffee and tea, or will we continue?

**Maureen Macmillan:** I am content to go on.

**The Convener:** Okay, I shall not force-feed you coffee.

My report contains several matters. First, I refer members to the letter, J1/02/02/10, which comes from Elaine Bailey, who is managing director of Premier Prison Services Ltd, which runs Kilmarnock prison. I will read the letter out and refer to the *Official Report* to which it refers. I do this simply to put the letter on record. The letter is dated 20 December 2001. I quote:

"Dear Sirs,

Subsequent to my appearance at the Justice 1 Committee on 31<sup>st</sup> October, which I attended with Ron Tasker, we have exchanged correspondence in relation to Michael Matheson's questions regarding the Freedom of Information Bill.

In researching Mr. Matheson's question, I reviewed the transcript of the meeting and whilst so doing recognised that I had made an error in one of my responses to the Committee. I said that I saw no problem with members of the Committee seeing privately in its entirety the contract that we have with the Scottish Prison Service.

That was an error on my part and I wish to withdraw that response from the record. There are a small number of issues which must remain commercially confidential in order to preserve our competitive position both in Scotland, and England and Wales where we also operate.

Earlier this year we had been in discussion with the Scottish Prison Service about the publication of the contract between ourselves and SPS and had agreed an acceptable position. I understand that publication is now imminent.

There was a further error in my response in relation to the level of profit I quoted. I said that our profit in 2000 was

£300k and that it was likely to be the same this year. I now find that to be incorrect; our forecast for 2001 is standing at £700k.

I apologise unreservedly for these mistakes and any confusion that may have been caused as a result. It was my first time before a Government Committee and I was somewhat nervous. I apologise for misleading Committee members, it had certainly not been my intention to do so.

Your sincerely,

Elaine Bailey

**Managing Director**

copy: Mr. Jim Wallace, Deputy First Minister

Mr. Tony Cameron, SPS

Mr. Ron Tasker, HMP Kilmarnock"

I refer members to the *Official Report* of the committee meeting on 30 October. Michael Matheson asked:

"Would you have any problem with publishing the contract and placing it in the public domain with the commercially confidential sections removed? Would you be happy for members of the committee to view the contract in private with the commercially confidential information still included?"

Elaine Bailey answered:

"I shall take the last two questions first, because I understand those. I thought that the contract had been published, or was at least in the throes of being published. I know that we had discussions with the SPS about precisely which parts of the contract would be treated as commercial and confidential; both the SPS and Premier wanted to reduce that to a bare minimum. As far as I know, if the contract has not already been published, it is very close to publication. I would have no problem with the committee seeing the commercially confidential information privately."

That is the evidence that is in the *Official Report*.

15:00

I am most concerned that the months have passed and what was offered then is now changing. I make no comment about the reasons, but I am concerned. I say by way of preface that it is not possible to change what is in the *Official Report* by letter. It is not possible to withdraw it and have it changed. The letter that I have read out is now in the *Official Report*.

Several options are open to the committee if it has concerns about the nature of the evidence that we will now not have. The committee can choose to respond to the letter from Premier Prison Services Ltd. We can also question the reason given for refusing to produce the entire contract, given our undertaking to examine the document in private, which was the position that was accepted originally. We can call Elaine Bailey back to give further evidence to the committee on the reason for refusing to produce the entire contract. We can make a written request to the Minister for Justice that the full contract be

produced and invite the minister to give evidence on it. The other option is to await the agreed version of the contract, as it may provide all the information the committee needs, although I remind members that the *Official Report* says:

"As far as I know, if the contract has not already been published, it is very close to publication."—[*Official Report, Justice 1 Committee, 30 October 2001; c 2725.*]

We are now in the middle of January.

A final sanction is open to the Parliament under section 23 of the Scotland Act 1998, which gives Parliament the power to require any person

"to produce documents in his custody or under his control".

We may not be near to using that sanction yet and the committee may not feel that we are even going in that direction. I say that by way of completing the picture of remedies that are open to us. It is up to the committee to determine what it wants to do about the letter, in light of the evidence that I have read out.

**Lord James Douglas-Hamilton:** The letter is dated seven weeks after the meeting at which Elaine Bailey gave evidence. That is not totally unreasonable. I have noticed that ministers of successive Governments have sent letters of clarification after, in lengthy evidence, they gave responses on one or two details that were not strictly in accordance with the correct position. The matter should have been clarified as soon as it was noted that that had happened. Seven weeks is not totally out of line with previous practice. It may have taken some time for Elaine Bailey to notice the mistake. She gave evidence over—how long? Was it half an hour?

**The Convener:** I cannot tell immediately from the *Official Report*. She started giving evidence before 14:30. We will check that for you.

**Lord James Douglas-Hamilton:** The key point is that she has corrected inaccuracies that needed correction. We should ask for the agreed contract to be sent in and we should note the terms of her letter. We are not entitled to ask her to breach commercial confidentiality. It would not be a good precedent for the Parliament to set.

**The Convener:** The point is that the contract was to be seen in private.

Let us hear the discussion. My first reaction is that I do not agree with Lord James Douglas-Hamilton about seven weeks being a reasonable length of time. Had I been Elaine Bailey, not having been before a parliamentary committee before, the first thing that I would have done when the *Official Report* came out would have been to read it and see what I had said. It would be human nature to do that, given that it was her first time before a parliamentary committee.

I have problems with the delay of seven weeks between the meeting and the letter. Ministers are a different matter. We know the pattern that they set and the amount of work that they have. I am not justifying their practice, but that is the reason that is given for long delay. It is human nature to look at what one has said when the *Official Report* comes out.

**Maureen Macmillan:** There is a parliamentary precedent for committees examining in private financial figures that would not be released to the public: the Transport and the Environment Committee has done that on private finance initiatives and the water industry.

I am sorry that Elaine Bailey has retracted the offer she made to the committee. Perhaps Premier Prison Services Ltd will reconsider; I wonder what it will offer us.

**The Convener:** Is it your position that we should respond to the letter in writing and question—given the undertaking—the reasoning for refusing to produce the entire contract?

**Maureen Macmillan:** Yes. We could point out that in other committees in the Parliament, that issue has not been a problem.

**Gordon Jackson:** Personally, I am not very interested in the phrase "given the undertaking". The first issue is whether they should let us see the whole contract. That is Maureen Macmillan's point. The second issue—which is totally separate—is the fact that Elaine Bailey said that she would let us see the whole contract. Her position is that she should not have done that.

**Maureen Macmillan:** She went beyond her brief.

**Gordon Jackson:** Yes, she did. She went beyond whatever authority she had. We do not know whether that was spotted a week later and it took six weeks to tell her or whether the chairman of the board spotted it three days before the letter. Either way, she went beyond her brief and she has said that she is sorry she did so. That is the end of that. Her position is that she should not have said what she said and that she is not prepared to show us the contract. We can no longer rely on the undertaking that she gave. I found her a straightforward witness. If she repents for having given an undertaking that she should not have given, we cannot do much about that—we cannot force the undertaking.

The only question is whether Premier Prison Services Ltd should be obliged to let us see the whole contract—whether or not it gave an undertaking. I do not know the answer to that. There will obviously have to be an agreement with the Scottish Prison Service about what the company shows. My inclination is to wait and see

how much is published, to identify what is missing and to complain, as a committee, if we think we should see more.

Forgive my cynicism, but I would not think that anything that was shown to seven people was confidential. I would not trust the confidentiality of any seven people in the world, because with as many as seven people it is never possible to prove who is responsible for any leak. I would never trust seven people in a confidential situation. Few Cabinets do not leak, never mind the Justice 1 Committee.

**Donald Gorrie:** I agree that there are two issues. I agree with Gordon Jackson that the fact that Elaine Bailey cannot live up to her undertaking is not a hanging offence. We must accept that. The matter of whether we should see the whole contract is much more serious. Commercial confidentiality is often used in a totally dishonest manner to conceal what might be embarrassing. I am not sure whether that has been the case on this occasion. I do not know who has leant on Elaine Bailey. We should pursue the issue of the whole contract being made available, but there is no need to take Ms Bailey off to the tolbooth.

**The Convener:** I too have the feeling that Elaine Bailey was leant on. I am not so relaxed about the seven weeks. I do not impugn Elaine Bailey, who gave the evidence. I am curious about the fact that it took seven weeks to retract the undertaking. I cannot believe for a minute that the witness and those who might have leant on her looked at what was said a long time ago. Why are we being denied the whole contract now?

I also have concerns about the delay in getting anything out of Premier Prison Services Ltd. It was said in evidence that something would be published shortly. That was at the end of October. We are months down the road. I would like some guidance on the terms of our response, so that a letter can be composed and circulated to members of the committee—including those who are not present. We want something that the committee will get behind wholeheartedly.

**Gordon Jackson:** I would be happy to say that the committee was delighted at the undertaking to give us the whole contract; that we are disappointed that that is no longer the company's position; that we have been exercised about why we will not see the contract; and that we reserve the right to revisit the matter when it is produced.

**The Convener:** I refer members to the stage 1 debate in the Parliament on the Freedom of Information (Scotland) Bill, during which the Deputy Minister for Justice, when asked about the Kilmarnock prison contract, stated that it would be "substantially published". That is at column 5514

of the *Official Report*. Executive officials said that the contract will be published within the next month or so. Are members content that we write to Premier Prison Services Ltd with the response as outlined by Gordon Jackson? We should also state that we intend to see the contract in February. We require clarification from the minister about when we will see the contract, given his statement in the stage 1 debate.

**Maureen Macmillan:** Could we ask Premier Prison Services Ltd whether we can find out anything that is not in the public domain, without the company releasing confidential information?

**The Convener:** We can take that up when we find out which details of the contract are published. I hope that we will have the contract in February. The matter should not be delayed further; Elaine Bailey gave evidence to the committee in October.

**Lord James Douglas-Hamilton:** The fourth paragraph of Elaine Bailey's letter makes it clear that the publication of the contract is imminent. Therefore, Jim Wallace is as much involved as Elaine Bailey. We should, by all means, ask Premier Prison Services for clarification as to the date of publication, but we should also ask Jim Wallace.

**The Convener:** Yes.

**Donald Gorrie:** Gordon Jackson's comments on our letter were correct. The letter should put down a marker; we will wait for the report, but we reserve the right to return to the matter.

**The Convener:** Certainly.

**Gordon Jackson:** We should be prepared to revisit the matter.

**The Convener:** It is difficult to draft a letter by committee, but we will get there. I will send a draft copy to members, who can comment on it.

We should move on. The next point is on Tony Cameron's evidence. Members will remember that there was a conflict of evidence. We have received responses on Peterhead prison from Jim Wallace and Alex Salmond, but we await one from Henry McLeish. I suggest that we do not proceed with the matter until we have all three responses, at which point the committee can decide.

**Members indicated agreement.**

**The Convener:** The next point is on research for the regulation of the legal profession inquiry. I remind members that before Christmas it was agreed that comparative research into the regulation of the legal profession should be commissioned. Comments have been made about the New South Wales ombudsman. Because commissioning and carrying out research is a lengthy process, it might not be possible to conduct the research in the time scale of the

inquiry. We now have an adviser, who has expertise in comparative models. Next week, the committee will take evidence from academics with knowledge of the matter. I propose that we use the adviser and do not proceed with an application for funding for research. What are members' views on that?

**Maureen Macmillan:** Do we have a paper on the matter?

**The Convener:** No. At previous meetings, it was asked whether we could examine models from Europe, Australasia or the American states. I get the feeling that the committee is moving in a certain direction on the regulation of the legal profession, but I do not want to pre-empt the matter. It would be useful to have a description of other models in a paper from the adviser. If we want to take the matter further, we can, but I do not think that we should bid for research.

**Maureen Macmillan:** That is a good idea.

**Lord James Douglas-Hamilton:** Should we approve an adviser?

**The Convener:** We have an adviser.

**Lord James Douglas-Hamilton:** So we should authorise him to proceed.

**The Convener:** Yes, we should authorise him to proceed with research. Are members content with that?

**Members indicated agreement.**

**The Convener:** Representatives of Scotland Against Crooked Lawyers will give evidence next week. I do not want to be flippant, but several members of the committee have been designated as crooked lawyers.

I am concerned that a leaflet that has been distributed frequently to people going in and out of the Parliament contains—to use a modest expression—inappropriate comments about members of the committee. I would like the committee's guidance on how to deal with that, given that Scotland Against Crooked Lawyers is coming before the committee next week. I am minded to write to it and give advance warning that I am aware of its comments and that I am not prepared to accept such comments in the course of its evidence.

Scotland Against Crooked Lawyers has also been advised that it must not name individuals or firms because evidence is taken under the sanctity of Parliament and there is no right of redress for those who are named—unlike ministers, who have a platform. That is a clear warning to SACL that that must not be done.

I am concerned about members of the committee being impugned. Four lawyers are

sitting around the table. Donald Gorrie is blameless. Can you give me your views on how I should address the matter, because I am very concerned that the committee is being impugned?

15:15

**Donald Gorrie:** I have only recently joined the committee, so SACL probably did not know I am on it. If you are writing to stress that SACL should not name individual firms and cases, you should also say that the witnesses must conduct themselves sensibly. What people put in leaflets is up to them, but what they do on a public occasion such as giving evidence is different and they have to behave themselves. That is my suggestion, if it could be put into parliamentary language.

**Gordon Jackson:** It might be the wrong thing to say; it might just encourage them. I do not care that much. That kind of thing is water off a duck's back. It is a matter of principle. I personally do not mind what people say, but there is a principle that people should be discouraged from having a go at people gratuitously in that way.

**Lord James Douglas-Hamilton:** There are a number of important principles around the matter, one of which is freedom of speech. They should be entitled to put the principles of their case, but that does not entitle them to libel or slander people with unproven charges. The witnesses need to be careful in the language that they use.

**The Convener:** Anything that has been said about me is also water off a duck's back. Plenty worse has been said in the political forum.

I was taking the view that the leaflet is a slight on the committee as a collective body—and I am not prepared to have that. The committee conducts itself with responsibility and integrity and that must be made plain.

The next item is committee travel. A bid has gone in for the committee to visit various places. You will notice that it is nowhere exotic when you are on the Justice 1 Committee—the list includes Peterhead. We do not get to go to an island unless there is a prison on it.

On the committee debate, I have bid for 21 March for a debate on our report into the legal aid inquiry, but responses from the Executive are coming in advance of that. We may want to amend the report before the debate in light of those responses.

On the Freedom of Information (Scotland) Bill, I inform members that amendments can now be lodged for stage 2. The closing date for lodging amendments for day one of stage 2 is Friday 1 February at 2 o'clock. I encourage members to lodge amendments as soon as possible. The first committee meeting for considering stage 2

amendments is 5 February.

I also advise that during the stage 1 debate, the Executive gave an undertaking to make the draft codes of practice available by Wednesday 30 January. That is important because it means that the drafts will be available prior to amendments being lodged. That will have an impact on the amendments. I am trying to encourage the drafts to be made available to the wider public, who have a great deal of interest in them.

That takes me to the end of the convener's report, so I can take questions.

**Gordon Jackson:** Over how many days are we going to be doing the stage 2 amendments?

**The Convener:** We hope it will take two days. That is why I am asking for amendments to be lodged. We hope it will take two days, but it depends on the number of amendments.

**Gordon Jackson:** What dates would that be?

**The Convener:** It would be 5 and 12 February.

**Gordon Jackson:** We would therefore do stage 2 for two weeks running in February.

**The Convener:** Yes, before the week's recess.

I meant to add something that is not in the convener's report. I was tentatively hoping that a few of us might have a more informal visit to Peterhead prison. I am afraid that that might happen during the recess. I do not know whether anyone who is not going away would be interested. I want to familiarise myself with the sex offenders programme; I might be prepared to do it myself.

**Maureen Macmillan:** Are we not going to do that during our visit to Peterhead?

**The Convener:** The trouble with having the committee meeting at that time is that arrangements are more cumbersome for microphones and the official report. That would delay the visit even further. We are still having that meeting; I am proposing an additional visit. I have always found small-scale visits to prisons useful.

**Lord James Douglas-Hamilton:** Do we have any idea when the away day will take place?

**The Convener:** It will probably be mid-March. The Justice 2 Committee is trying to come and we hope to invite the minister. He did not know about that, but he does now.

**Donald Gorrie:** Could I recap? The Government amendments on the codes of conduct have to be in by 31 January. Is that correct?

**The Convener:** The draft codes of conduct should be available by Wednesday 30 January.

**Donald Gorrie:** When do our amendments have

to be in by?

**The Convener:** By Friday 1 February. You have only two days. That was as much as we could squeeze out of the Executive.

Item 8 on the agenda is to be discussed in private.

15:21

*Meeting continued in private until 15:23.*



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