JUSTICE 1 COMMITTEE

Tuesday 29 January 2002
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
3rd 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) (Liberal Democrats)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Bill Aitken (Glasgow) (Con)
Phil Gallie (South of Scotland) (Con)

WITNESSES

Andrew Duncan (Scotland Against Crooked Lawyers)
Maureen Henderson (Scotland Against Crooked Lawyers)
Professor Alan Paterson (University of Strathclyde)
Margaret Ross (University of Aberdeen)
Stuart Usher (Scotland Against Crooked Lawyers)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Chamber

Scottish Parliament

Justice 1 Committee

Tuesday 29 January 2002

(*Afternoon*)

[THE CONVENER *opened the meeting in private at 13:47*]

13:59

Meeting continued in public.

The Convener (Christine Grahame): Welcome to the third meeting this year of the Justice 1 Committee. I have received apologies from Lord James Douglas-Hamilton. Bill Aitken will be attending from around 2.30. I welcome Phil Gallie and inform him that members of the committee will be called to ask questions before I ask him to contribute to the discussion.

Legal Profession Inquiry

The Convener: The first item in the public session of our meeting is our inquiry into the regulation of the legal profession. I ask members to declare any relevant interests.

Gordon Jackson (Glasgow Govan) (Lab): I am a member of the Faculty of Advocates.

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

Maureen Macmillan (Highlands and Islands) (Lab): I am married to a solicitor who is a former member of the council of the Law Society.

The Convener: I welcome our witnesses, Andrew Duncan, Maureen Henderson and Stuart Usher, from Scotland Against Crooked Lawyers. I refer members to the submission from the witnesses that we have before us. I remind our witnesses that, as they have been advised on two occasions, we are examining the system of complaints against solicitors, advocates and solicitor advocates, not the specifics of individual cases. We want to inquire about the generality of problems that occur when people make complaints. If the witnesses go into the specifics of an individual case, I am not prepared to continue. I will not have individuals mentioned.

I remind members of the public in the gallery that I will not allow participation from the gallery.

Before asking about SACL's concerns, I would like to know how the group came to be formed.

Stuart Usher (Scotland Against Crooked Lawyers): Are we on air?

The Convener: Yes.

Stuart Usher: I do not see what your question has to do with anything, but I will answer it.

The Convener: Bear with us. The information will be helpful to us.

Stuart Usher: We formed the group because we all suffer from the same disease: we were all done by crooked lawyers. When one of our number started demonstrating, people sympathised with him and we grew from that.

The Convener: When was the group formed?

Stuart Usher: We were formed in the middle of 2001.

The Convener: How is the group made up formally?

Stuart Usher: We prefer to keep that under wraps.

The Convener: With respect, it would be useful

for the committee to know how your group is constituted.

Stuart Usher: We are an informal group of freely associating people.

The Convener: You have no chair, vice-chair, secretary and so on.

Stuart Usher: We have certain posts. I sent details of them to you.

The Convener: I am asking for the sake of the record.

Stuart Usher: I am the co-ordinator of Scotland Against Crooked Lawyers, Andrew Duncan is the chief crooked-lawyer hunter and Maureen Henderson is the second chief crooked-lawyer hunter.

The Convener: Do you have a formal membership?

Stuart Usher: Yes.

The Convener: How many members do you have?

Stuart Usher: We guard that information. We have many members all over Scotland.

The Convener: With respect, it would be useful for the committee to know the number of members of the group.

Stuart Usher: Let us put it like this: we have a membership of between 20 and 30.

The Convener: Is your membership between 20 and 30 as at this moment?

Stuart Usher: Yes.

Maureen Macmillan: Do you believe that your organisation's views are representative of people who have been clients of the Scottish legal profession? On what reasons do you base your opinion?

Stuart Usher: Our views are decidedly, and without any doubt whatever, representative of the views of the Scottish people.

Maureen Macmillan: Why do you think that?

Stuart Usher: When we walk down the street in our monthly demonstrations, people constantly come to us—we actually get quite annoyed about it—and go on and on about their problems. If you walk into a public house or coffee shop and mutter under your breath, "Blasted lawyers", you will usually get a reaction. People say, "Oh, are you talking about that infidel class?"

Maureen Henderson (Scotland Against Crooked Lawyers): My case has been going on for many years. Years ago, I started going around putting notices on car windscreens. Eventually, people would stop me and say, "Are you the lady that had this happen to you? Well, this happened to me." That happened so many times that I realised that I was not the only one in that situation. It was not simply one of those odd occasions on which something had gone wrong. I realised that there were many people out there who were suffering the same problems.

My problem was with the Law Society of Scotland in particular. I had had a faulty lawyer. He later committed suicide, as he was in trouble again and saw a jail sentence looming.

Maureen Macmillan: Thank you for that.

I understand from your submission that you believe that there are three main problems with the current system of regulation of the legal profession: delays, lack of communication and conflict of interest. Are those your only complaints, or do you have other concerns?

Stuart Usher: Was that from our petition or from our written submissions?

Maureen Macmillan: It was from your submissions.

Stuart Usher: We understand that delays happen. They are not the most desirable thing, but they happen in life. What was the second one?

Maureen Macmillan: Lack of communication.

Stuart Usher: Lack of communication is extremely irritating. Very often, there is a constructive lack of communication.

Maureen Macmillan: Do you believe that the lack of communication is deliberate?

Stuart Usher: Yes, it is deliberate. What was the third thing that you mentioned?

Maureen Macmillan: Conflict of interest.

Stuart Usher: The Law Society is the governing body but purports to represent the interests of victims of crooked lawyers. It is impossible for the Law Society to do both. Actually, our submission should have said that the main problem is criminality. There is criminality within the Law Society in particular and in the legal profession in general.

Maureen Macmillan: Will you explain what you mean by criminality within the Law Society?

Stuart Usher: By criminality in the Law Society, I mean that we have given the society evidence of criminal actions or crime having been committed against us—and against all the people that you see in the gallery—which the Law Society has not acknowledged. Everyone suffers from the same disease. The Law Society makes no reference to the evidence that has been presented to it. If you say, "What about that?" the only answer is, "That is a matter of opinion." The Law Society does not

recognise criminality.

Maureen Macmillan: Have you taken your complaints to the police about the criminal behaviour that you think is in the Law Society?

Stuart Usher: Let me respond briefly to your question and then Andy Duncan will come in.

Most of us have indeed taken our complaints to the police. In my own case—I will be brief, as Mr Duncan wants a word—I went to the police on two occasions. When the police came round, they said, "My God, colossal skulduggery has been going on here." I said, "You needn't tell me about it." They said, "Well, we'll try and do something." They said that they would get in touch with me in about two weeks' time, which they did. They said, "We have had instructions from above. We cannot pursue this. As you need a lawyer, the Law Society must be involved." That was me dead.

Mr Duncan would like a word.

Andrew Duncan (Scotland Against Crooked Lawyers): Before we go on about the police, complaints against the Law Society were mentioned. A further point relates to the document that I am holding up, which is a press release by Christine Grahame.

The Convener: Put that down just now, please.

Andrew Duncan: It shows that the situation here today is unsatisfactory. The convener seems to have different opinions on the way that other people should testify compared to us.

The Convener: I do not see the point that you are making.

Andrew Duncan: I am making a point about a matter within the education department in your own area. The chief of education has resigned, so that he will not have to testify.

The Convener: That is quite irrelevant to this meeting.

Andrew Duncan: I do not think that it is.

The Convener: Bear with me. We are following an interesting line. We have had representation from you stating that you feel that complaints against solicitors have not been properly dealt with. That is a reasonable line of inquiry and I am prepared to go along with it. I make it plain now that I am not prepared to listen to this.

Andrew Duncan: Fair enough.

On the police, I am still dealing with the police in relation to the officegate affair involving the former First Minister. The Law Society has mentioned that he should be prosecuted at Westminster.

The Convener: This is not relevant.

Andrew Duncan: It is criminality.

The Convener: Bear with me again. We were following a line of discussion based on your statement that you represent 20 or 30 members and that many people come up to you to express failings in the procedures for complaints against solicitors. That is very interesting to the committee. I would like to continue that line of inquiry.

Maureen Macmillan: My reference to the police was to find out whether they agreed with you that there was criminality in the Law Society and what they had done about it. Mr Usher answered that point. Perhaps we can move on and hear your ideas on how the process could be changed. How would you like a complaints procedure to be run?

Stuart Usher: I believe that doctors do not regulate themselves or have moved away from regulating themselves—I am open to correction on that point. Our views on how the complaints procedure should be run are in our petition, but we will outline them again. We must get rid of self-regulation. It is no good having lawyers purporting to look after the interests of victims of crooked lawyers. That will not work. It is regulation by lawyers, for lawyers, with lawyers—it is too incestuous.

The solution to the problem is to replace that function of the Law Society—I would scrap the Law Society in toto—with a body comprising well-known and highly respected people of probity, which would handle complaints about crooked lawyers. The argument then arises that those people would not know enough about the law. We did not make the law so complicated, but we have no problem with a lawyer being involved. If lawyers must be involved, they can be on the side as advisers. That is our solution to that problem.

Maureen Macmillan: Your suggestion is that there should be a lay committee that would deal with complaints, with a legal adviser on the side to advise it on legal matters.

Stuart Usher: Yes, but it would not be a committee of the Law Society. It must be a separate body in a separate building.

Maureen Macmillan: Without using the names of individuals, can you give me examples of your concerns? What sort of things have solicitors been involved in that you complain about? I do not want to discuss individual firms or names of solicitors.

Stuart Usher: We were asked to make submissions and we made them. A lot of people in the gallery made submissions too. When one makes a submission, one describes what has happened. Naturally, we put down the lawyers who did each one of us.

Maureen Macmillan: Is there a common theme to your concerns? Is the same kind of thing going wrong?

Stuart Usher: Yes, undoubtedly. Mr Duncan and Mrs Henderson will have something to say on the point. It is the same problem—fraud. Fraud is taking place daily—perhaps right now—in several offices in Scotland. Unlike Harold Shipman, lawyers do not go around murdering people—that is too obvious. However, it is a long death for the people who get done. Basically, it is fraud.

14:15

Maureen Henderson: In my case, I believe that there was a conspiracy between an MP and a lawyer. As a result, my name on a title counted for nothing; I was treated as though it was mere decoration. Not knowing about law—I was a citizen who had never been involved in law—I did not know where to go for help.

Stuart Usher: You were defrauded.

Maureen Henderson: That lawyer led me up the garden path.

The Convener: I will have to stop you there. I understand why you want to say this, but it is not proper to the inquiry. You are going into the details of an individual case. We want to ask about general matters. Is the problem that the lawyer has failed to communicate with the client or has misled the client accidentally or deliberately? What common themes are coming through?

Maureen Henderson: I was leading to the point that I was given advice that turned out to be incorrect. I was fed that incorrect advice for more than a month. This must be happening to other people. People are told that the lawyer will do something, but it is not done.

The Convener: I take it that you are talking about professional incompetence.

Maureen Henderson: With hindsight, I have doubts about whether it was incompetence.

Stuart Usher: It was not incompetence, it was deceit.

Maureen Henderson: It is sheer deceit.

The Convener: The point is that you are saying that some lawyers are being deceitful.

Maureen Henderson: Yes. When one finds that one's lawyer is deceitful, one turns to another law firm. However, we have found that other law firms will not touch the case. We cannot find anyone to help us because no lawyers will do anything.

The Convener: You made a second point in your submission that if one is discontented with one's current solicitor, it is difficult or impossible to get another solicitor to act on one's behalf. Is that coming through generally from people who speak to you? Is that your point?

Maureen Henderson: Yes.

Phil Gallie (South of Scotland) (Con): I have several questions.

The Convener: Does anyone else want to come in?

Michael Matheson (Central Scotland) (SNP): We seem to be moving around quite a bit. It would be more helpful if we tried to stick to the thread that we want to pursue.

The Convener: Yes. I will explain to the witnesses that we are interested in their concerns about the current system.

Phil Gallie: I am interested in the point about people who feel that they have been given bad advice and cannot get another lawyer to represent them. If that problem occurs, they can go to the Law Society, which is supposed to find them a lawyer to pick up the case.

What are the overall experiences of those in your organisation with respect to trying to find someone who is prepared to put a case against another lawyer?

Andrew Duncan: Every member of SACL has the same problem. It is very difficult, if not impossible, to get a lawyer once the lawyer realises that the Law Society is involved. The Law Society will even write to the lawyer and tell them not to take the case; we cannot get representation. The solicitors will take a case as far as the door of the Court of Session and then drop out on the day of the hearing. That is what every member of SACL has had to put up with for all those years—20 years, in my case.

Phil Gallie: Are you saying that the Law Society sends out instructions to solicitors not to take up cases against its members?

Andrew Duncan: Yes I am, sir.

Phil Gallie: That statement would have to be justified in detail. You seem to be saying that the actions of the Law Society cut across the way in which I understood it to operate. It is obliged to find someone to represent—

Andrew Duncan: I could explain my statement perfectly, but I cannot because we have to generalise—we were told that you would not listen to information about individual cases. That was the point that I was making when I said that this committee was not properly convened.

The Convener: You have made your point, Mr Duncan. You are saying—

Andrew Duncan: My second point is that I have received an ultra vires decision from the Law Society, yet I am unable to get a lawyer in Scotland to take up my case.

The Convener: We have heard your point, which we will put in writing to the Law Society. You are saying that the Law Society will not provide a solicitor to act for you.

Andrew Duncan: That is correct. Furthermore, the president and officials of the Law Society sit as sheriffs—

The Convener: I want to follow up your statement that the Law Society will not provide you with a lawyer and that it sends out letters advising, or telling, firms not to act on your behalf.

Andrew Duncan: Yes.

The Convener: Are you saying that letters are sent to all firms?

Andrew Duncan: To some firms—I cannot say that letters are sent to all firms as I can speak only from my experience.

Phil Gallie: I would have thought that such letters could be produced and passed to the convener, following which the committee would consider the matter to be very serious and would take it up with the Law Society.

The Convener: Yes. If the witnesses produce those letters, the committee would certainly take up the matter with the Law Society.

Andrew Duncan: We will ask the group members who have suffered such treatment to produce those letters.

Phil Gallie: Let me take a step further. Reference was made earlier to the general standing of solicitors in society. Does SACL recognise that the majority of solicitors in Scotland are honest, that they are interested in individuals' affairs and that they are intent on getting results for their clients?

Andrew Duncan: No, I do not go along with that. The problem is that there is a closed-shop policy—I have that in writing from Mr McLeish.

Phil Gallie: I find your view hard to accept. I accept that, in any profession, there will always be people who are bad eggs, if I may call them that—people who are prepared to turn a blind eye and who do not do things properly. However, are you not going rather far by saying that every solicitor in Scotland is open to question? I give you the point, but I was asking about the majority of solicitors being good and fair.

Andrew Duncan: I do not go along with the view that every solicitor is a bad egg. However, there are 8,000 solicitors in Scotland and last year there were 1,000 complaints about them. That amounts to more than one bad egg in the barrel.

Stuart Usher: I understand Mr Gallie's question. Obviously, there are many perfectly honest lawyers, but the minority are actively crooked. The problem lies with self-regulation. The majority—the honest solicitors—pass by. They must know what is going on, but they do not want to get involved out of fear. Rather than upset their partners or make waves, they do nothing, as long as they can keep their noses clean. We do not say that the majority of lawyers are actively crooked, but a substantial minority are, and other solicitors are frightened of them. It is like Chicago in the 1920s and 1930s—

Phil Gallie: I do not want to go too far down that road, but, to an extent, I accept what you say. Do you agree that the faculty system that exists in Scotland tends to create a club atmosphere among solicitors, which makes some solicitors reluctant to pursue cases against individuals whom they consider to be friends?

Stuart Usher: Yes, I go along with that statement. To a degree, such an atmosphere is understandable. If a chap is a lawyer, he has something in common with other lawyers. For example, they go to the same clubs and golf clubs—that is one reason why I would never go near Muirfield. However, the problem is bigger than that. One cannot get a lawyer to go for another lawyer. I do not know whether the Law Society has a figure on successful prosecutions of a lawyer by another lawyer. We cannot get that information, although the committee might be able to get it.

The Convener: Are you saying that there are no sheriff court cases or Court of Session cases in which the defender or one of the defenders is a firm of lawyers?

Stuart Usher: Do you mean cases in which another lawyer prosecutes the defender?

The Convener: A lawyer must prosecute the defender on behalf of a client.

Stuart Usher: The defender can be prosecuted by a party litigant.

The Convener: That is true. Are you saying that you know of no cases in which one lawyer prosecuted another?

Stuart Usher: I know of none at all. I ask those in the public gallery whether they know of any such cases. They can nod or shake their heads.

The Convener: I remind you that we are not in a theatre. Please address the committee.

Stuart Usher: Certain people in the public gallery have fought for decades to get to court. I fought for many years to get to court, but no lawyer would touch my case.

The Convener: I accept that you do not know of any cases in which solicitors are the defenders. It is for the committee to test that claim; our research

might show that such cases are brought.

We have heard evidence about extending the powers of the legal services ombudsman. The witnesses mentioned an independent body. I would like members to pick up those points later.

Maureen Macmillan: What is the witnesses' attitude to the Law Society's troubleshooter scheme, which was designed to provide people with solicitors who would go to court on their behalf against another solicitor? You do not seem to have faith in that scheme.

Stuart Usher: I have no faith whatsoever in that scheme.

Andrew Duncan: Two troubleshooters have been appointed to my case. One of them is the eminent solicitor Andrew Cubie—sorry, I should not mention the name. He knows that the Law Society's case against me was ultra vires, but the case did not come to court.

Maureen Macmillan: What kind of scheme should replace the troubleshooter scheme?

Andrew Duncan: There must be an independent advocate for the public.

Stuart Usher: The troubleshooter scheme does not work. It is manipulated and it is not carried out in good faith. We asked the Law Society to come up with figures for the number of successes that the troubleshooter scheme has had for victims of crooked lawyers. If the committee can get those figures, I will say, "Well done," but we have not been able to get them. I would place a hefty bet that the number of successes is minimal. Cases are usually buried in paper so the scheme does not work. Many of the people in the public gallery have tried the troubleshooter scheme and got nowhere.

Andrew Duncan: Let me put the troubleshooter scheme into perspective. The Law Society has a list of troubleshooters, but the one who was appointed to my case was not from the list; he had started in business that year. A legal aid certificate had to be issued by the Law Society before he could take on the case. That is not right, but that is how the scheme works.

The Convener: It would be useful for the committee to investigate further the troubleshooter scheme.

Michael Matheson: I want a clearer picture of the system that the witnesses would like. I think that they want an independent system, but I am not clear about how that would operate. Should the system deal only with complaints against lawyers? Should the Law Society continue to have a role in professional development for solicitors? Exactly what do the witnesses want?

Andrew Duncan: There is no need for so many people to be involved. An independent body could be set up that had no connection to the Law Society and the Faculty of Advocates and so on.

Michael Matheson: And that body should deal purely with complaints.

Andrew Duncan: Yes.

Michael Matheson: So the Law Society would continue to have a role in professional development and so on.

Andrew Duncan: Yes.

Michael Matheson: Would that independent body have a role in setting standards?

Andrew Duncan: Yes, it would definitely set standards.

Michael Matheson: How would you envisage it doing that?

Andrew Duncan: For a start, the law—by which I mean the European convention on human rights—would be adhered to.

14:30

Stuart Usher: Would you repeat the question please?

Michael Matheson: Which one?

Stuart Usher: The last one.

Michael Matheson: How would you envisage that independent body setting standards?

Stuart Usher: It would probably have a committee to consider standards. The Law Society has rules of biblical proportions—it makes and interprets those rules. I read one the other day that had 630 words. The independent body would simplify the rules. They should not be so amorphous and must be slimmed down and made more commonsensical. The independent body would try to simplify and improve the system. All it needs to focus on are three words: fraud, deceit and theft. The independent body would operate on that principle. It would have to make the rules far easier in their execution. At the moment the rules are out of control and are being taken advantage of with the wrong aims in mind.

Michael Matheson: Could the current role of the Scottish legal services ombudsman be expanded to include the role that you have just outlined?

Stuart Usher: No, not at all. In theory he is independent but in practice he mixes in the same clubs. Of course, you can never get people not to contact each other.

Michael Matheson: Can we stick to the substance of the issue, which is the independent role that you would like to be fulfilled? Could that

role be undertaken by the ombudsman?

Stuart Usher: No, not as things stand. Two years ago, the ombudsman had one clerk and worked part-time. A multibillion-dollar industry had a part-time ombudsman with one clerk. Even the present ombudswoman works part-time. There are two clerks now and I believe that there will be another one. The ombudsman could never take on that role. There would have to be an ombudsman's office with no lawyers in it. It would have people of probity and a staff of at least 30.

Michael Matheson: Why 30?

Stuart Usher: We are talking about an inquiry into the legal profession. The only way that the committee will get its answers is to go into a number of individual cases. At the moment, the committee is not prepared to do that.

Michael Matheson: You began by saying that the position of ombudsman in its present form could not have a role, but you appeared to go on to say that it could have a role if it had more staff and were given greater powers.

Stuart Usher: Yes, that would be the case if it were given greater powers, and if it were independent and seen to be independent. I would call it not the ombudsman, but the ombudsman's office or, as in England, the Office for the Supervision of Solicitors.

Michael Matheson: I do not think that we need to get caught up in titles at the moment.

If the role of the ombudsman were to be extended to include monitoring, regulating and overseeing the way in which the Law Society operates and deals with complaints, would you see that as a step forward?

Stuart Usher: I am sorry—see that as what?

Michael Matheson: Would you see that as a step forward?

Stuart Usher: No, not really. As I said, the role could be expanded—although I did not quite hear you. Perhaps my hearing is not too good.

The Convener: The point that Michael Matheson was making—and I thought that you agreed with it—was that, if the ombudsman's role developed beyond its current remit, and if the ombudsman received greater resources, that solution would achieve the required independence.

Stuart Usher: I apologise—I did not hear the original question well. That suggestion would indeed be a step forward.

Donald Gorrie (Central Scotland) (LD): I will ask about the way in which your preferred system might work; but I want to be clear about something first. You seem to be concentrating on lawyers who act in way that is definitely crooked and dishonest. I would have thought that there would be more problems with lawyers who are incompetent—who give bad advice, do not answer letters or make a muddle of things. Would your system cover lawyers who are incompetent as well as lawyers who are dishonest?

Stuart Usher: We differentiate. We do not mind incompetence. We are pretty incompetent ourselves. Myself, I am very incompetent; I make lots of mistakes. We all make mistakes.

We are not worried about delays. The essence of what we are worried about, and what we want something done about, is deceit. Calculated deceit and fraud are the things that we want fixed. Incompetence is not the problem.

I take your point, in that a lawyer can make a perfectly genuine mistake, caused by incompetence or whatever. However, having done that, the lawyer should have a certain amount of protection too. Let us say that that mistake costs the client £10,000. The lawyer should say, "Look, I made a mistake there. I didn't send that letter. It's cost you £10,000 and I'm terribly sorry about it." If it was a genuine mistake, that lawyer should not be prosecuted. He should have privilege, or whatever the word is.

Donald Gorrie: That brings me on to my next question. There are two aspects: punishment of the lawyers who have done wrong and some sort of redress for the clients who have suffered. What are your views on punishment and redress?

Stuart Usher: The Law Society is very fond of using terms such as misconduct and inadequate professional service, but that does not address the problem. The problem is deceit or incompetence. I am sorry—I have lost the question.

Donald Gorrie: I wanted to know your views on punishment for those who are found to have been doing wrong and on redress for defrauded members of the public.

Stuart Usher: If deceit is involved—calculated fraud or theft—the punishment should fit the crime. The lawyer should make redress. If an old lady dies and the lawyer embezzles her estate or if, in a more cunning manner, he siphons off money and that is discovered, he should pay back that money if he can and the punishment should be serious. The redress would be payable by the lawyer to his victim. That would stop 98 per cent of the crime in its tracks.

Donald Gorrie: You thought that a body of at least 30 officials should run the complaints organisation. How would that be paid for? It has been suggested that a levy could be made on all lawyers, or that a system of fines could be used, in

which the lawyers who were complained about the most would pay more. Another suggestion was that the person who complained should contribute in some way. What is your view on the funding?

Stuart Usher: There is merit in the idea of a sliding scale for lawyers who are complained against constantly, so that it becomes more and more expensive for them. Although I do not like to say so, the type of organisation that we want would probably need some central Government funding. I imagine that the legal profession would be able to fund it, but if it could not, central Government would have to provide the funding.

Donald Gorrie: Your paper refers to the Law Society's measures for continuing professional education and development, which you consider to be inadequate. What are your ideas on how to provide proper qualification and continuing development of lawyers? Who would be responsible for that?

Stuart Usher: That type of thing could stay with the rump of what still existed of the Law Society. People go to university, pass an exam and become lawyers, in the same way that people become doctors. A lot of mumbo-jumbo is tied up with this matter. As was evident in the submissions to the Justice 1 Committee, lawyers are always carrying out procedural improvements. That does not address the problem of fraud and crooked lawyers. Lawyers' procedures must be the best in the world—in theory, anyway. They can fiddle with their silly games if they like—that is fine. They would have to act in good faith and they would have to be supervised. Without a shadow of a doubt, there are individuals in the Law Society who are not acting, and who have not acted, in good faith for many years.

Donald Gorrie: Do you support the idea of laws about continuing training, so that once students have passed out of university and have qualified, they would lose their certificate if they did not attend three or four courses every five years?

The Convener: There is continuing professional development for solicitors every year. If they do not partake in those courses or get through them, they do not have a practising certificate. That is a point of information. Although we could have a debate about whether that development is satisfactory, the procedures for it exist.

Stuart Usher: May I answer the question?

The Convener: Of course. I was simply clarifying that there is professional development every year.

Stuart Usher: We do not think that the business of taking courses every year and development is necessary. The way the legal profession is, someone who is good at practising law will be in demand and will do well. The business of the Law Society improving methods and providing guidelines and courses is a red herring that conceals the reality of what is going on. We are not the slightest bit interested in that.

If a chap or a woman passes an exam, they go into practice and that is it. Doctors are the ones who have to adapt to changes in equipment such as knives and X-ray machines. Lawyers do not have to do that type of thing. The law does not change; the only way that it changes is by precedent. We do not see the necessity of development. The main thrust of the new organisation would be to defeat deceit.

The Convener: I want to clarify for Donald Gorrie that there is a two-year training diploma. It is not a question of graduates who have come straight from university being let loose—that should not be the case. Before someone comes through the system, they must complete a diploma course and a two-year traineeship. I make that factual comment as someone who has followed the process.

Gordon Jackson: I am sorry to go over old ground, but I am not clear about something. As I have listened, it has become clear that your complaint is not about professional incompetence, delay or failure; it is about—in your words—crookedness, fraud, theft and embezzlement. To be fair, the title of your organisation makes that very clear. Those are criminal offences and not a matter of professional incompetence. Other people can deal with that. During most years, the police will prosecute some lawyer, who will get umpteen years in jail for criminal offences. As Phil Gallie said, that is in the nature of any profession.

It seems to me that the regulatory body that should deal with your complaint is not the Law Society or any new body. In our country, the regulatory body for fraud, embezzlement, taking a dead person's funds and theft is the police. I am not clear what you mean when you say that the police are not giving you satisfaction. I can understand the police telling you that they are not interested in delay or bad practice, but why do you think that you do not get satisfaction from the police for the sort of criminal conduct that you are complaining about? In any free society, the police are the regulatory body for such behaviour.

14:45

Andrew Duncan: It is not the police. It is the procurator fiscal. The police will pass a complaint to the procurator fiscal and it is up to the procurator fiscal to progress matters.

Last year in Scotland, the procurator fiscal did not prosecute 1,500 cases because of lack of funding and management. Lord Hope said that the

justice system of any country is of no use unless it is accessible.

Gordon Jackson: I want to be clear. We are not going to leave with any dubiety about what you are saying. Are you saying that the police are passing cases of criminal behaviour to the Crown Office and to the Procurator Fiscal Service with a recommendation that people be charged, and that that is not happening?

Andrew Duncan: Yes.

Stuart Usher: I would like to enlarge on that.

Gordon Jackson: I will let you enlarge on that. I just want to be quite clear about what you are saying. The police are telling you, and telling the procurator fiscal, that those men should be charged with theft and embezzlement and the procurator fiscal is refusing to do that. Is that your allegation?

Stuart Usher: That is Andrew Duncan's allegation. Our common experience is that someone goes to the police, who consider the issue. The police might be sympathetic and say, "By God, this is skulduggery on a huge scale. We'll come back to you." Two weeks later, they come back and say, "Sorry, chum. We can't do anything about it." When you ask them why, they say, "You have to have a lawyer."

Gordon Jackson: Can I just pause you there?

Stuart Usher: That is it. You wanted the answer.

Gordon Jackson: My understanding is that that would be the police saying that it was not a criminal matter. We are now changing tack.

You have already told me that the police are saying to the procurator fiscal, "Here are crooked lawyers committing crimes and stealing money, and you should prosecute them" and they are not being prosecuted. Is that because of incompetence in the Crown Office, or corruption? Is it because the procurators fiscal are also lawyers? Why do you say that they are refusing to prosecute criminal charges?

Andrew Duncan: Because there is corruption in the office.

Gordon Jackson: In the Crown Office?

Andrew Duncan: Yes.

Gordon Jackson: Does that corruption go to the top or is it at local level in the Crown Office?

Andrew Duncan: I would say that it goes to the top.

Gordon Jackson: Your position is therefore that lawyers are not being prosecuted for crimes in Scotland because the Lord Advocate is corrupt.

Stuart Usher: Basically, yes. It looks like that.

Andrew Duncan: Lord Denning compared the law to a broken reed and said that the police do not have the resources to follow up all cases, so some cases go by the way.

Gordon Jackson: I want to press you on that, because you are taking a different line and talking about where cases are followed up. I am now talking about cases in which the police have said that a case should be prosecuted and the prosecution system has failed to prosecute. You are suggesting that that is the result of corruption in the prosecution system.

Stuart Usher: It looks like that. We do not have proof of that but the practical effect is that you report a case to the police and the police do nothing.

Gordon Jackson: The police may well refuse to do anything, for a variety of reasons. They might think, on occasion, that there is nothing in the claim. That is a matter for them.

I am dealing with your allegation that the police were recommending that people be prosecuted and that the refusal to do so was a result of corruption. I want to be clear that that is what you are saying.

Andrew Duncan: We cannot be clear on that, because we neither see nor hear what the police do after we leave.

Stuart Usher: Mr Jackson has asked a specific question and we will give him a specific answer.

We come across criminality and fraud by crooked lawyers and we go to the police about it. The police consider it and are appalled. They say that it is perfectly obvious what has been happening.

I am speaking from my own experience, because that is the safest thing on which to base statements like this. On one occasion, our local procurator fiscal said, "By God, this doesn't look too good." Two or three weeks later, the police came back and said that they could not do anything about the matter. I asked, "On whose say so?" They said that it had gone to higher channels. That is all that I was told. I argued and the chap said, "I am terribly sorry. I know damn well what has happened, but we can't follow it up." He said that they might follow it up if I got a lawyer.

Members might well look confused. One of my lawyers—my ex-lawyer after I discovered him—said that that was absolute nonsense. Confusion is sown like seeds in the wind. The end result is that the police will not act in all the cases that we know of. They will say that a case is a civil matter, or that it is this or that. The end result is that we are told to go to the Law Society. We get buried

there. We are told, "Get yourself a lawyer", but you cannot get one. If you get one, nine times out of ten he will do you.

Gordon Jackson: A police officer telling someone that a case is a civil matter is one thing. The policeman might be making a judgment that we do not like, but it is his judgment that there is no crime.

That is not the same as the allegation that police officers are identifying a crime and the authorities are not prosecuting it. That is an entirely different matter. You will forgive me if I do not allow you to confuse those two issues; they are entirely different. With the convener's assistance, I will not allow those to be confused.

Stuart Usher: Are you saying that the police cannot follow up civil matters, only criminal matters?

The Convener: Absolutely.

Gordon Jackson: Absolutely.

Stuart Usher: I want everyone in the chamber to hear that. The police will follow up only criminal matters. Is that right?

The Convener: Of course.

Stuart Usher: Is theft by a crooked lawyer in his law firm a criminal matter or a civil matter?

Gordon Jackson: I am not here to answer questions, but that is undoubtedly a criminal matter.

Stuart Usher: Right well—

Gordon Jackson: Let me finish. If a lawyer is stealing or embezzling money, he is committing a serious crime; he should be prosecuted and go to jail. As Phil Gallie pointed out, that happens from time to time. That is a criminal matter.

I am trying to work out what the problem is. If the police are calling something a civil matter, that is a matter for their judgment. If you are saying that the police recommend prosecution of criminal matters and those matters are not prosecuted, that is a very serious allegation. We will need to take evidence on that—not here, but later. We will undoubtedly take it up with the police and the Crown Office.

Stuart Usher: The police might say that something is a civil matter when it is a criminal matter. They might say that it is a matter of opinion. The end result is that nothing happens. That is the reality.

In my case, which I know the best, there is a lot of criminality. What is skulduggery then?

The Convener: We are clear that there are two issues, which Gordon Jackson expressed and delineated. We will follow up the serious allegation that your colleague made, which I will summarise. The police make recommendations to the procurator fiscal that a crime has been committed. The crime is not prosecuted, because of the attitudes that prevail in the Crown Office. The trouble is that solicitors are not being pursued. We would certainly follow up that allegation and would want to ask the Crown Office about it.

Phil Gallie: There are moves and pressures from the legal profession about reviewing police complaints procedures. There is a feeling that those procedures should be independent. If the police complaints procedures were to be changed in that way, would it be reasonable to turn the focus back on to the Law Society with respect to the self-regulation of solicitors?

Stuart Usher: I did not catch your entire question.

Phil Gallie: I am making a comparison between solicitors and the current moves to have a separate police complaints procedure.

Stuart Usher: Yes, we would find that very helpful. It would be a step in the right direction.

Phil Gallie: Should the committee keep that in mind for the future?

Stuart Usher: Yes, very much so.

Phil Gallie: I wish to return to the main issue, which is fraud. I was rather disappointed to hear your response to Mr Gorrie's question about solicitors' incompetence and the laid-back attitudes that can cost clients. I seem to get such complaints from my constituents. Are you not at all concerned about that? Solicitors frequently cost clients dear.

Stuart Usher: Obviously we are concerned, but incompetence is not a cardinal sin.

Phil Gallie: It is a sin that adversely affects lawyers' clients.

Stuart Usher: I agree—incompetence is not desirable. If it has adversely affected a client, some form of recompense should be forthcoming. However, the essence of the matter is deceit and fraud.

Phil Gallie: On your charge of fraud, would you say that police and procurator fiscal action is a result of the complications arising from the issues that the police and the procurators are asked to consider and the fact that there are limits on their time?

Stuart Usher: I agree. I think I touched on this with Mr Gorrie. Those complications arise because there are so many rules and regulations and so many different bodies, including the Scottish Solicitors Disciplinary Tribunal, the Law Society,

the Faculty of Advocates and the Crown Office. The whole thing is too complicated and it must be simplified.

The Convener: We have already had evidence that procedures could be simplified.

Stuart Usher: There are too many procedures.

The Convener: Thank you for your evidence. It was very helpful.

Andrew Duncan: We have heard a lot of talking today, but the fact is that we need a body of self-regulatory people—a simple body to give people representation and justice. That would eliminate the need for all the talk that has gone on here today.

The Convener: Thank you. I understand your point.

Stuart Usher: I would like to bring up one last thing. I wanted to bring it up at the beginning and forgot about it.

The Convener: I am sorry, but you have had an hour. I am not prepared—

Stuart Usher: Why not?

The Convener: Because we have given you an hour and someone else is waiting to give an hour's evidence. We are being as even-handed as possible. Thank you.

Stuart Usher: I will put the question over—

The Convener: No, you will not.

Stuart Usher: Well, I think it is—

The Convener: I suspend the meeting.

14:58

Meeting suspended.

15:01

On resuming—

The Convener: I reconvene the meeting and welcome Professor Alan Paterson. I refer members to the paper from Professor Paterson—it is quite erudite and I think some of us struggled with it.

I will kick off the questions. Which principles of good practice do you identify as being most important in a system for regulating solicitors or advocates?

Professor Alan Paterson (University of Strathclyde): I should start by declaring my status. I am a member of the council of the Law Society of Scotland and I sit on Law Society committees that deal with complaints. I say that because I am not here representing the council or the Law Society.

On the question, I have set out in paragraph 2 of my submission my agreement with ideas that have been proposed by the National Consumer Council in "Better business practice: how to make self-regulation work for consumers and business". I am happy with the suggestions of the better regulation task force about transparency, accountability and proportionality.

In paragraph 8, I set out in detail the following suggestions: the need to balance the interests of the profession and of the public; the need for clearly articulated goals; the need for clear and consistent standards; the need to deal with overlapping standards; the need to be clear about the truth-finding mechanism that we are using at any stage; and the need to involve appropriate dispute resolution at each stage.

The Convener: I notice that one of your suggestions is "Be relatively speedy". Could you develop that a little?

Professor Paterson: The speed of a complaints process is controlled by a number of events. It can be helpful if there is a documented procedure that sets realistic time limits. The Solicitors (Scotland) Act 1980 does not provide any such helpful mechanism. It is fair to say that the Law Society is not helped by the structure of that act in terms of timetables.

As you know, the Scottish legal services ombudsman is not very happy with the amount of time that complaints take to process; some seem to take an inordinately long time. However, that is partly because of the way in which the Solicitors (Scotland) Act 1980 and the complaints procedures are structured. Procedures in other jurisdictions are much more streamlined.

The Convener: Could you give an example of a more streamlined complaints procedure that is within the committee's jurisdiction?

Professor Paterson: The Scottish Conveyancing and Executry Services Board has strict timetables, but it has not had many complaints because it does not have many registered practitioners, so it has not been possible to show how workable those timetables are. In theory, however, it seems to be a good model.

The Convener: It is a good model for the committee to consider.

Maureen Macmillan: I am confused about definitions of terms such as "professional misconduct", "unsatisfactory conduct" and "inadequate professional services". You said that the definitions of those terms were inadequate. Could you give me some idea of what they mean and, perhaps, an example of each?

Professor Paterson: If you find those definitions confusing, I wonder what the average member of the public thinks of them. I tried to make that point in my evidence.

I find the tests of those terms to be opaque. I do not think that they reveal much to the average member of the public. They do not provide much guidance to the average practitioner or to the client relations committees—I do not mean only the lay members of those committees. To be frank, I do not understand how lay members can, of their own volition and without further guidance, understand what competent and reputable solicitors regard as serious and reprehensible. I tried in my evidence to make the point that, all too often, lay members do not get the additional guidance that I would like them to have.

The primary source from which lay people can get guidance is the Scottish Solicitors Discipline Tribunal's precedents. The discipline tribunal has given much guidance as to what culpability means in all circumstances—which is the second part of the Sharp test. The tribunal indicates to what extent harm to the client is relevant to misconduct. It also indicates to what extent junior status can be taken into account. It has given an indication as to whether the fact that someone is suffering from overwork, alcoholism or stress can be taken into account when assessing whether there has been misconduct.

Those things cannot be found out from the tests. One must go to the discipline tribunal for guidance—that is where I recommend that guidance be sought. My concern is that, for a variety of reasons, the guidance from the discipline tribunal has not been given often enough to the client relations committees. It is not a conspiracy; it is just that there is not enough time and it is difficult. However, I think that more guidance on the discipline tribunal's rulings needs to be given to the client relations committees and to the council.

There are difficult areas that fall between the tests and that the tests will not clarify without the code of conduct or guidance from the discipline tribunal. For example, if a solicitor is twice convicted of driving while intoxicated, is that professional misconduct? What if that happened on three occasions? It is established that what a solicitor does in his or her private life is relevant to misconduct. That is where we need to develop more guidance.

Maureen Macmillan: Surely that would become incredibly detailed. There would not be just three categories of culpability; there might be a dozen.

Professor Paterson: Not necessarily. The Sharp test continues on from what competent, reputable solicitors describe as "serious and reprehensible" and goes on to say that all the circumstances of a case and culpability in those circumstances must be examined. "Serious and reprehensible" appears to be a slightly curious phrase to use unless one knows the facts of the case of Sharp v the Council of the Law Society of Scotland, from which the test stems.

The facts that emerged in the case of Sharp v the Council of the Law Society of Scotland were that in a firm in which there were senior partners and junior partners, the junior partners appeared not to have been permitted to attend any of the partnership meetings of the firm, nor to have had any influence on the accounts. However, all the partners were found guilty of misconduct at the tribunal. The Inner House of the Court of Session, when it considered the case, did not believe that the junior partners were in any way culpable. Although the word "culpability" was used in the case, it was not necessarily being used in the same sense as it would be used in criminal law. Its sense was not clear; it is a word whose meaning needs to be examined.

That is why the discipline tribunal had to consider issues to do with illness, stress and junior partner status. It also had to consider whether there had been harm to the client and whether the fact that the solicitor was unaware of changes in the rules was relevant to culpability. The discipline tribunal has ruled on all those matters, but there is no intuitively obvious solution without considering what the tribunal has said.

Maureen Macmillan: What about remedies for clients and consequences for the solicitor? Are you considering the penalties and the way in which clients might be compensated?

Professor Paterson: Clients are not compensated following findings of unsatisfactory conduct; they are compensated following findings of inadequate professional services, or IPS. The test for IPS is whether professional services are not in any respect of the quality that could reasonably be expected of a competent solicitor.

Lay people are able to comment on that, but both the lay people and the lawyers on the Law Society's client relations committees are presented only with the instruction that they can compensate by up to £1,000. Unless we develop guidance to say what levels of compensation are appropriate for different kinds of cases, there is no mechanism to achieve consistency. There is the same problem with the tests of misconduct and unsatisfactory conduct. Unless the committees and the council of the Law Society are given more guidance than they currently receive, there is no mechanism to achieve consistency of results; consistency is very important in a complaints procedure.

The Convener: We have been concentrating on solicitors. Are you able to comment on how any of what has been said relates to advocates?

Professor Paterson: My understanding is that IPS is not part of the discipline procedure for advocates, but I do not really understand why. IPS was a statutory creation, but it was not applied to advocates. I understand that the General Council of the Bar in England and Wales applies IPS voluntarily. That has not been done in every case, but the Bar Council is prepared to apply it in some cases. I see no reason why, in principle, IPS should not apply to advocates.

Because IPS does not apply to advocates, and because the complaints are all to do with conduct, relatively few complaints about advocates are received. When complaints of service are made on cases involving a solicitor and an advocate—all cases that involve advocates involve solicitors—it is difficult for the lay client to know whose is the fault if something has gone wrong. It might be that the advocate has held on to the case for far too long or has been double-booked at the last minute. If that is the case, there is no mechanism for compensation to be paid to the client from the advocate. That is because it would be a case of IPS, which is not statutorily applied to advocates.

The Convener: Is not it also to do with the fact that, as I understand it, there are no contractual relationships between the advocate and the solicitor and the advocate and the client?

Professor Paterson: That is true. However, IPS can be applied where there is no contractual relationship, but it is difficult to do so. It would have to be done statutorily.

Michael Matheson: Paragraph 8 of your evidence addresses the complaints procedure. You list 12 goals that should be achieved in a complaints procedure. How does our present system for handling complaints against solicitors stand up to those goals?

Professor Paterson: I have tried to answer that question in paragraph 10. As I say in paragraph 10(a),

"I have detected no evidence of a bias in favour of the profession by the Society's staff, committees or Council."

I have been very impressed by the work of Philip Yelland and his team in the client relations department.

Nonetheless, if I were a lay person looking at the matter from the outside, I would question the fairness of some aspects of the system. In that context, I have highlighted the procedure whereby a member of the council can be asked to make representations on behalf of the solicitor who is being complained against—although they can occasionally do so on behalf of the solicitor who is making complaints against another solicitor. The system that allows a solicitor to speak on behalf of a constituent member in council appears to be unfair to observers because nobody is instructed to appear on behalf of the complainer—the other side—in the adversarial procedure that then ensues in council.

The conveners of the client relations committees see their job as being to defend the minutes of their committees. They were asked about that fairly recently and came unanimously to the conclusion that their role was to defend the committees. Therefore, they do not see their role as being to represent the complainer in an adversarial situation, vis-à-vis the constituent member of the Law Society and council. That is unfair and seems to be a breach of natural justice.

15:15

Michael Matheson: Given the way in which the system operates, would some of the concerns that have been expressed—most of which appear, on the surface, to be based on a perception of the way in which the system operates—be better addressed by having a complaints system that is independent of the Law Society?

Professor Paterson: No, we do not need to move to a completely independent system. It would be bad for the professional bodies if they were stripped of their disciplinary roles, because it is their job to look after the public interest in relation to the profession as well as to look after the interests of the profession. I do not believe that the professional bodies should become simply trade unions.

We should introduce a system similar to that which operates in New South Wales where there is, in effect, co-regulation. Many people would argue that what we have now is co-regulation, because solicitors and advocates are not regulated only by themselves, but by a variety of people whom I have mentioned in my evidence. We have a kind of co-regulation, but I would like a stronger form and an ombudsman who has stronger powers. The bulk of the disciplinary role should be left with the professional bodies, which should be monitored, overseen, influenced and guided by an ombudsman.

Michael Matheson: How would a difference of opinion between the Law Society and the ombudsman be resolved in that sort of structure?

Professor Paterson: Under the current system, our ombudsman can make recommendations, but if the Law Society or the faculty does not want to accept those recommendations, the only thing that the ombudsman can do is publish her recommendations. That is how matters stand. However, legal ombudsmen elsewhere have the

power to impose their decisions on the professional bodies. They cannot impose a finding of professional misconduct on the individual solicitor or advocate concerned.

Although they can overrule the professional body on cases of IPS or unsatisfactory conduct, if the ombudsmen decide that professional misconduct is involved and the professional body disagrees, the ombudsman can only prosecute before the discipline tribunal in the same way as the professional body. Although other ombudsmen can say that professional misconduct is involved, they cannot impose that charge by fiat; they must take the matter before an independent tribunal. That is what happens in New South Wales.

Gordon Jackson: You mentioned the committee on which lay people sit. That committee makes a recommendation to the council of the Law Society, which has a quasi-adversarial system. What is your view on the solution that we should remove the council from the system? I know that statute would be required for that, but disciplinary matters could be delegated only to the committee and not to the council. The three stages are the committee, the council and the discipline tribunal. The suggestion is that we remove the council from that system.

Professor Paterson: As you know, we cannot remove the council because the Law Society lacks delegated powers, although it is keen to acquire them.

Gordon Jackson: I assumed that we could solve that.

Professor Paterson: If we can solve that, one solution to the adversarial nature of the process would be to remove the council of the Law Society. That was done in Ontario, which had a similar, although not identical, model. The convocation, which is the equivalent there of the council, was removed from the process and the job was given to an appeals committee. That would probably be the answer. However, the professional body would resist such a move, which I can understand. The professional body feels strongly that it should rule on matters of conduct. It acknowledges the argument about matters of service but, on conduct, the body feels that it should have a say. In Ontario, it was hard to remove the convocation from the process; however, that is the solution that I suggest.

Gordon Jackson: For the avoidance of doubt, I did not suggest that the Law Society should be removed from the process. I suggested that the present structure be changed. I think that you agree with that.

Professor Paterson: Yes. In Ontario, the large council—or convocation—was removed from the process and the job was given to an appeal committee that is part of the Law Society of Upper Canada.

Gordon Jackson: I talk to many lawyers privately and it is not my impression that such a move would be resisted strongly, although that is anecdotal.

Professor Paterson: Opinion on the matter has not been tested. I think that the best solution is to give the job to a specialist disciplinary committee in the Law Society or the Faculty of Advocates. There should be a lay person on the committee. I would choose that route rather than leaving the matter with the council. However, for the time being, the council must be involved, which means that we must find another solution. That might involve either having no representation in the council, which is difficult, or some kind of amicus curiae, which is a representative for the complainer.

Gordon Jackson: How should people be appointed to the next stage, which is the discipline tribunal? I have represented people before that tribunal and my impression is that it is very lawyer-oriented. The public perception might be that even the discipline tribunal is a matter of lawyers looking after lawyers. How can we get around that perception?

Professor Paterson: It is uncomfortable that the Law Society nominates members of the tribunal and I have no difficulty about removal of that system. However, that is not the crucial point about the discipline tribunal. The crucial point is that the tribunal's guidance is communicated to the council and the committees of the Law Society and that those bodies take the guidance into account.

Another problem with the tribunal is that because it concerns the livelihoods of solicitors—which is important—it involves full-scale adversarial hearings, which can take several days and are expensive. When the tribunal—or the discipline committee, as it was called—was created in the 1930s, it was envisaged that it would deal with all discipline and misconduct cases and that it would not be a full-blown adversarial system. It was supposed to deal with lesser misconduct cases as well as serious cases.

We have moved to a situation in which sending cases of minimal misconduct to the tribunal does not make sense; it is overkill and it is far too expensive. There is a gap in the powers. The Law Society ought, like some other professional bodies, to be able to find that there has been misconduct and to impose sanctions, rather than merely give reprimands. Sanctions might involve a fine and education. One of the most impressive aspects of the legal services commissioner in New South Wales is that he sees his role as being to

educate the public and the profession about what a complaints procedure can and cannot do and about the ways in which many complaints can be avoided.

The Law Society has much information in its files about complaints that come up time and again. We do not use that information to educate the profession. We have done some education, but we could do much more. We could work with the profession on its service and say, "You screwed up; that was not necessary and here is how it could be avoided next time." The trouble with discipline is that it is too often seen as being the handing out of a sanction, which is the end of the matter; it is not seen as working to avoid a similar situation in future.

The Convener: Donald Gorrie has a question on developing the business of the legal services ombudsman.

Donald Gorrie: People who think that we need to change the system suggest three options. The first is to have a new body, the second is to keep the Law Society and create a new body above it to monitor what it does and the third is to have a greatly enhanced ombudsman operation to do the monitoring. What are your views on those options?

Professor Paterson: I am in favour of the option that involves co-regulation with an ombudsman who has greater powers. I am not in favour of the totally independent body, because it is a bad development for a professional body to move purely into a trade union role. That is my view and it is also the view of the New South Wales legal services commissioner. I respect his judgment on the matter. It is very important that a professional body retains its commitment to the public interest and the pursuit of that. I know that it looks like a conflict of interests, but it is important for the professional body to pursue the public interest as well as the profession's interest.

Are you asking what sort of powers one might give to the ombudsman?

Donald Gorrie: Yes.

Professor Paterson: The ombudsman needs to have the power to monitor. Our ombudsman does not have the power to monitor how the complaints procedure is working. All she can do is wait until somebody manages to struggle to the end of the line to complain to her, at which point she can deal with the complaint. The complaints that reach her are not a random cross-sample of complaints so she does not know—nobody does—how well the complaints procedure works, because there is not enough monitoring of it. I am in favour of giving the ombudsman power—as is the case in New South Wales and to a lesser extent in Victoria in Australia—to audit files on a random basis and to ask for particular files if she wants them. In New South Wales the ombudsman can attach directions to a file saying what he would like to be done in relation to a particular case, or whether he would like a specialist report. He does not use that power very often, but it is an important power to have.

I am proposing a single-gateway model, in which the ombudsman would become the sole gateway for complaints. That would deal with the point that Mr Matheson raised about perception. The ombudsman would be—and be seen to be—independent. The ombudsman receives all complaints and makes crucial decisions about what is and what is not a complaint, which is an issue that causes us trouble. However, the ombudsman does not hang on to the vast bulk of complaints. A protocol is in place in New South Wales and the Victorians have just recommended that their system should adopt a similar protocol. That protocol has been worked out with the professional bodies—the single gateway applies to their equivalents of the Faculty of Advocates and the Law Society. That would be important in a complaint that involved a solicitor and an advocate.

With the single gateway, there would be a protocol that says which cases will be dealt with by the ombudsman and which will go to the professional bodies. From what I have said, members will appreciate that my view is that there must be a protocol or perhaps something in statute that says that every case should be investigated by the professional body unless a strong reason is given in writing why that should not happen. That cannot be left too much to discretion.

Also, with the single gateway, the bulk of the complaints would still be dealt with by the professional body, subject to the scrutiny of the ombudsman. The ombudsman can scrutinise any file at any time.

15:30

Donald Gorrie: You have helpfully described the situation in New South Wales. Would you draw to our attention any ombudsperson in the UK or elsewhere who would be a good model to follow? I have grave suspicions about ombudspeople. I am sure that they are personally worthy but, in my experience, their institution is of dubious value. However, there must be some that do better than others. Could you point us in the right direction?

Professor Paterson: I am not sure. In the English model, the ombudsman has greater powers. For example, there is dubiety about whether our ombudsman can even consider the merits of a complaint. It is argued that all she can consider is how well that complaint was handled. I am not entirely in agreement with that system, but

we ought to clear up that ambiguity. It should be clear that the ombudsman can consider the merits of a case, not just how well it was handled.

In England and Wales, if the ombudsman decides that compensation is to be paid to the client either by the Law Society or the solicitor, she can enforce that. Our ombudsman cannot. The English ombudsman therefore has some powers that are worth considering. The police ombudsman in Northern Ireland has very strong powers. I am not sure I would want to go that far.

I should clarify that I do not think that everything about the New South Wales model is ideal. It gives too much discretion to the commissioner. However, the fact is that he has powers to regulate the issuing of practising certificates. The Law Society of Scotland issues practising certificates with restrictions. That is part of the disciplinary process and should be considered as part of regulation.

You heard earlier about the operation of the master policy. That is not subject to regulation by the ombudsman. The operation of the guarantee fund is also not subject to scrutiny by the ombudsman. They are in New South Wales and I do not understand why they could not be made the subject of scrutiny by the ombudsman.

Gordon Jackson: I like the idea of a gateway and I am attracted to the idea of increased powers for the ombudsman. I also see the point of having a protocol that pretty much defines what stays and what goes. My reservations about a gateway are not all about cost, but there are a lot of complaints. At the moment, they are all investigated by the Law Society, which has a cast of thousands who are doing nothing else. If every complaint goes to be considered by the ombudsman first, and then 95 per cent—to pull a figure out of the air—go on to the Law Society, the Law Society will end up doing as much as ever, but there will be a huge increase in the costs and staffing of the ombudsman's office. If the gateway is for every single case, a huge duplication might result. That worries me.

Professor Paterson: It could. That is a valid point.

In New South Wales, the ombudsman considers whether, prima facie, the complaint is genuine or frivolous or within any of the boundaries. If, prima facie, it looks like a genuine complaint that should go on to the professional body, the ombudsman dispatches it straight off. The ombudsman does not undertake a thorough, in-depth investigation of such complaints. All that he or she has to do is decide whether, prima facie, the complaint is valid within the grounds of complaint and acceptable within the jurisdiction. He or she does not have to thoroughly investigate it unless it is a case that, under the protocol, they are going to keep. For example, the New South Wales legal services commissioner would keep those cases that have political fallout or involve a senior officer or member of the council of the Law Society.

Gordon Jackson: That sounds like a criminal sift. Would he not achieve a similar result by sending everything to the Law Society to decide whether the complaint is legitimate? In that system, every case that the Law Society decided was not a legitimate complaint would have to go back to the ombudsman for confirmation. That would prevent a certain amount of duplication.

Professor Paterson: That is more or less the current situation. As soon as a case is rejected on the ground that it is not a valid complaint, the Law Society informs the complainer that they can take it to the ombudsman.

Gordon Jackson: I am suggesting that it should go automatically to the ombudsman, who could then confirm whether it was not a legitimate complaint or send it back to the Law Society if he found that it was legitimate.

Professor Paterson: There will always be some duplication. It need not be huge and if the protocol is clear, it will be relatively minimal. However, what we would gain would be the perception—and reality—of an independent gateway. People would not think that they were being fobbed off.

The Convener: If we were considering other systems of pursuing complaints against solicitors and advocates, which other jurisdictions and models should we examine in terms of cost and who funds the system?

Professor Paterson: Ultimately—this is not terribly surprising—the people who pay for complaints are clients. It does not matter which system is in place, at the end of the day it is the clients who pay. The Law Society's complaints system in Scotland is paid for by the solicitors as part of their practising certificate subs, but they get that back, if they are businessmen, from their fees.

In other jurisdictions such as New South Wales and Victoria, the costs are paid for from the interest on client trust accounts. Such accounts are set up differently over there. The same money is used to pay for legal aid and for some parts of legal education. I do not think that we should pursue that model, for two reasons. First, interest rates fluctuate, which makes it an unreliable funding method. One would need to keep expanding and cutting back. Secondly, my view on the law of agency is that interest on trust and client accounts ought to go to clients. In these days of computers, we ought to be moving to a situation where the bulk of interest earned on client accounts goes back to the clients.

In general, the bulk of complaints procedures are paid for by clients. In our system, the ombudsman is paid for by the taxpayer and I can see the argument why that might be desirable. If we were to expand the ombudsman's role considerably, there would be an argument for a levy on members of the profession—both in the Faculty of Advocates and the Law Society—to pay for it. I am sure that they will love me for saying that.

The Convener: There will be a few dinner engagements you will not be invited to.

Phil Gallie: If the Law Society sees some argument for change, why does it not currently recognise to the full the findings of the ombudsman? There have been several cases where points raised by the ombudsman have ended up as a picking list with the council rather than being referred to the full complaints procedure. That creates dissatisfaction on the part of the most important people—the clients. Do you have any comments on that?

Professor Paterson: I am not representing the Law Society, so I cannot say why the Law Society would do what you suggest. Having studied the systems in New South Wales, Victoria, Scotland and England, it is clear to me that although structures and procedures are very important, it is vital that the people involved respect one another. In the jurisdictions where there is no respect between the professional body and the ombudsman, relationships can be very difficult. In such cases people do not listen to the recommendations; they talk not to one another but past one another. There are also examples of jurisdictions such as New South Wales, where the relationship between the ombudsman and the professional body is one of mutual respect, even though he has very wide powers.

I should point out that the New South Wales commissioner is an exceptional individual and that you have to legislate for ombudsmen who are not necessarily at that level. I am very impressed with our ombudsmen and I am not referring to anyone specifically, alive or dead, in the UK or elsewhere. However, you must legislate for an ombudsman of reasonable powers and ability. Similarly, you must ensure that you do not give the ombudsman too much power and discretion.

Phil Gallie: If we do not give the ombudsman or another independent body the appropriate powers, we will end up with the scepticism that seems to exist in the public's general view that solicitors and the Law Society are incestuous. Does that worry you?

Professor Paterson: Yes, of course. It is important that we take some action to deal with the concerns that have been raised with the committee. That should not be restricted to solicitors or advocates. As I said in my submission, there are other providers of legal services. Although I do not argue that everyone should be subject to the same level of regulation, some providers of legal services to do with claims companies are almost unregulated. In those cases I do not see any protection for the public. I am not making any allegations of abuse; I am saying that the protection is not there. I would like a more level playing field in relation to protections, without necessarily imposing the same level of regulation on all providers of legal services.

Phil Gallie: Just finally—

The Convener: I am sorry, Phil, but it is time to move on. Thank you, Professor Paterson. I hope that you are proposing that the committee visit New South Wales. It is time we went somewhere other than a prison.

Professor Paterson: Indeed I am, convener. What about a videoconference?

The Convener: Thank you.

We will now take evidence from Margaret Ross, the postgraduate officer and deputy head of the law school at Aberdeen University. Thank you for your patience in waiting to give evidence to the committee.

Maureen Macmillan: Your submission makes clear that you are an unashamed advocate of open self-regulation. Can you expand on what you mean by that phrase?

Margaret Ross (University of Aberdeen): I mean a more transparent system of self-regulation. Something that all of us have learned through the process of the committee inquiry is that there is a lot more to self-regulation in the professions in Scotland than the average client would appreciate. There is lay involvement and there are rigorous processes.

I am a solicitor with a practising certificate, but my principal job is to teach law at Aberdeen University and to teach those who are new to the profession. Because I do that, I am conscious of the kind of things that Professor Paterson spoke about. Very good resources, such as decisions of the discipline tribunal, are available and are used for teaching at diploma and legal practice level. However, I am sure that many members of the profession do not appreciate what is available, what the standards are and how the processes operate. They may have experienced those processes at some stage, but they do not fully understand the position. Similarly, clients do not fully understand how the processes work.

I have confidence in the processes, although I think that they could be better and I favour strengthened parallel regulation. The problem is

that people do not know enough about the processes to have confidence in them. That goes a long way towards creating the perception that the processes are ineffective and involve lawyers looking after lawyers.

15:45

Maureen Macmillan: Do you think that the general public know what to expect from a lawyer and what a lawyer should and should not do when delivering a service to them? Do they know what they should or should not complain about?

Margaret Ross: Not necessarily. In practice, I have found that many potential clients are unhappy about crossing a solicitor's threshold because they are fearful of costs and of not understanding what would be required to deal with their case. Many are channelled through citizens advice bureaux and other advice centres, where they can discuss their problem more openly and get some assistance on the legal issues in their case and what might be expected from a solicitor. They are often then referred to a solicitor who specialises in the area concerned.

Solicitors could do more to indicate to their clients at the outset what they can and cannot do. I point out regularly to students that in role-play situations they often, out of eagerness, promise things that they cannot deliver. It is very important at an early stage for solicitors to set the right expectations and to explain to clients the process, what matters a solicitor should be handling for them and, ideally, the costs. I realise that some costs cannot be specified because they depend on the time that a case takes and on reactions from the other side in that case. However, I am sure that solicitors could do more.

In recent years there has been a big improvement in letters of engagement setting out to clients what their solicitor will and will not do. However, there is still a poor level of understanding between the average consumer and the average lawyer. Failure to articulate what one expects and the other will do can become a breeding ground for complaints.

Maureen Macmillan: So when you talk about the role of education in open self-regulation, you mean both education of solicitors in how to deal with clients' expectations and education of clients, which is possibly more difficult.

Margaret Ross: Education of clients is more difficult, but it can be done. To that end, I favour the creation of a forum that would allow many of the people who have given evidence to the committee's inquiry to talk to one another. I know that there are liaison groups between the Law Society and the Scottish Consumer Council and that those bodies get involved in specific things that each other does. However, I see a place for a body—not an appeals body—that could develop a sense of collegiality among the different organisations that have responsibilities for consumers and the professions. We need to try to get that interface, so that helpful information can be given to clients or potential clients.

Websites, leaflets and advice centres have improved matters enormously in recent years but, as Professor Paterson said earlier, there is sometimes an element of people talking past one another. There should be an effective discussion about improving the perception of processes and, to an extent, the processes themselves. It seems to me that a lot of attention should be paid to improving perception of the processes. From reading a number of the *Official Reports* of the committee's meetings and submitted evidence, it seems that there is more concern about the perception of the processes than about their independence. Although it might be appropriate to do something to the processes to make them more overtly independent, attention should be paid to the perception problem.

Maureen Macmillan: If you cannot achieve openness and get something done about perception, is self-regulation still an option? Would it not be better to consider other suggestions, such as strengthening the role of the ombudsman or having an independent body regulating the discipline of the profession?

Margaret Ross: I would not be in favour of an independent body regulating discipline, for two reasons. I do not know whether a body with powers and funding delegated from the Law Society but with statutory foundation would be perceived as any more independent than the process that we have at the moment. The experience in England is that there is no more confidence in the Office for the Supervision of Solicitors than there was in the process that the Law Society handled. The ombudsman, on the other hand, helps to create a degree of public confidence. The ombudsman in England and Wales has indicated that a strong part of her role is improving processes, perception and understanding and preventing complaints rather than dealing with them reactively.

The other concern that I have goes back to the idea of professionalism. I think that it is quite right—and the ombudsman in Scotland agrees with this—that the profession regulates itself. It should keep its own house in order and should be aware of what the lines of complaint are. The best way of achieving that is for the profession to process complaints.

The Convener: We have heard evidence from people who have difficulties with having faith in a system that regulates itself. My experience, when I

became a lawyer, was that when I had a complaint, I was astonished to find out that the Law Society was handling it. From then on, I was destabilised and disgruntled, even by the final position.

There are huge difficulties. Even if complaints are handled properly, it will never be felt that people are getting a fair crack of the whip. If we were to extend the powers of the ombudsman to examine the substance of complaints—and to be a single gateway, as Professor Paterson said—what role would you envisage for the solicitor or firm in question in that process?

Margaret Ross: This might be idealistic—that is the role of academics—but in every situation, where possible, complaints should be dealt with at firm level. We know that there are recommendations that firms have complaints partners. There are mediation processes, which the Law Society facilitates. I am sure that they get some complaints out of the way and resolve them, I hope, to the client's satisfaction.

I do not doubt that some complaints are dealt with, face to face, by clients and solicitors every day. When I researched how complaints operated a few years ago, I noted that, if the client requested it, the Law Society would ask a local solicitor who was not involved in the case to speak to them. As I understand it, that does not happen routinely when a solicitor is complained about.

When I have complained and been complained about, my experience of the complaints process is that people consider it intangible. People write long letters to explain what they did and why they were not in the wrong. They submit the relevant file, but they do not play a hands-on part in the complaints process.

I advocate sitting down and discussing the matter and not taking the approach of being on opposite sides, because there is common ground in any complaint. I would like the Law Society to do more, but I am acutely conscious that the society is the sum total of its members and that its members might not agree on what the Law Society should propose.

I would like a process that involved someone—not from the office of the solicitor who has been complained about, but from an independent solicitor's office—at the location of the complaint who tried to talk things through. It would be beneficial if that were done not by a member of the council of the Law Society's staff, but by a solicitor, perhaps from a panel that had agreed that it would help in that way and that had had mediation training or had an acute perception of clients' concerns. That would be possible. Many people in the legal profession could embrace that role. We must inspire the consumer's confidence that the process is open. Exchanges of correspondence and a committee to deal with complaints might not have that openness.

The Convener: That is something along the lines of the Scottish Consumer Council's proposal. It talked about resolving issues early and in a more personal manner, before they fester. Does no such procedure operate at present?

Margaret Ross: I am sure that it happens ad hoc. Members of the Law Society's secretariat are trained as mediators. If someone involves the local member of the council of the Law Society, problems can be dealt with locally, but that tends to happen ad hoc. That might occur more in a place such as Aberdeen, where members of the profession are fairly well known to one another, than in a larger city.

The Convener: Does any jurisdiction have a complaints procedure that uses the strategy that you describe for dealing with complaints and which involves an ombudsman and a first referral at grass-roots level with a mediator? Does any such model exist?

Margaret Ross: I cannot think of a directly comparable model, but I have examined only the systems in England and Wales. If the Law Society is the first line of complaint, a more user-friendly avenue into it should be created, coupled to the suggestion that I just made.

In England and Wales, the Bar Council has a complaints commissioner, who filters complaints initially. That person is not a member of the bar, but a lay person. The Law Society of Scotland could engage a lay person. Lay members of the society's staff might be involved in the complaints process—I do not know, because I have not investigated that in the past couple of years. If a lay person received complaints and operated to a protocol that was the subject of discussion among interested bodies, that lay person could inspire the complainer's confidence and direct matters to a process of local negotiation, if possible.

Confidentiality and business secrecy are issues in any profession, but I am sure that most solicitors would rather have another solicitor try to mediate or facilitate negotiation than go through a somewhat faceless process involving a complaints committee at arm's length.

Gordon Jackson: I am hugely attracted to the idea of local mediation sorting things out early on. In this committee, we are more concerned about the end process but I am interested in your emphasis on the beginning.

You mentioned the situation in Aberdeen and, earlier, Phil Gallie mentioned local faculties. My worry is that local faculties can be rather chummy places because every member of the local faculty

knows every other member and has a view on them. That view might be that they are an able guy or it might be that they are a numpty, but whatever their view is, they are liable to come to the mediation process with baggage and prejudice. Is there a way of using a local mediation process while avoiding that seemingly insurmountable problem?

16:00

Margaret Ross: It is inevitable that there will be baggage. This might be idealistic, but if you are doing a professional job of mediation rather than chatting with your mates in the court atrium about whether someone else is good or bad, it should be possible for someone with the right training and qualities—it is important to note that not everyone could be a mediator—to overcome their prejudices about a person. If anything, in an effort to be wholly fair, they will probably try extra hard to overcome a perception that they might be biased. At the end of the day, however, the process of mediation and negotiation, while vital, is not determinative. There would always be an option to go back to the arm's-length process.

There would have to be training to ensure that the lawyer in question was able to act neutrally, but I am confident that a system that used people who had been properly trained would be competent. Such work would attract members of the profession who have a conciliatory manner and are willing to attempt to be neutral. They would see the work as another string to their bow, and doing it would add to their confidence. However, it is my job to be idealistic.

Gordon Jackson: You might well be right. My reservations might tell people more about me than about anything else. I am not sure whether I could be an impartial mediator. If you had a case against your pal's client, that would be fine, but if you had to mediate in a personal dispute between two people whom you knew well, you would inevitably have to deal with baggage, even if it were over-compensating baggage.

Would it be possible to have some sort of external mediation service? I agree that it is only a first step and that, if it does not work, people can go somewhere else, but there is no point in having a good local mediation service unless it is likely to work more often than not.

Perhaps I am worrying too much about this, but is there any way of avoiding the pitfall of someone mediating in a case that concerned their drinking mate or their enemy?

Margaret Ross: I would hope that someone who felt that they could not overcome their genuine conflict of interest would distance themselves and recommend that someone else act as the mediator.

I have experience of the community mediation service that operates in Aberdeen and the north-east. The service, which mediates effectively in many situations, is made up of lay people who have had training in mediation.

If there were a question about neutrality and client perception, the client might prefer to have a non-legal mediator. However, I imagine that some complaints would be best dealt with by someone who had had legal training. Perhaps there should be two mediators, such as a lawyer and a lay mediator working together. That might be regarded as a huge investment in time. However, if one considers the amount of time that is spent scrutinising files, discussing in committees, and, perhaps, having more than one reporter examining a complaint, it would surely be better to spend money and time early on to resolve matters to everyone's satisfaction.

The Convener: We will move on from that interesting aspect, as we do not need to go into such detail at the moment.

Donald Gorrie: Local conflict resolution is an important subject. All political parties, for example, and cabinets and coalitions in particular, are based largely on conflict resolution. However, I will set aside that issue for now.

You seemed to indicate that self-regulation is philosophically good. Is self-regulation good only for lawyers, for particular reasons? If not, is it also good for people such as politicians, doctors, accountants and stockbrokers?

Margaret Ross: Inherent in the concept of being a profession, rather than simply being a provider of a service to the consumer for money, is that a professional body should want to self-regulate. In my experience, most professions self-regulate. Lawyers are perhaps different from accountants—although it might be becoming increasingly difficult to distinguish between them—in that lawyers operate within the justice system and do not have complete control of that system. They control some elements of the system, but must work with others in other parts of the system.

It is vital, however, that lawyers operate as a profession and that there is a process that makes all members of the profession feel that there is a standard that everyone must meet. That process consists partly of continual education, regulation and learning from when things go wrong. The latter aspect concerns me. There is not enough feedback when things go wrong to allow for the improvement of standards to prevent things from going wrong again.

Self-regulation should happen in virtually every area of service, but it is particularly important in

what are seen as the traditional professions. However, the Law Society of Scotland is simply the sum total of its members. I often hear law students asking why the Law Society does not ensure that they all get traineeships, or why the society does not make something happen or prevent it from happening. The Law Society's answer is that it must discuss, as a council, everything that it does and come to conclusions.

It is right that certain professions, including the legal profession, should have some control from outside. Such control would ensure, for example, that a rogue council of the Law Society could not create a situation that would be professionally unacceptable or untenable. I like the legal ombudsman model, which tries to keep the legal profession within its statutory obligations but does so by a process of recommendation rather than direction.

This has been a long answer to your question. I favour self-regulation for virtually every profession. However, a profession that interfaces with other systems and bodies occasionally needs some outside control.

Donald Gorrie: Do you envisage the legal ombudsman having greater powers than at present and a more directive or hands-on approach to controlling how complaints are dealt with? At the moment, the ombudsman's powers are relatively limited. What further powers does she need?

Margaret Ross: I am in favour of the ombudsman having the power to make random routine checks of complaint handling. The ombudsman should participate in any forum that discusses how professional conduct is regulated and how professional standards are communicated to the consumer.

I would be slightly concerned if the ombudsman had too much power of direction and was able to say, "You must change your rules and do this instead." Some things that the ombudsman has suggested would be good for the profession have not been taken on board after being discussed in council. I would be concerned if the ombudsman could go as far as to require the Law Society to change its standards. That should not be the remit of one person, albeit that that person is always of high standing outwith the legal profession and has experience in other professions and areas. That is not a criticism of any one person, but I would be concerned if an ombudsman had the power to say to the whole profession, "You shall do this instead."

Sometimes, there may be good reasons why the profession should not take a particular line. For example, the suggestion might have been tried previously without success, or the profession might see that such a course would create a potential conflict. The profession might see difficulties that the ombudsman has not noted. A good dialogue between the various parties involved—which I have advocated all along—might mean that the ombudsman would not need to suggest sweeping changes in the profession's processes. I know that the ombudsman has said that, as far as possible, the profession itself should take things on board. She will continue to make recommendations that the Law Society will consider carefully, so one hopes that the society will bear in mind the fact that the ombudsman has the benefit of looking from the point of view of the consumer and the non-lawyer.

I am worried that tension could be created if the ombudsman had great powers of direction. On the other hand, I do not think that it is necessary to invest money or manpower in an independent regulatory body. From my experience of sitting on a statutory commission that oversees an aspect of the health service, I see the great benefit of being able to deal with individual issues and complaints. However, given the size of the legal profession and the fact that it is a much less complex deliverer of services than the health service, I see no reason why the profession cannot be effectively regulated by the Law Society—with as much openness and as much lay input as possible, particularly at the start of the process—and by an ombudsman with slightly increased powers.

I am in not in favour of the ombudsman being a gatekeeper on the New South Wales model. I agree with Mr Jackson's point that such a model would involve unnecessary duplication and might devalue the role of the ombudsman—or whatever the post may be called. I favour a process whereby entry is through the Law Society but not through a door that says, "You are about to be dealt with only by lawyers." The process should be up-front about the fact that there is lay involvement from the beginning.

The Convener: I welcome Bill Aitken to the committee. He has a question.

Bill Aitken (Glasgow) (Con): I read your submission with great interest. It has much to commend it. However, given the fact that the problem is client perception, how would you get across to aggrieved clients that self-regulation involves a necessary degree of detachment?

Margaret Ross: That is difficult. One way of doing that would be to have a local complaints mechanism, which might involve a layperson or a local mediation mechanism. That would prevent clients from feeling that they are being confronted by a bank of lawyers. There would be open discussion of the problem and how it might be resolved.

More could be made of the fact that the profession pays for the regulation process. Professor Paterson said that the money for that process ultimately comes out of the client's pocket. Everything comes out of the client's pocket initially. Even if we did not require a complaints process, the clients would still pay fees. It is important that all solicitors—whether they are complained against or not—pay for that process. It has been suggested that people who have been complained against should pay part of the fee for the complaints process. I favour the idea of all solicitors paying for the process, because that means that they all have a stake in ensuring that it works effectively. The fact that all solicitors pay for a process that involves lay examination of complaints could be far better publicised.

16:15

However, we should not apologise for the fact that the examination process must have a legal content. The committee has heard evidence that in many respects lawyers are the strictest judges of what lawyers do—they are often more strict than lay members of committees or the discipline tribunal. Not enough has been done. That is because each person in the process has considered the issue from a different angle. If there were more collaboration between the Scottish Consumer Council, the ombudsman and the Law Society, more could be done to be upbeat about the process. Perhaps the committee's inquiry into the regulation of the legal profession will be a catalyst for that.

Although the process has to involve lawyers, it is independent of an individual complainant's lawyer. That lawyer will not like being complained against. That is regarded as a problem, because lawyers become defensive and adversarial. We can counter that by facilitating local discussions of a complaint.

Bill Aitken: That returns us to the point that Gordon Jackson made. If we follow the line that you suggest, in close-knit legal communities where lawyers sometimes work in close co-operation—in Aberdeen, for example—lawyers might be investigating one another. That of course can be a negative characteristic of the investigation. We are not convincing the public that there is sufficient detachment. Although I am not convinced that the problem is as significant as some suggest, the public perception must be corrected. The investigation process must be one step removed.

Margaret Ross: I understand your point. It is difficult to overcome that perception. My view is that one should attempt to overcome it by providing information and education. That does not necessarily work, even with members of the profession who do not fully understand the complaints process. I realise how difficult that task is. My suggestion that when complaints come to the Law Society, they should be examined in the first instance by a non-legal person is a step towards addressing the issue.

I am wary of an independent body, because nobody is truly independent. If one were to set up an independent body, funding would become a major issue. We would enter the interminable resources argument—"We would like to do better, but we do not have the resources." The fact that the Law Society organises the handling of complaints puts it in a better position to channel resources to deal with a surge or a dip in complaints, as necessary.

I am concerned. It is in the hands of those who have made it their business to learn a lot about the process to convey to consumers that there is less cause for concern than they might have imagined.

Difficult cases will undoubtedly arise from time to time. If something goes wrong, an apology should be given at the earliest opportunity and the matter should be resolved quickly. That will involve insurers coming into the forum that I mentioned. Delays can occur because insurers are trying to protect the interests of their client—the member of the legal profession—and the master policy.

I take the point that a consumer would probably prefer there to be an independent body, but I predict that such a body would not inspire more confidence and would lead to additional cost.

Michael Matheson: I want to ask about the various models that could be used for regulation. In your submission, you refer to the system in England and Wales—the Legal Services Commission. I am not familiar with the way in which the LSC deals with complaints. Would you shed some light on that please?

Margaret Ross: A new statutory regime has been set up down south. As I understand it, the LSC is the umbrella organisation. It considers not so much the self-regulation side as the provision of legal services by people other than lawyers. It is the umbrella above the Community Legal Service, advice centres and various other providers of legal or quasi-legal advice. As long as the operation of the legal profession is satisfactory, the LSC will leave it to regulate itself. There is a statutory requirement on the profession to have rules for admission to the profession and rights of audience in the courts.

A new statutory body is charged with giving advice on the education, training and regulation of members of the legal profession. Previously, the Lord Chancellor's Advisory Committee on Legal Education and Conduct had that advisory function; but it has now been replaced by a new statutory

advisory panel that has a fairly broad membership.

There is also a complaints commissioner, who can be brought into the process if the Lord Chancellor is unhappy about the way in which the professions self-regulate and deal with complaints.

I can see why those bodies have arisen: England has a large body of solicitors and a large and disparate bar. However, the process seems unwieldy. I can see the benefit of having a panel to advise on regulation, training and education. The forum that I mentioned could perhaps play a part in such a system. However, it seems that the process down south could involve a tremendous number of people. The complaints commissioner is reactive—the commissioner reacts to bad practice but does not necessarily play a part if things are going well. Nevertheless, there is a lot of expense. The more layers there are and the higher the number of people involved, the more confusing it will be for the consumer, who will ask, "Who do I go to with this complaint? How far up the ladder can I go?" Such a system seems too much for a small jurisdiction such as Scotland. I do not advise following that model.

Michael Matheson: Just for clarity, is the complaints commissioner a part of the Legal Services Commission, or are they independent of it?

Margaret Ross: As I understand it, the complaints commissioner is independent. They sit in parallel. The complaints commissioner seems to be a troubleshooter, who is sent in when difficulties arise with the complaints process. The complaints commissioner has the power to direct the professions on the way in which they regulate conduct.

Michael Matheson: Is the Legal Services Commission able to direct the regulation of the profession if it chooses to do so?

Margaret Ross: I understand that the commission sets overall quality standards for the delivery of all types of legal and quasi-legal services. The profession will be expected to have regard to those quality standards when it sets its own standards.

The Convener: Thank you.

Before the committee disbands, I advise members that our next meeting will be held on Tuesday, 5 February, in committee room 3 at 1.45 pm. Members will be delighted to hear that we will consider the Freedom of Information (Scotland) Bill at stage 2. Michael Matheson will play a starring role, as I understand that he has a large number of amendments. We will also consider our forward work programme—

Gordon Jackson: When is the meeting?

The Convener: The next meeting will be held in committee room 3 at 1.45 pm on Tuesday, 5 February. I would like to hear members' ideas for the forward work programme at that meeting.

The deadline for lodging amendments for stage 2 of the Freedom of Information (Scotland) Bill is 2 o'clock on Friday, 1 February.

Gordon Jackson: What time is our next meeting?

The Convener: Our next meeting will start at 1.45 pm and will be held in committee room 3.

Gordon Jackson: At some stage, I would like to have a discussion on where we are going with our inquiry, although I do not necessarily want that discussion to be on the record. Some issues have come up that I would like to discuss. We have a lot of answers, but they open up other lines of inquiry—I have in mind at least two—that we should follow up.

The Convener: I assure you that in no way will we hurry our inquiry. The issue that you raise is one that we can discuss when we discuss our forward work programme. Our inquiry has been exploratory and while we have tried to contain it, it has opened up in many directions.

Michael Matheson: Other countries use various models. We have heard that there are two Australian systems and that there is a Canadian system. We should explore those systems further to gather background information.

The Convener: Mary Seneviratne, our adviser, will produce a paper for the committee on comparative models in other jurisdictions. That paper will be useful. She has also had an input into some of the questions that we have been asking. I am well aware that we must get the inquiry right—we are not in a race against time.

Gordon Jackson: We have a lot to do.

The Convener: We will take our time and try to come up with solid recommendations.

Donald Gorrie: For eleventh-hour people like me, do all amendments have to be lodged by Friday, or does the deadline apply only to amendments to sections that are to be discussed on the first day?

The Convener: I understand that all amendments for stage 2 must be lodged by Friday, despite the fact that there will be at least two—or possibly three—days for consideration of the bill at stage 2.

Donald Gorrie: Other committees that have dealt with bills at stage 2 have done so on a tranche-by-tranche basis, if that is the right expression.

The Convener: I am sorry—the clerk has corrected me as I may have misled members. We will come back to members on that point before Friday, as there may be a timetable for stage 2.

Donald Gorrie: I am afraid I might not lodge all my amendments in time, knowing my incompetence.

The Convener: That is just a front that you put on for us, Donald.

Meeting closed at 16:27.

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