The Committee will meet at 1.45pm in the Chamber.

1. **Regulation of the Legal Profession Inquiry (in private):** The Committee will consider lines of questioning for witnesses to the inquiry.

2. **Regulation of the Legal Profession Inquiry:** The Committee will take evidence on the inquiry from—

   - Andrew Duncan, Maureen Henderson and Stuart Usher, Scotland Against Crooked Lawyers,
   - Professor Alan Paterson, Law School, University of Strathclyde and
   - Margaret Ross, Postgraduate Officer, Deputy Head of Law School, Aberdeen University.

Lynn Tullis
Clerk to the Committee, Tel 85246
The following papers are attached for this meeting:

Agenda items 1 & 2:
Note by the Clerk (private paper) J1/02/3/1
Submission to inquiry by Scotland Against Crooked Lawyers J1/02/3/2
Submission to inquiry by Professor Paterson J1/02/3/3
Supplementary submission to inquiry by Professor Paterson J1/02/3/4
Submission to inquiry by Margaret Ross J1/02/3/5
Supplementary submission to inquiry by Margaret Ross J1/02/3/6

Papers for information circulated for the 3rd meeting, 2002

Minutes of 2nd meeting, 2002 J1/02/2/M
Justice 1 Committee

Regulation of the legal profession inquiry

Written evidence from Professor Alan Paterson

Introduction

1. In the last twenty-five years the traditional concept of professionalism amongst lawyers in the UK and the regulatory bargain by which the profession provided access, expertise, integrity and public protection in return for status, restraint on competition and self-regulation, has been steadily renegotiated. Self-regulation in particular has come under increasing scrutiny. Twenty-five years ago self-regulation was largely unquestioned. The profession’s right to regulate itself was seen as a vital part of being a profession, and was argued to be in the public interest since (1) only peers were in a position to judge their fellows (2) peers were more likely to be tough on errant lawyers than outsiders and thus standards in the profession would be higher (3) it was cheaper than the alternatives and (4) it was quicker and more effective than the alternatives.1 Today the criticisms of self – regulation are much more to the fore: that it can be a cloak for rent-seeking if not profiteering, for regulatory capture, ineffective disciplinary procedures and anti-competitive practices.2 More active consumer movements and a global movement in favour of freer trade has led governments of all political hues to embrace deregulation of the profession to a greater or lesser degree. However, the problems of information asymmetry between lawyers and clients which justified regulation in the first place have led to re-regulation in the shape of public protection measures – ethical codes, legal services ombudsmen, penalties for “shoddy work” and financial services regulation. This process of de-regulation and re-regulation has resulted in a greatly enhanced tension between commercial pressures and professional integrity which is forcing the state, the profession and society to re-consider the regulatory framework for the profession and other providers of legal services in a wide range of jurisdictions.3

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2 Such arguments can be found in many modern writings including Ogus, op.cit. at p.108, Seneviratne, op.cit. at pp.28-9 and D.Rhode, “Policing the Professional Monopoly” (1981) 34 Stanford Law Review 1.

2. Economists differ over the scope and extent of regulation that is appropriate in the context of the legal profession although it is accepted that the justification for any regulation is the market failure caused by the asymmetry of information between the lawyer and the client. The new consumerism however, would seem to necessitate that regulation of lawyers and providers of legal services should seek to reach an appropriate balance between the interests of the profession and the public interest. Critics of self-regulation by the profession in a range of jurisdictions have pointed to the conflict of interest experienced by law societies and similar professional bodies in achieving this balance and even more so in demonstrating that they have done so in an even-handed manner. In addition, there is a growing body of literature on the attributes of effective regulation in a wider context. Ayres and Braithwaite have argued that regulation should be responsive, involving a dialogue between the regulator and the regulated. In “Better Business Practice” the Scottish Consumer Council identified 13 points of good practice with respect to regulation, including: clear standards, wide consultation on the standards; an independent structure, strong independent presence on regulatory bodies, public accountability, a well-publicised complaints procedure with effective sanctions, and high levels of consumer satisfaction. In similar vein the Better Regulation Task Force in 2000 argued that the principles of good regulation are fivefold: Transparency, Accountability, Proportionality, Consistency and Targeting.

3. Finally, scope. There has been a tendency in the UK to see regulation of the legal profession as being primarily focused on complaint handling, financial services and to a lesser extent the scope of the professional monopoly. Yet


5 I. Ayres & J. Braithwaite, *Responsive Regulation* (New York, Oxford University Press, 1992). By this they mean that regulators should use a pyramid of strategies in a dialogue with the regulated, keeping the strongest sanctions in reserve, to encourage the profession to accept voluntary reform in the public interest. ( other supporters of dialogue are Parker op cit 403 and Nicholson and Webb “Institutionalising trust: Ethics and the Responsive Regulation of the Legal Profession ” (1999) 2 *Legal Ethics* 143 )
6 NCC, 2001
7 Similarly, the Legal Ombudsman of Victoria has suggested that any regulatory scheme should be independent, accessible, effective, efficient, fair, accountable and set up for the benefit of the public. Submission to Legal Practice Act Review, December 2000 para 2.3
self-regulation covers far more than this, as does the scope for market failure. Thus in New South Wales external regulators have an input into the articulation and setting of professional responsibility standards, the education, admission and certification of professionals, as well as the advertisement of their services. As such there is a considerable overlap between regulation and competition policy. This can either be dealt with by making the competition authority (e.g. the Office of Fair Trading) a regulator or by giving an existing regulator (e.g. the Ombudsman) a joint responsibility with the competition authority on competition issues.8

Background

4. Traditionally, regulation of the legal profession in Scotland, as in most other jurisdictions, lay in the hands of the courts who had admitted them to practice. Although the supreme courts in many countries retain ultimate control over many aspects of the regulation of the profession e.g. admission, discipline and professional standard setting, they have long since delegated large aspects of de facto regulation to the profession itself.9 Onto this in recent years the UK government have overlaid additional regulation from e.g. the Legal Services Ombudsman, the Financial Services Authority, the Office of Fair Trading, the DTI (insolvency matters), Consumer Credit, the Immigration Services Commissioner and the Legal Aid Board. The resulting model of self-regulation has been described variously by commentators as “coerced”, “mandated”, “modulated”, “regulated” or “sanctioned”10 to reflect the fact that self-regulation now operates within a broad, multi-layered regulatory framework. While such an approach has many supporters, the solicitors’ branch of the profession considers that it has led to them being over-regulated, whilst others point to gaps in the checks on self-regulation11 and note that the different regulatory layers do not sit comfortably with each other. Thus it is unclear what the respective remits of the Office of Fair Trading and the Scottish Executive are with respect to competition policy and the Scottish legal profession following the passing of the Scotland Act 1998.12 In sharp contradistinction to the profession, other providers of legal services in Scotland13 are less regulated than lawyers, sometimes to a very considerable degree. This raises difficult questions of paternalism, client

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8 This is the approach taken in Victoria and New South Wales.
9 In part this came about as a result of resourcing issues. The courts had neither the staff nor the time nor the resources to regulate the profession adequately. This remains the case, and is a potential drawback with respect to those regulatory aspects that the courts have retained. Thus the Lord President of the Court of Session plays an key role in scrutinising the Practice Rules passed by the Law Society but has no infrastructure to assist him with this task.
11 e.g. in relation to the education, admission and certification of lawyers.
13 With the notable exception of Independent Qualified Conveyancers or Executy Practitioners who are held in some respects to stricter standards and a more rigorous complaints procedure than solicitors.
choice and competition policy about the extent to which there should be a level
playing field in relation to the regulation of all providers of legal services and
the extent to which clients should be able to contract out of public protection
measures.

The existing regulatory framework

5. Standards and standard setting. Many providers of legal services will be
covered by different aspects of private law e.g. the law of contract, agency,
negligence, and the Unfair Contract Terms Act 1977 and the Unfair Terms in
Consumer Contracts Regulations 1999. While these can provide effective
remedies, the applicability of the relevant law is not always high in the public
consciousness, and the expense of using the courts and lawyers to pursue
these remedies (especially where the person to be sued is another lawyer),
will often combine to defeat the efficacy of these standards as a form of
regulation. Codes of Conduct, practice rules, guidelines and standards also
apply to legal profession and IQCs, and Codes exist for Accountants and
voluntary sector advisers. Other providers of legal advice e.g. claims
assessors, may be subject to very few constraints. This variability in
standards amongst providers of legal services is confusing to the public,
who will frequently be unaware of it in the first place. This raises the policy
issue as to whether clients should be permitted to purchase legal services without a
basic minimum set of regulatory standards over and above the private law.
Paternalism and the lack of transparency in legal products argue for a
minimum Code of Conduct for all providers of legal services and a ban on
clients (particularly legally inexperienced ones) being able to contract out of
significant protective measures. Yet supporters of the free market argue that
clients should have the right of choice, and that particularly experienced
corporate clients should have the ability to opt out of protective measures
such as the conflict of interest rules if they deem it in their interests so to do.
This is a thorny issue which merits a paper in itself, nevertheless the inability
of the market to control for quality in the field of legal services convinces me
that non-lawyer providers of legal services should operate with certain
minimal measures of public protection and a considerably higher degree of
transparency than currently prevails. Moreover, I remain of the opinion that
the public interest requires that certain fundamentals of professional ethics
cannot be excluded by private contracts between the lawyer and the client.

6. The foregoing should not be taken as implying that the existing standards for
legal professionals or the ways in which they are set are beyond criticism.
The test for misconduct in solicitors which is applied by the Law Society and

\[\text{14} \text{ Particularly the law of agency.}\]
\[\text{15} \text{ Just as hirers of cars can purchase different levels of insurance cover or damage excess but}
\text{must have a basic minimum protection policy, so too should legal services clients in an area}
\text{where the product is considerably less transparent.}\]
the Scottish Solicitors' Discipline Tribunal – the Sharp test,\textsuperscript{16} the test for unsatisfactory conduct,\textsuperscript{17} and the test which they apply with respect to what is an Inadequate Professional Service (IPS)\textsuperscript{18} are sufficiently opaque as to provide relatively limited guidance to the average client, the Ombudsman or a layperson sitting on a client relations committee or Discipline Tribunal. All three tests require amplification if they are to pass the clarity test of “Better Business Practice” or the consistency test of the Better Regulation Task Force, and to prevent those applying the tests from exercising a largely unfettered discretion in every case. In the case of misconduct there is the Code of Conduct, the Practice Rules and the Practice Guidelines, provided they are brought to the attention of the client relations committees. However, a breach of any of these, no matter how serious, is never automatically misconduct.\textsuperscript{19} In every case there is a discretion as to whether the breach constitutes misconduct. A clearer source of guidance might be precedents of the Discipline Tribunal as to what constitutes misconduct. While the Tribunal clearly considers that its decisions have precedential value, it has been rare for Reporters or client relations committees to be provided with such precedents. Similar considerations apply in respect of unsatisfactory conduct. Again, in the past the Society has been reluctant to try to specify clear and consistent standards for IPS, although a working party has recently been established to try to identify examples of IPS in order to provide guidance to client relations committees and the public.

7. The new consumerism would also identify the process of standard setting as a further area of weakness with respect to Scottish solicitors. Although substantial parts of the Code of Conduct and numerous practice rules and guidelines relate to the relationship between the lawyer and the client, neither the latter nor the wider public (including consumer bodies or regulators) have any input into the content of these standards. This hardly comports with the need under the re-negotiated regulatory bargain to demonstrate that a fair and appropriate balance between the interests of the profession and the public has been drawn in the standard set. While it is true that the Lord President is required to approve practice rules passed by the Law Society, this is not a consultative process involving interested parties and the wider public (as recommended by Better Business Practice) nor does the Lord President have the infrastructure or staff to carry out such a consultation or to research the possible implications of proposed rule changes. In contrast, in New South Wales (NSW) the Legal Services Commissioner (the ombudsman) has the power to scrutinise any proposed rule change by the Bar or the Law

\textsuperscript{16} Conduct “which would be regarded by competent and reputable solicitors as serious and reprehensible”.

\textsuperscript{17} “Conduct by a solicitor which does not amount to professional misconduct but which involves a failure to meet the standard of conduct observed by competent solicitors of good repute”.

\textsuperscript{18} “professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor”. s.65 Solicitors (Scotland) Act 1980.

\textsuperscript{19} This anomaly arises from the wording of the Solicitors Scotland Act 1980. In contrast, wilful breach or professional regulations is misconduct for IQCs in Scotland and lawyers in NSW.
Society from the perspective of the public interest and competition policy. In Victoria an independent Legal Practice Board\(^{20}\) can recommend rule changes and the Legal Ombudsman can recommend the disallowance of proposed rule changes to the Board, on public interest grounds.\(^{21}\) Similarly, the Legal Profession Advisory Council in NSW (consisting of eleven individuals appointed by the Attorney General of whom at least 5 must be laypersons and 5 lawyers) may review any professional rules of the Bar or the Law Society at any time, from the perspective of the public interest, including competition policy.\(^{22}\)

8. Complaints Procedures. The Office of Fair Trading has suggested that a complaints procedure should be speedy, responsive, accessible and user friendly, offer conciliation as an option and provide a low-cost, speedy, responsive, accessible, user friendly, independent redress scheme as an alternative to court action.\(^{23}\) My own view is that a complaints framework for providers of legal services should:

a) Balance appropriately the interest of the profession/providers and the public interest;

b) Have clearly articulated goals and written procedures;

c) Involve the application of clear and consistent standards in order to ensure consistent outcomes;

d) Cope appropriately with overlapping standards eg IPS, negligence and conduct;

e) Be clear as to the favoured truth-finding mechanism i.e. inquisitorial or adversarial, at each stage in the process;

f) Involve appropriate dispute resolution mechanisms at each stage: the job descriptions and remit of personnel should be clear and they should receive appropriate training and support;

g) Be fair to each side: e.g. adhere to the principles of natural justice, permit equal opportunity to each side to make representations at appropriate junctures, and should encourage an equality of arms where an adversarial procedure is being used;

h) Be relatively speedy;

i) Be adequately monitored (including review);

j) Be affordable to the profession, the complainer and the respondent;

k) Involve sanctions that are proportionate in the eyes of the profession and the public (adequate, meaningful and commercially significant);

l) Satisfy the reasonable complainer

9. I am only able to comment on the complaints procedures with respect to Scottish solicitors and IQCs with any detailed knowledge. Successive

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\(^{20}\) With 3 non-lawyers, 3 lawyers and judicial chair. Part 15 Legal Practice Act 1996.

\(^{21}\) S.76 Legal Practice Act 1996.

\(^{22}\) Legal Profession Act 1987 s.57H, s.58 and s.59.

\(^{23}\) Similar criteria have been suggested by the Scottish Consumer Council. SCC, *Complaints About Solicitors*, 1999 at p.3.
Ombudsmen have expressed concern over aspects of the complaints procedures for advocates, but I have no personal experience of it, or that which operates with respect to the voluntary sector. So far as the solicitors’ scheme is concerned the Law Society has been considerably hampered by the existing legislation (which is based on earlier legislation) which is of limited utility in the 21st century. Thus decisions on complaints must all be taken by the Council, since there are no delegated powers in the statute. Again the statutory provisions are unclear, as they are in England, as to the ability of the Council to discipline its members as opposed to recommending prosecution before the Discipline Tribunal.

10. Applying the criteria set out in para. 8 to the complaints process for Scottish solicitors, my observations are as follows:

a) I have detected no evidence of a bias in favour of the profession by the Society’s staff, committees or Council. There are, however, aspects of the procedure which may give some complainers the appearance of favouring the profession.

b) The complaints procedure is only partly articulated in writing and circumscribed by time limits. In these two respects it compares unfavourably with that of the Conveyancing and Executry Services Board.

c) The problems over clear and consistent standards has been described in para 6 above.

d) This is an area which has been addressed in the last year.

e) The current procedures involve a mix of “truth-finding mechanisms” which can result in confusion, especially where they are insufficiently delineated.

f) The appropriate balance between conciliation, inquisitorial investigation and adversarial adjudication in the complaints procedure is an issue on which reasonable minds may differ. In terms of the current balance, considerable work has been done in terms of job descriptions, remit and training but there may be scope for further work in relation to (1) case managers (2) client relations partners and (3) laymembers of committees or the Discipline Tribunal. For example, what is the role of the laypersons on the client relations committees? Certainly to ensure that the profession does not favour its own. However, presumably they are not expected to act as untrained lawyers. Thus, without more guidance it is difficult for a layperson to confidently assess what a “competent and reputable solicitor would consider serious and reprehensible”.

g) The system and those who operate it endeavour to be fair to both sides. However this is easier to achieve at the early investigative stage than at the committee stages where an inequality of arms may exist between an unrepresented complainant and a solicitor who may be represented (albeit in writing) by the Legal Defence Union. Equally, as the Scottish Legal Services Ombudsman has noted, the ability for Council members to speak at Council

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24 I remain puzzled, however, as to why IPS should not apply to advocates.
25 Parts III and IV of the Solicitors (Scotland) Act 1980.
26 See the Scottish Legal Services Ombudsman's Annual Report 2000/01 p.43.
on behalf of constituents who have been complained against, without there being a spokesperson representing the complainer is unsatisfactory.\textsuperscript{27} It could also be argued that it constitutes a breach of the rules of natural justice.

h) As the Scottish Legal Ombudsman’s Annual Report for 2000/01 indicates, this is a major failing with the current procedure.

i) Compared with NSW and Victoria our complaints procedure is inadequately monitored. There the Ombudsman / Commissioner is statutorily required to monitor the complaints procedures of the profession.\textsuperscript{28} This can be at the level of the individual case or by requesting to see a range of random files. Further the Ombudsman / Commissioner can give directions as to how a particular complaint should be handled e.g setting special time limits or lines for investigation.\textsuperscript{29} Finally, the Ombudsman/ Commissioner may review any complaints decision of the professional bodies, whether or not they have been requested to do so by the complainer.\textsuperscript{30} In doing so, the Ombudsman / Commissioner may order a re-investigation, or conduct that re-investigation or ( in NSW ) substitute his own decision for that of the professional body without further investigation. However, even where the Ombudsman / Commissioner forms the view that the behaviour complained about is misconduct, a prosecution before the Discipline Tribunal is still required, unless the respondent agrees to be reprimanded. Here, the Scottish Legal Services Ombudsman can only review cases if she is requested to and the focus of the review is primarily on the adequacy of the investigation and whether proper procedures have been followed by the professional bodies.\textsuperscript{31} These constraints leave complainers who are unhappy with the decision of Council with only an attenuated route of appeal. In relation to IPS decisions taken by Council, the respondent has at least an appeal to the Tribunal, although it is an expensive option.

j) In relation to the investigation and handling of complaints up to and including the Council stage, the procedure appears affordable to all parties, although the level of voluntary, unpaid work by Reporters, client relations committee convenors and members is a potential area of vulnerability. However, the cost of Discipline Tribunal cases is now a serious problem for the Law Society and the respondent. This makes the doubts over the Council’s powers to discipline for misconduct doubly unfortunate.\textsuperscript{32}

k) On paper the range of sanctions statutorily available to the Council and the Tribunal

\textsuperscript{27} Ibid. p.42.
\textsuperscript{28} Legal Practice Act 1996 s. 147; Legal Profession Act 1987 s. 149
\textsuperscript{29} Legal Practice Act 1996 s. 148; Legal Profession Act 1987 s. 150 This power is rarely exercised.
\textsuperscript{30} Legal Practice Act 1996 s. 154; Legal Profession Act 1987 s. 159
\textsuperscript{31} s. 34 (1A) Law Reform ( Miscellaneous Provisions ) (Scotland) Act 1990. In contrast, the English LS Ombudsman can re-investigate the original complaint and substitute her own decision for the professional body’s.
\textsuperscript{32} See SLS Ombudsman Annual Report 2000/01 at p. 43.
appears reasonable. However, there are a number of problem areas. Responsive regulation would argue for greater scope for dialogue between the Society and respondents at the post-sanction stage. The financial limit for IPS compensation of £1,000 has not been uprated for inflation for a decade and is now well below that existing in England. Without research it is unclear whether average IPS awards have risen in the last five years, and how high that average is. The SCC research on Complaints about Solicitors found that less than half of the complainers surveyed were happy/very happy with the compensation they had received for IPS. Again, doubts have arisen as to the Society’s powers to sanction for misconduct or unsatisfactory conduct. As the Ombudsman has observed the fact that “findings” of unsatisfactory conduct will not appear on the respondent’s record or be accompanied by any sanction is unlikely to satisfy complainers. Moreover, while the overwhelming majority of competent and reputable solicitors probably do understand the nuances of “regret and deplore”, reprimand and censure, it must seriously be questioned whether they are appreciated by complainers who are likely to see them as little more than a slap on the wrists. This perception of leniency will not be assisted by the fact that several decisions of the independent Discipline Tribunal in the last five or so years have been attacked for excessive leniency in the media. This may simply be an area where there is an irreconcilable conflict between the standpoints of the profession and the public.

1) The only evidence on complainer satisfaction is the SCC study on Complaints about Solicitors (1999) which found that almost as many complainers were dissatisfied with the way the Society dealt with their complaint as were satisfied (41%). Of course, not all complainers have reasonable expectations.

11. Public protection measures. The Guarantee Fund and the Master Policy professional indemnity insurance scheme offer significant measures of public protection – greater than in many jurisdictions – at a relatively low cost to the profession. The rigorous guarantee fund inspections of solicitors’ firms on a two yearly cycle compare favourably with most other legal professions. The Faculty of Advocates and voluntary sector advice agencies also carry indemnity insurance. These are major advantages which clients of claims assessors do not necessarily enjoy, although they may not be aware of this. However, the operation of the Guarantee Fund and the Master Policy (or indeed any of the insurance schemes) is not monitored by an external regulator. This allows those whose claims under the schemes are rejected, to harbour suspicions as to the independence or even-handedness of the

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33 The comparative figure is £5,000.
34 Op. cit. p.53
35 Ibid. p. 43. Over the last decade Council reprimands have been running at 30 a year, nearly 50% higher than the prosecutions to the Tribunal.
36 Ibid. p. 43.
schemes. In NSW the Commissioner’s remit extends to monitoring the operation of the mutual indemnity fund and the fidelity fund.

12. **Education and Admission.** Entry to the legal profession is controlled effectively by the Law Society and the Faculty of Advocates. It is not subject to monitoring by an external regulator, although the Lord President has to approve the Admissions Regulations. The Office of Fair Trading refer to the regulatory impact of professional control of entry in England in *Competition in Professions*.

There is an inevitable tension between quality standards of admission and ease of entry to the profession. Perhaps for this reason in New Zealand and most of Australia admissions and educational standards are in the hands of an independent body chaired by a judge and with representatives of the profession and the universities sitting on it. Although we have no statistics as to the social make-up of today’s entrants to the profession, it is perhaps a matter for concern that it is now harder to enter the solicitor’s branch of the profession in the UK than to become a lawyer in Australia, New Zealand, Canada, or the United States. It would be fair to say that education, admission standards and entry to the profession has become an area of debate between the universities and the Law Society in the last seven or eight years.

13. **Certification and accreditation of specialists.** The granting of practising certificates (with or without conditions) lies in the hands of the Law Society, as does the accreditation of specialists. Neither of these functions are monitored by an external regulator. In NSW the Commissioner’s remit as a co-regulator also covers these areas.

14. **Conclusions and proposals for reform.**

a) **Level playing field.** Currently there is not a level playing field between different providers of legal services in relation to the extent of regulation to which each is subject. For the reasons set out in para. 5 above, I believe that a basic regulatory framework and minimum set of standards is required for all providers of legal services. This is not an argument for reducing the standards or regulation of the legal profession which are justified by their status and monopolies. Remaining differences in regulation between providers should be dealt with by greater transparency. There should also be a common regulator/co-regulator for all providers.

b) **Options.** Some commentators consider that the legal profession should be

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39 In other jurisdictions there have been examples of admission standards allegedly being used to restrict the numbers entering the profession.
40 In terms of entry barriers such as cost, years required and educational hurdles to be overcome.
independently regulated\textsuperscript{41} reducing the professional bodies to a purely trade union function. I remain unconvinced that depriving the professional bodies of a major role in standard setting, complaints and the consideration of the public interest is the appropriate solution to today’s regulatory challenges. Rather I believe professional self-regulation should operate within a broader, multi-layered\textsuperscript{42} co-regulatory framework.

c) Co-regulation. The Law Society needs greater disciplinary powers with respect to professional misconduct and unsatisfactory conduct. The emphasis, particularly in IPS cases, needs to shift towards client care and education of the profession. Access to the Discipline Tribunal needs to be more affordable – perhaps by the use of a Registrar as in Victoria. Standard-setting should become consultative and monitored by a co-regulator. Certification, accreditation and public protection measures should be monitored by a co-regulator. Admission and education standards should be handled by an independent body as in the Antipodes. Finally, I believe that the complaints procedures of the Law Society should be brought more in keeping with the attributes of an effective complaints framework and that the Ombudsman’s powers should be considerably extended in relation to complaints. In Victoria a twin entry system of allowing the professional bodies AND the Ombudsman to entertain complaints, with latter having review powers, has not been a success. In NSW the Commissioner receives all complaints and passes the great bulk to professional bodies to handle, subject to his monitoring and review powers. This model works very well and I believe it to be one that is worthy of closer scrutiny.

Professor Alan Paterson

\textsuperscript{41} See Arthurs, 1995 \textit{op.cit.}; Kennedy, \textit{op.cit.} and A. Arora and A. Francis, \textit{The Rule of Lawyers} (London, the Fabian Society, 1998).

\textsuperscript{42} The bewildering array of existing regulators of the legal profession are set out in R. Baldwin, \textit{Regulating Legal Services} (London, Lord Chancellor’s Department, 1997).
Textual Amendments to Professor Alan Paterson’s written submission to the regulation of the legal profession inquiry (J1/02/3/3)

1. Page 3 Fn 14 Delete “and the Supply of Goods and Services”.
2. Page 5 line 1 (in para 6) “it is rare” should read “it has been rare”.
3. Page 8 para 10 sub-para (i) the last words of the sub-para should be: “deal with their complaint as were satisfied (41%). Of course, not all complainers have reasonable expectations.”
Justice 1 Committee

Regulation of the legal profession inquiry

Supplementary evidence from Professor Alan Paterson

The particular areas of concern raised in my written evidence that I would wish to emphasise are as follows:

1) Para 6. The lack of sufficient mechanisms to enable the Society to achieve consistency in decisions on Conduct and Service / IPS matters. The Committee may find it helpful to have the definitions of misconduct, unsatisfactory conduct and inadequate professional services (see footnotes 16, 17 and 18), or the attached sheet, to hand, when this paragraph is discussed.

2) Para 10 (g) The inequality of arms that can exist at Council when complaints are being handled.

Other areas which may be of interest to the Committee:

(1) Para 10(i) Inadequacy of monitoring
(2) Para 10(j) Cost in relation to the Discipline Tribunal

The sections of my evidence which relate to other jurisdictions are primarily:

Para 10 (l) and Para 14 (c)

Professor Alan Paterson
22 January 2002
Summary of evidence from Margaret L. Ross

1. Introduction and background
2. Legal Profession and legal services
   These topics may not be conflatable but should be examined, clarified and their respective scopes clearly publicised. Retain clear distinction between tasks requiring legal professional delivery and those capable of delivery by others, and acknowledge strengths of a multi-layered and competitive system into which consumers can enter at the layer of their choice.
3. Legal Profession
   The strengths of professionalism and self-regulation are supported, and it is suggested that the distinct professionalism of judicial work merits an open process for establishing and maintaining standards of delivery from the bench without encroaching on judicial independence.
4. Services provided by non-lawyers
   Clarity of service provision is essential to ensure that expectations are set and met. Dialogue with professional and non-professional service providers will educate policy makers on the best means of ensuring clarity of service provision and complaints about quality. Extensive regulation of non-lawyers not appropriate, provided there is information to ensure informed choice of that scope of service by the consumer. Information and dialogue is the route to overcome barriers and suspicion. Collaborations between lawyers and non-lawyers to be encouraged if there is integration of the service for the consumer and clear routes for complaint.
5. External Regulator
Not in favour of a regulator such as the Legal Services Commission model. Not necessary in a small jurisdiction, if there are improved channels for dialogue and better understanding of respective roles in satisfying market needs.

REGULATION OF THE LEGAL PROFESSION INQUIRY

Evidence by Margaret L. Ross, Senior Lecturer in Law, University of Aberdeen, Taylor Building, Old Aberdeen; Solicitor and Notary Public.

1. Introduction

1.1 I am pleased to have been invited to offer my views in your inquiry into the regulation of the legal profession in Scotland, and I am pleased to note that the Justice Committee considers this an important matter on which to undertake review.

1.2 I have undertaken researches into the structure handling of complaints against solicitors and counsel throughout the United Kingdom and the undernoted publications may be of interest to the committee. In my review of complaints against counsel I had regard to the provisions of the Access to Justice Act in England, and in particular the regulatory function of professionals within their own profession. I was admitted as a solicitor in 1981 and have been involved in legal education part time since 1980 and full time since 1992, and have sat on many committees liaising with the law society in its review of legal education. I have acted as an independent reporter to the court and children’s hearing in child proceedings and as a part-time chair of child support appeal tribunals.

1 Procedues for Complaint against Counsel in the United Kingdom: Internal purification versus external vindication’, with Y Enoch, 2000 19 Civil Justice Quarterly 405-431; ISSN 0261-9261; ‘Complaints Against Solicitors: A Comparative Study of the solicitors’ complaints procedures in Scotland, England and Wales and Northern Ireland’ (with Y. Enoch) (series of three articles) 1996 Scottish Law and Practice Quarterly; 145-158; 216-223; 331-339; ISSN 1360-7782
2. Legal profession and legal services

2.1 The scope of your enquiry extends to all members of the legal profession including the judiciary and to others providing advice on legal issues without formal qualifications. This is a very broad scope and I note that you have sought comment from, amongst others, the various professional and other providers. I will not offer detailed comment on individual providers, but instead I would suggest that certain general principles and themes are considered.

2.2 It may be impossible to conflate the regulation of the legal profession and of services of a legal nature in Scotland and it may be counterproductive to attempt to do so. If one accepts that it is important that there should be a profession of law, and I consider that it is important not only to preserve that profession but to ensure that its professionalism is promoted, then it is necessary to consider which services can be provided only by those within a legal profession (in whatever form that may be) and those services which are legal in nature but may be offered by those who are trained to advise or assist in certain areas, but who are not professing to be more than paid non-lawyer advisers.

2.3 In recent times there has been an expansion in the available outlets for advice in relation to areas in which the law applies. Given that our lives are regulated directly or indirectly by a variety of laws this is inevitable and appropriate. The volume and complexity of law having grown exponentially over that period, within the legal profession members increasing specialise, so that they can give up to date best legal advice to clients. The historical model of the lawyer as a person “of business” who would advise personally on matters from succession, investment, company formation and collection of debts is replaced by specialist (and in some instances specially regulated) advisers within and outwith the bounds of the legal profession. This has extended the market to which individuals or businesses may turn for advice on areas that traditionally were within legal services provided by lawyers. The
extension in market has affected cost, accessibility, standards and, most importantly, choice. The consumer has a choice as to whom to approach for services and those concerned in the delivery of services within or outwith the legal profession have a choice as to the nature of service to be offered. This element of choice is welcome, probably was overdue in arriving and is in keeping with individual autonomy.

3. Legal Profession

3.1 Interestingly whilst the perception may remain that there are many things that only a member of the legal profession may do in the delivery of legal services, in fact only a small number of tasks are restricted to those who are members of the professions. In the performance of those tasks, and the myriad other tasks for which lawyers are routinely engaged although these might also be undertaken by a non-lawyer, the members of the profession are heavily regulated. They are regulated by statute, professional rules, the law of agency in general and law agency in particular, and the law of delict. Increasingly, the law of contract plays a part, in that lawyer and client may agree that the contractual standard to be met in delivery of a service will be more exacting than the standards embedded in the normal sources e.g. as to timescale for performance of a service. They are open to litigation, to complaints procedures, to professional investigation and to prosecution in the courts and before the discipline tribunal. The admission to the profession, annual licensing to practice, discipline and limiting future practice are all regulated by the profession, but in the case of solicitors there are lay persons involved, especially in the handling of complaints. The combined effect of the mesh of regulatory material is to restrict members of the legal profession in the means of delivery of legal services. For example the profession cannot take on litigation on a contingency fee basis i.e. a fee the amount of which is contingent upon the amount obtained in settlement of a claim, but such an arrangement can be reached between a claimant and a commercial provider of claims management. The professional requirement to protect against conflict of interest
prevents this arrangement with a member of the profession. Advertising standards and personal conduct are other examples of areas in which those providing legal services within a profession are more heavily regulated than those outside it.

3.2 I believe that the nature and extent of regulation of the conduct of members of the legal profession is poorly understood in many quarters, but the fact that large numbers of people go to members of the profession for services that could be provided elsewhere is testament to a faith in professionalism. A minority of persons may approach a legal professional because of a misunderstanding that only the professional is able to carry out the task. However, in the main consumers are exercising choice when they consult a member of the legal profession and I think that a theme underlying any review of regulation of legal services should be the preservation of choice. This must be accompanied by reliable information to inform choice. This requires, primarily, transparency as to what is the service being provided, the qualifications or training of the persons who will provide that service, the supervision arrangements, complaints processes and remedies in place.

3.3 The legal profession is self-regulating in the sense that it sets its own admission standards and processes complaints or refers cases for disciplinary proceedings. It already provides the information mentioned in the previous sub-paragraph, although there is always scope for improvement on the transparency and accessibility of processes, both at the stage of client contact with the chosen solicitor and in contact with the professional body. The Scottish Legal Services Ombudsman through individual cases, regular liaison and annual reports monitors the effective of self-regulation in the context of complaints handling and in the 2001 Annual Report pp57-61 makes interesting general points in relation to regulation and self-regulation of which the Committee are no doubt aware and will hear from her personally.

3.4 I am an advocate of open self-regulation, and I believe that in Scotland it works and should continue to work in the legal profession and for the protection of consumers and the integrity of the professional service.
Any consumer scepticism about the effectiveness of that process should be countered by greater openness and education about how the process operates rather than by introduction of an external regulator or external imposition of greater volume and specification of regulatory provisions. It is not and never has been in the interests of members of the legal profession to cover up for the shortcomings of professional colleagues. The errors or transgressions of those colleagues impact directly upon the reputation of the profession, and on the costs incurred by lawyers in insurance, indemnities, and fees for their profession’s regulatory mechanisms. However more important than the reputational and financial impact of poor quality service provided within the legal profession is the unique ability of those within the profession to assess the quality of a colleague’s professional service. Judgement by one’s peers, particularly in the demanding, competitive market in which services are now provided, serves to uphold rather than diminish the service available within the profession as distinct from that which a consumer may choose to obtain outwith the profession. It is of course essential that the consumer is represented in the deliberation of complaints about service and conduct, and in this respect the Law Society of Scotland has made considerable advances over the last decade or so, but I think that it is vital to the maintenance and development of professional integrity and standards that the professional input is informed, but not neutralised, by lay input. In relation to counsel the Faculty of Advocates has few complaints, and less lay input than the solicitor or solicitor/advocate branches of the profession. This could be improved, and I think that better procedures should exist for involving some solicitors in the handling of complaints against counsel, and for a process of dealing in an integrated fashion with complaints that involve both solicitors and counsel.

3.5 I am counting as members of the legal profession those who are advocates; solicitors; solicitor advocates; licenced conveyancers and executry practitioners (whose regulatory body is being abolished and for whose members the Law Society of Scotland is to deal with complaints meantime) and those members of the part-time judiciary
who remain practising members of the relevant professional bodies. The professional regulation should apply regardless of the post in which the profession is being performed e.g. fiscal, local authority solicitor, in-house counsel, lawyer-mediator. In my view it is essential that the professionalism attaches to the person, and that in dealing with any complaint against that person, the context in which the person works is given appropriate account, but not to diminish a professional standard. Apart from the requirement to establish interest to complain there should be no limitation on who may make a complaint about professional service or conduct, but it is appropriate to have a filtering process once complaints are received, as the professional bodies do have at present, but with a clear avenue for appeal against a rejection at the filtering stage.

3.6 The judiciary

Members of the judiciary (other than lay magistrates and some honorary sheriffs) are invariably past members of a branch of the legal profession. As such they have experience and understanding of professionalism in the delivery of legal services, and in the presentation of cases in the adversarial system. This no doubt accounted for the absence of a history of judicial training in Scotland, but this has been addressed recently, and the more open and skills orientated selection process for the judiciary is to be welcomed. It is reasonable to expect that members of the judiciary, who enjoy considerable autonomy in the exercise of discretion, application of procedures and the assessment of matters of credibility when sitting alone, should undergo rigorous selection, training, support and appraisal processes on matters unique to their judicial role, including judicial ethics and effective communication from the bench. Parties or their agents unhappy with judicial conduct have the right to appeal the decision in the individual case, but the courts’ complaints process should enable bench issues to be raised and dealt with according to an agreed protocol. This need not detract in any way from the independence or autonomy of the judiciary but instead can enhance the confidence in distinct judicial professionalism.
4. Services provided by non-lawyers.

4.1 It is clear that in many topics effective advice and assistance can be provided by persons who are not members of the legal profession, and this can be an attractive and accessible option for consumers. To attempt to impose regulation on those non-lawyers can lead to all the procedural and costly disadvantages of regulation without generating any of the advantages of a profession, particularly a common feeling of professionalism. In any event a major function of widening the scope of provision is surely to depart from the strictures of professionalism, introducing flexibility in terms of cost, accessibility and scale. Vital to this distinction is the reliability of information to inform the choice. It is perfectly proper for a consumer to seek advice on a compensation claim from a claims management company if the consumer is fully informed as to what the company can and cannot offer in the way of independent non-legal and legal advice about the claim and its handling to legal conclusion. Whether this is achieved by negotiated codes and protocols, licensing, advertising controls and trading standards is a matter for the Committee to consider, bearing in mind time and cost involved as against benefit to service standard. A vital step towards this is dialogue between profession and non-profession providers. Dialogue of this sort is already underway in informal arrangements made by the providers themselves, and in the Community Legal Service Working Group. However the existence of that dialogue and its positive role could be much more widely publicised and understood, not only by the consumer but by those providing legal services in and outside the legal profession. Suspicions of one another are frequently based on outdated stereotypes and lack of information, an unnecessary addition to the natural competition which will exist in the market. That competition could be put to much more effective use in the deliberate provision of a legal service that has many layers, but sets realistic expectations and minimum standards.

4.2 By natural process some collaboration has developed between non-qualified advisers and members of the legal profession. This is a
feature of the competitive market and if it acts to the benefit of the consumer then it is to be encouraged. However in this context it is even more important that expectations and standards are set and managed appropriately. A consumer is entitled to know from the outset that e.g. an estate agent will refer to a particular solicitor, or a claims adviser to an associated law firm, and to know that there are other choices available or that that service is predicated upon fixed choice. In particular such arrangements should map the routes for first instance complaints about the service as a whole, for external review of the compliance of that service with the specified standard and for any professional complaints process available. It is important that the consumer should not fall through a gap between the providers service standards – the joint service should provide additional integrated protection rather than less.

5. An external regulator

5.1.1 In England and Wales statute provided for the establishment of Legal Services Commission. Whilst this model provides the scope for dialogue between various players in and around the provision of legal services, and a means of accrediting non-lawyer providers of legal services I am not convinced this is the way forward for Scotland. The make-up of that body is perhaps too broad and unwieldy and more could be gained from targeted, negotiated processes for dialogue. I think that we should recognise the importance of the small market factor in Scotland as compared to the large and diverse market in England and Wales. The effect of competition is felt acutely, dialogue between providers is relatively easy although not well publicised, and the chief problem here may be to ensure choice for those in remote areas (although access by electronic means can be developed.)

6. I am happy to offer further comment of called to do so.

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Margaret L Ross
Subject: Models of self-regulation in England & Wales and Northern Ireland

England & Wales

- Solicitors

Office for the Supervision of Solicitors whose functions are delegated and funded by the Law Society. Initial sifting process (not automatically reviewable), then referral to panels for inquiry into service or conduct complaints. Lay members participate, but are not in the majority.

Complainants encouraged to deal first with solicitors’ firm and mediation is offered by OSS. Complaints considered by Panels within OSS. OSS will refer serious conduct matters to the Disciplinary Tribunal.

Profession sets its own complaints procedure but this is open to review and instruction by the Legal Services Complaints Commissioner introduced in 2000 by Access to Justice Act 1999 (acting on the direction of the Lord Chancellor where there has been dissatisfaction expressed about complaint handling in general).

Profession sets its own education, training and conduct standards (recently created a Regulation Directorate within the Society) but the Legal Services Consultative Panel (also established 2000 in place of the Lord Chancellors Advisory Committee on Legal Education, ACLEC) is required to assist in maintaining and developing standards.

Profession has been conducting review and has proposed that a lay commissioner become the head of an independent complaints body.

Ombudsman reviews cases referred to her (which may include the merits of the original complaint, not just its processing) and produces guidance in annual report. An direction for action by the Lord Chancellor/Legal Services Commissioner prevails over the ombudsman’s general recommendation.

- Barristers

Complaints processed by Bar Council, sifted by non-legal complaints commissioner who may dismiss summarily. Complaints proceed to
panel for investigation if re service only (that panel has 50% lay membership), or to a professional conduct and complaints committee (40% lay membership).

Setting of complaints procedures and rules of education and conduct is subject to the external bodies introduced in 2000 described above.

**Northern Ireland**

Both professional bodies set their own professional standards, and deal with complaints in committees where there are lay members but they are not in the majority. Complaints about complaint-handling may be referred to an ombudsman who also may consider complaints from the outset, although most would be referred to the professional body for initial processing.

Margaret L Ross  
22 January 2001