"I'M NOT HAPPY WITH MY SOLICITOR..."

A discussion paper about the way in which complaints against solicitors in Scotland are dealt with.

The Scottish Consumer Council would welcome comments on this paper by 30th April 1986.

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SCOTTISH CONSUMER COUNCIL

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1. INTRODUCTION

Earlier this year the National Consumer Council published a report, "In dispute with the solicitor", which looked at the way in which complaints against solicitors in England and Wales are dealt with. That report pointed out that although the procedures in Scotland were different the same points of principle applied.

This discussion paper now examines the Scottish procedures in the light of the criteria established by the NCC - accessibility, impartiality, flexibility of sanctions and effectiveness.

We believe this discussion paper is timely. The recent annual reports of the Lay Observer, the impartial watchdog over the present system, have highlighted ways in which the existing procedure might be improved.

We are also aware that the Law Society of Scotland is presently examining its complaints procedure. We hope that this discussion paper will be seen as a constructive contribution.

This paper examines existing complaints procedures in the light of consumer criteria, looks at various proposals for reform and then sets out the main features of a complaints procedure which would be accessible, impartial, flexible and effective. It does not set out in detail how such a procedure would work. We believe that detailed arrangements should be considered after basic principles have been discussed and agreed.

The proposed new procedure set out in this paper does not represent the Scottish Consumer Council's final conclusions. We would welcome comment on these proposals. We hope that the publication of this paper will stimulate debate about reforming the complaints process and will lead to an open discussion between the professional and consumer interests about the best path of reform.

2. THE PRESENT SYSTEM

Complaints about Scottish solicitors are primarily handled by the Law Society of Scotland which has a statutory duty to deal with complaints. The present system for dealing with complaints is fragmented in different ways which are difficult for the ordinary person to understand.

In 1984 a total of 1,045 complaints were made to the Law Society.
A crucial distinction is made between complaints involving 'negligence' and those involving 'professional misconduct'. If the Law Society believes that a case involves 'negligence' it will tell the client that he has the right to raise a civil action in the courts to claim damages from the solicitor. The client would have to prove to the court that the solicitor had failed to exercise the skill which one can expect from a competent professional, and as a result the client suffered some loss. The Law Society will not take up the case on his behalf (though the Society may put the complainer in touch with solicitors known as "troubleshooters" who will be prepared to take up a case against a solicitor).

Complaints of 'professional misconduct' are dealt with through the Law Society's complaints procedures. Professional misconduct concerns the ethical behaviour of the solicitor and involves a breach of the standard of conduct required of a solicitor.

**Legal Aid**

Another distinction is made between complaints where the client is legally aided and other cases.

If a complaint is made to the Law Society about work carried out under the legal aid schemes the Society will firstly send the complaint to the legal aid committee which issued the legal aid certificate. This is normally the local committee, but in some cases (eg cases in the Court of Session), the "Supreme Court Committee". The committee can decide that a complaint is 'frivolous'. If this happens the Law Society will not carry out any further investigation. Complaints not considered frivolous are referred to one of the Law Society's complaints committees, and dealt with in the same way as other complaints.

In 1984 of a total of 1,045 complaints, 92 were Legal Aid Complaints.

In non-legal aid cases the Law Society Complaints Department carries out initial investigation of complaints, attempting if possible to negotiate a satisfactory settlement of the problem. Complaints requiring more detailed examination are passed from the officials carrying out the initial investigation to one of the complaints committees. These committees consist of members of the Council and, since June of this year, a lay member sits on each committee.

In 1984 of 599 complaints which were disposed of by the Society 462 were dealt with by Society officials and 137 were referred to complaints committees.

**Professional Misconduct/Negligence**

If initial investigation suggests that 'negligence' alone may be involved the Law Society investigation will stop and the client will be informed that his complaint involves negligence and that he should consult another solicitor about a possible claim. It should
be noted that this is the only means by which the client can obtain any financial compensation (unless the solicitor voluntarily compensates him). The Law Society apparently frequently points clients in this direction when there has been financial loss, since it is the only way to obtain compensation. The Society itself does not rule on whether there has been negligence; it merely informs the client that there may have been negligence on which he should seek advice. If the client wishes help the Society will put him in contact with a solicitor willing to undertake a negligence action.

If there are problems other than negligence the Law Society investigation (by officials or by the committee) continues. In a number of cases a solution acceptable to both solicitor and client is found by negotiation. This can involve compensation for loss but the Law Society has no power to enforce such compensation. It could involve an explanation which satisfied the client or an apology.

The complaints committees can recommend that the Council of the Law Society take one of a number of steps where the complaint is considered to be well-founded:
(a) reprimand of the solicitor.
(b) withholding of practising certificate, or attaching of conditions to the renewal of the certificate, where a solicitor fails to provide information to enable a complaint to be dealt with, or fails to complete the client's business satisfactorily in a reasonable period.
(c) temporary withdrawal of practising certificate or the appointment of a judicial factor where the solicitor has failed to comply with the special 'Solicitors Accounts Rules'.
(d) in cases of complaint about undue delay, require the solicitor to give an explanation of the cause of the delay, and if the explanation is unsatisfactory, to surrender all relevant documents.
(e) in cases of dishonesty, require the handover of all relevant documents and apply to the court for a stop on all accounts in the name of the firm.
(f) prosecution before the Scottish Solicitors' Discipline Tribunal. In 1984 there were 19 such prosecutions.

Fees

If a complaint is about the fees charged by a solicitor the Law Society will not give advice about whether charges are reasonable or not. The Society will, however, advise that it is possible for a client to ask an Auditor of Court to "tax" a solicitor's bill. This means he will judge whether it is correct or not. However, this service can be expensive.
Solicitors' Discipline Tribunal

If the complaint involves "professional misconduct" the Council of the Society may refer it to the Scottish Solicitors' Discipline Tribunal. This is an independent statutory tribunal (which has four lay members) and the Council of the Law Society normally acts as 'prosecutor' (though individuals can bring their own cases in exceptional circumstances). The tribunal has power to order that a solicitor be struck off, suspended, censured or fined. 'Professional misconduct' is not simply 'a mistake', 'minor incompetence' or 'delay', but a repetition of such incidents may constitute misconduct. Throughout the investigation process, the Law Society officials and the complaints committee are looking for signs of 'misconduct'. While complaints falling short of 'professional misconduct' may give rise to a negotiated settlement or one of the other sanctions the Council may impose without going to the Discipline Tribunal, the emphasis on 'misconduct' may lead to complaints being rejected on the ground that they do not amount to 'professional misconduct'.

The Lay Observer

The Lay Observer is an independent person appointed by the Secretary of State whose job is to deal with allegations from members of the public about the Law Society's treatment of a complaint. The initial complaint must already have been dealt with by the Law Society. After investigation the Lay Observer's opinion is sent to the complainer, the solicitor and the Law Society. The Society need not accept the Lay Observer's recommendation.

3. WHY CLIENTS COMPLAIN

The Law Society's Annual Reports set out some figures on the reasons for complaints against solicitors. These figures vary from year to year but the most common reasons concern delay, lack of communication, alleged negligence and alleged unethical conduct.

However, it is also important that consideration be given to the motivations behind statistics.

Traditionally, the need for a complaints process arose from the viewpoint of the profession itself. The complaints process was seen as a means of ensuring that solicitors comply with certain standards of ethical behaviour and, if not, are properly disciplined. This has a 'public interest' element since it must be in the public interest for the profession to be properly regulated. However, the complainer is not necessarily seeking to 'punish' the solicitor, nor does he necessarily have his problem put right by such punishment. The close link between 'complaints' and 'punishment' may also sour the relationship between dissatisfied client and solicitor.

The existing procedures are geared to looking for 'professional misconduct' or 'negligence'. There is a danger that by stressing these and attempting to place complaints in one or other of these categories, anything else is dismissed as 'unfounded'. Since
'misconduct' is regarded as a very serious matter, and since some form of 'punishment' (even if only a reprimand) follows, there is a risk that some complaints which may be justified are rejected. This may be because any lack of competence uncovered is a relatively minor matter, but it may have had some significance for the client.

There are also a number of situations where a complaint may be seen as 'unfounded' from the viewpoint of the professional, but where the client is genuinely aggrieved. First there are complaints which really boil down to a criticism of the "law" or "legal procedures" rather than of the lawyer. There is sometimes a narrow line between such criticism and allegations of incompetence. Even where the complaint is not fairly directed against the solicitor, the client may be genuinely angry and confused. He deserves, and should get, a clear explanation.

Some complaints arise because the client has failed to understand the laws or the legal procedures in which he has become involved. The client may have suffered no loss or prejudice, and the solicitor may have acted properly throughout. There has nevertheless been a failure of communication. All professions develop their own expertise and language. Some solicitors are better than others at explaining what is happening, and equally some clients have greater difficulty than others in understanding. The solicitor (like the GP) has as much need of good communication skills as extensive academic knowledge of the law. This is obviously a matter for professional training and practice. Client's complaints which turn out to have arisen from a failure to explain or understand should be dealt with courteously and at some length. Hopefully the client would go away satisfied that he has not been dealt with unfairly.

A complaint may touch on an area which is very much a matter of judgement eg. a decision in an accident claim as to whether to recommend acceptance of an offer of compensation. Unless the solicitor's advice has been totally out of line with similar cases, his conduct of the case is not at fault. Nevertheless the fact that the client has complained may suggest that there has been a failure in communication.

In each of the above examples the investigator needs to be sensitive to the real cause of complaint not just to the apparent one.

This can also be the case where there is a complaint about the cost being too high. Giving more information about fees at the outset should improve the situation, although in court work particularly estimating cost in advance can be very difficult. Trainee and assistant solicitors are often themselves poorly trained in fee-charging, which is carried out elsewhere in the office. Improvements in practice and training may therefore overcome many of these problems. However, a proportion of complaints which appear to be about 'cost' may actually be about the quality of work done. It is often because a client is dissatisfied that he feels he has been overcharged. In such cases it is not enough for the client to be informed that he has been charged the 'normal' fee for the work done.
4. CRITERIA FOR A COMPLAINTS SYSTEM

Certain criteria should be met in any complaints system. The existing system can be measured against these criteria.

Accessibility

The accessibility yardstick covers several features. The procedures should be sufficiently comprehensive to deal with all types of legitimate complaint. They should be easily understood and simple to use. They should be geographically accessible. Complainers should not find it difficult to put forward their case. Fear of the expense should not be a barrier to the pursuit of a legitimate complaint.

The complaints system must be easy to find out about and easy to use. The present system fails this test because there are several separate "paths". First there is the distinction between legal aid and non-legal aid complaints. Admittedly from the complainer's point of view he initiates a complaint in the same way i.e. by taking it up with the Law Society. But if the complaint concerns legally aided work it must be sent to the legal aid committee and this must cause delays. A legal aid committee may reject a complaint as being "frivolous".

Another complexity arises where negligence is involved, and the client is told he should see another lawyer with a view to taking court proceedings against the original solicitor. The Law Society maintains that in such cases the advice to see another solicitor is the best advice which could be given. Within the limits of the present system this is correct - it is, for instance, probably the only way to obtain financial compensation where a solicitor is unwilling to accept liability. It is not what most complainers want to hear. It can sound like "buck-passing" and involves explaining the problem yet again, apparently starting a wholly new procedure. It also means taking the problem with one solicitor to another solicitor. Some people have lost their faith in solicitors, others may simply find it difficult and embarrassing. Although the Law Society now helps people to find a solicitor willing to take on such cases, there can still be difficulties in obtaining legal aid for an action. If the client is not eligible for legal aid the financial risk of losing may be too great.

The present complaints procedure is based on the written complaint. This places the onus on the complainer - to write his complaint clearly and at sufficient length. Meeting and interviewing complainers can take place but is not a normal part of the process.

Many people find it difficult to express their complaint clearly on paper. Experience in other areas has shown that there is often no substitute for seeing and hearing the complainer. In Supplementary Benefit appeal cases, the success rate where the appellant is neither present nor represented is very low. The written appeal rarely contain enough relevant information. It is often difficult
for the lay person to know that information is relevant. The use of a simple form to initiate proceedings could be helpful, in order to extract some of the basic facts, followed up in most cases by an interview.

The Law Society has begun to recognise the importance of human contact. They are presently discussing with local law faculties a scheme whereby senior solicitors would interview local complainers who had difficulty in expressing their complaint clearly in writing.

Another barrier to initiating a complaint is the lack of guidance for solicitors' clients about what is or is not worth complaining about. It is difficult for clients to know whether or not they have a reasonable cause for complaint when there is no written code of conduct setting out what a client can reasonably expect of his solicitor. It is also sometimes difficult for solicitors to know what is expected of them.

The Royal Commission on Legal Services in Scotland recommended that the Law Society draw up an authoritative guide to the professional conduct of solicitors in Scotland which should be expressed in terms comprehensible to laymen.

It would be impossible for such a guide to cover every possible situation which might arise so it would be important that it should not be regarded as exclusive. It should also be regularly updated in the light of decisions taken in the complaints process.

**Impartiality**

Public confidence demands that those who investigate and adjudicate must be, and must be seen to be, impartial. This applies both to claims for compensation and to the possible imposition of punishment.

The principle that no-one should be a judge in his or her own case is a good one. The legal profession presents a special problem. If you wish to sue your doctor for negligence you go to a lawyer. Clients often feel that there is no unbiased source of advice when their complaint is against a lawyer. Public confidence is lacking when a profession deals internally with all complaints.

In May of this year the National Consumer Council commissioned Market and Opinion Research International (MORI) to undertake research on the kind of complaints system which might meet with the approval of the public. The results of this survey are contained in the Appendix to this paper. In summary the survey shows a significant preference for a complaints process independent of the profession and with a majority of lay involvement.

The existing system would clearly fail to meet with public approval. Most of the investigation is in the hands of the lawyers' own professional organisation. This gives the Law Society a double role which is an uneasy one. At one and the same time the Society is, pursuing the interests of the profession, and also acting as the "public watchdog". With the best of intentions this may be a difficult task to perform successfully.
It is true that in many cases the profession's interest and the public interest will coincide. It is in the interests of reputable solicitors that incompetent or unethical practitioners are discovered and dealt with. Nevertheless even in such cases the public perception may be that the profession is looking after its own.

There is some 'lay' involvement in the complaints process. There are now lay members on each of the Council's complaints committees and four lay members on the Discipline Tribunal. However, these lay members are very much in the minority.

There is also the 'Lay Observer' but many complaints never reach this stage. The 'Lay Observer' post was introduced in response to the criticism that there was not an independent element in the process. However, only a minority of complaints will ever come to the Lay Observer's attention. Sometimes this will be because the complainant is perfectly satisfied with the Law Society's reply, but some people will be uncertain about the Observer's role and the relationship with the Society. It is now the policy of the Law Society to inform complainers of the Lay Observer's role. This is very welcome. In addition, a new leaflet about the "Lay Observer" has just been published which sets out in a simple and straightforward way what the Observer can do. Hopefully this will help make the public more aware of the post's existence.

No-one doing his job properly has anything to fear from outside investigation. Resistance to such investigation makes the client feel that there is something to hide. This does not mean that there is no room for specialist knowledge in the investigation. What matters is who administers and controls the process. With the medical profession the body which deals with complaints (the General Medical Council) is independent of the body which represents the interests of the profession (the BMA). Other service sectors also have complaints procedures which act independently of the trades or industries covered, though financed by them e.g. the Insurance Ombudsman Bureau and the new Bank Ombudsman.

**Cheapness**

The system must not be expensive for the complainant. There is also a public interest in the overall cost being low. However, cheapness cannot be allowed to override the needs of the complainant. For instance, interviewing complainers will be time-consuming and expensive, but it is justified if this is the best means of obtaining information and understanding the problem. As pointed out above, many complaints can be resolved by good communication and proper explanation.

The present procedures have a cost - the Law Society's officials employed in this work, meetings of the complaints committees, local legal aid committee meetings dealing with complaints, the running of the Discipline Tribunal, the Lay Observer, expenses, and the cost of legal aid in some negligence actions. A single system could reduce
some of the duplication, but it has to be accepted that achieving a better system may involve an extra cost.

**Speed**

Many of the complaints against solicitors are about the time which it takes to have one's case dealt with. The Lay Observer's Reports show that this is often compounded by delay in dealing with the complaint. The need for thorough investigation may sometimes, though not always, come into conflict with the need for speed. Complainers should be kept in touch with progress, and reasons should be given for any delay.

**Respect for the Complainant**

At all stages the complainant deserves respect. It is true that some who complain have got hold of the wrong end of the stick. They deserve a careful and courteous explanation of why their complaint has no foundation. As in any other field there will be a small minority who are plain difficult. However, most people will be satisfied if they have a "fair hearing" and an opportunity to put their case. What produces very difficult and bitter complainers is a procedure which takes place behind closed doors and ends with a letter badly stating that "after full investigation we have decided that your complaint has no foundation."

**Flexible and effective remedies**

The complainant wants to have things "put right" so far as is possible. It is important to distinguish between a remedy for the client and professional discipline. A wide range of remedies is necessary, including explanations, apologies, extra work carried out at no charge by the original or another solicitor, remission of fees and compensation for loss. Discipline may follow, but should be dealt with separately.

The present system is mainly concerned with discipline and this may mean that the complainant does not get proper redress.

5. **PROPOSALS FROM ELSEWHERE**

The NCC paper "In Dispute with the Solicitor" (Spring 1985) recommends for England that there should be an independent body to deal with complaints. Specifically this paper suggests setting up an independent "Legal Council", on which solicitors should be represented and, possibly, would employ one or more "Ombudsmen" who, together with supporting staff would deal with complaints. The Ombudsman would:

(a) investigate complaints

(b) promote an agreed or conciliated solution where possible and appropriate
hold hearings where necessary, either alone or sitting with a tribunal. The Ombudsman would have the power to order action or compensation by the solicitor, or to punish the solicitor where the incompetence or misconduct was minor.

It is suggested that cases involving substantial claims for compensation should continue to be dealt with by the courts. Serious cases of professional misconduct would be dealt with by the Solicitors Disciplinary Tribunal.

The Coopers & Lybrand Review

The English Law Society have commissioned Coopers & Lybrand, a firm of management consultants, to investigate and report on the organisation, management and administration of the Society's affairs. A report has been issued on complaints and discipline. This also recommends a new regulatory body separate from the Law Society. This "Solicitors Complaints Board" would have a majority of solicitor members, elected by the profession but not also members of the Law Society's own Council. The Board would investigate and adjudicate. The Solicitors Disciplinary Tribunal would continue to deal with serious disciplinary matters but would be organisationally more distinct from the Law Society than at present.

The Coopers and Lybrand report has met with a mixed response from the English legal profession. Some members, particularly the present President of the Law Society, have accepted the main proposal that there should be an independent body to deal with complaints but there is a substantial body of opposition to this.

Royal Commission on Legal Services in Scotland

The Royal Commission on Legal Services in Scotland recommended that there should be a single, simple procedure for investigating and acting on all complaints against solicitors. This complaints procedure would still be under the control of the Law Society. It also recommended that the Discipline Tribunal should be able to award compensation.

Scottish Association of Citizens' Advice Bureaux

The Scottish Association of Citizen's Advice Bureaux has called for reform of the Law Society's complaints procedure, stopping short of removing the function from the Law Society altogether. It recommends an accessible and approachable handling of initial complaints, with monitoring by a Complaints Committee. This Committee would include lay members, and would have powers to give such remedies as compensation, remission of fees and so on. Legal aid and non-legal aid complaints would be dealt with together.
6. **A LESS RADICAL REFORM**

It would be possible to meet some of the criticisms of the present system without setting up a completely new and separate organisation. For example some personal contact and greater speed and consideration for the complainants point of view could be incorporated within the Law Society's investigations.

The distinction between legal aid complaints and other complaints could be ended. Recent Government proposals for changes in the administration of legal aid may create an obstacle to merging legal aid complaints into the Law Society's own complaints procedure. The Scottish Office is proposing to remove the administration of legal aid from the Law Society and setting up a separate legal aid administration. If this is done, it might seem a little illogical to move complaints to the Law Society. On the other hand it could be argued that the complaints we are dealing with are those about the solicitor's work, and that it is still appropriate for them to be dealt with by the Law Society.

A wider range of remedies such as a power to award compensation could be employed by the Scottish Solicitors' Discipline Tribunal, alongside their existing powers of punishment. This Tribunal itself could be given a larger proportion of lay members.

None of the above changes adequately resolve the question of the "independence" of the complaints procedure. As discussed earlier this is in part a credibility problem - the aggrieved client may simply not believe that the system could work impartially. The profession can only benefit from greater public confidence. Lay involvement in what is the professional's own organisation may not be entirely satisfactory. The lay element may adapt itself to the outlook of the profession. Choosing the lay members from the "consumer" or "advice" movement may improve matters but they may still find themselves isolated.

Another possibility would be to be expand the remit of the Lay Observer to cover supervision, spot checks etc.

7. **A NEW SYSTEM FOR COMPLAINTS**

There are five distinct phases in the procedure for dealing with complaints:-

- investigation
- conciliation
- adjudication
- redress
- discipline

In addition there must be someone or some organisation which supervises and is ultimately responsible for the procedure.
An Independent Organisation

We believe that a new "Complaints Body" should be set up, independent of the Law Society. We believe that an independent body is necessary to ensure that there is public confidence in the impartiality of the complaints process.

This new complaints body would consist of a "Council" who would be responsible for the overall working of the complaints process. The "Council" would establish guidelines for the investigation and adjudication of complaints and monitor the work carried out. The "Council" would also appoint those who are to investigate and adjudicate on complaints.

We do not propose that such a "Council" have a wholly lay membership. Lawyers would be essential to provide expertise and experience. However, given the need to establish the appearance of impartiality in the public eye, it would be best if there were a majority of lay members. This coincides with the views of the majority of those surveyed in NCC's MORI poll. SCC has also stressed the importance of a lay majority for other bodies.

We believe that legislation would be necessary to enable the Secretary of State to set up a new independent complaints body.

The Preliminary Procedure

The new body would employ full-time staff who would carry out investigation and conciliation. It is proposed that the procedure should be initiated by the complainer completing a short form to establish details such as names, dates and the basic nature of the complaint. The solicitor involved would be sent a copy of this form and asked for preliminary comments in writing.

In virtually all cases there should be a meeting with the complainer to obtain more information and to clarify the complaint. It might be possible for such meetings to be undertaken by staff members. If not, it would be possible to set up a network of local, part-time interviewers. It would be useful for the interviewer to have had the solicitor's comments before the meeting. As discussed above a meeting is essential to get to the bottom of many complaints. It would be up to the full-time staff to analyse the various issues involved, since there are often several aspects to the problem.

Where the problem or any part of it has arisen from misunderstanding or poor communication or from the law or legal procedures, the meeting would be an opportunity for explanation and discussion to take place. Where appropriate the complainer's often justifiable anger may be re-directed elsewhere e.g. to his MP or to a pressure group where "the law" is at fault. Verbal explanation should always be followed by a written explanation in "plain English". In many cases the complainer would at this stage be quite happy to withdraw his complaint.
The staff interviewer should travel to the complainer for this meeting. Consideration might be given to the employment (on a fee basis) of local interviewers, where lengthy travel would otherwise be involved.

More complicated complaints would require three-way discussion and correspondence between the staff investigator, the complainer and the solicitor. Solicitors will be better able than many complainers to correspond by letter but meetings may be helpful. The staff investigator should have the right to the assistance of the professional organisation. The Law Society should have the right, when requested by a solicitor, to supervise the handing over of files and to keep copies of papers taken.

Time limits for replies to correspondence should be applied to both complainer and solicitor, with flexibility where there is good cause e.g. illness or holiday. Failure by the complainer to get back in touch without adequate warning should lead to the complaint being dropped. Failure by the solicitor should lead to the complaint being referred automatically to the next adjudication stage and should also be referred to the Law Society as a matter for disciplinary action.

There should also be time targets for those investigating the complaint. The speed of dealing with complaints should be something particularly closely looked at by the supervisory body, whether a 'Council' or Government department.

The investigator should prepare a Report analysing the complaint, and giving his opinion on whether the complaint is justified. He should suggest possible remedies. It is suggested that Reports should be prepared even where the complainer indicates he wishes to withdraw his complaint at an early stage. Reports in such cases might well be short but could still point to where improvements could be made e.g. better communication. Reports should go to the complainer, the solicitor and to the Law Society. If the complainer is not satisfied where a complaint is held to be unfounded or is not satisfied by the remedy offered he could request referral to an adjudicatory hearing. If a remedy is proposed the solicitor could accept the Report and implement it. If the solicitor does not accept it, he too could request referral to adjudication.

**Staffing**

The number of staff would depend on the number of complaints to be dealt with in a year. An indication could be obtained from the existing level of complaints. It is easy to be accused of creating yet more well-paid bureaucrats. However, the staff must be sufficiently well-qualified, and/or experienced to be able to negotiate adequately with solicitors. They must therefore have a reasonable status, which means having a reasonable level of salary. Legal knowledge or training should not be a disqualification (and indeed a number of people with such knowledge would be important) but would not be a necessity.
Adjudication

It is envisaged that most complaints will be dealt with to the satisfaction of both the complainer and the solicitor by the investigator. However, complaints would proceed to an adjudication stage in the following circumstances:

(1) Where the investigator upheld the complaint but it had not been possible to obtain a settlement acceptable to both complainer and solicitor. Referral would be by the investigator or at the request of either complainer or solicitor.

(2) Where the investigator did not consider the complaint well-founded but the complainer wished to have it considered by adjudication.

The costs of adjudication should be met from the funds of the new organisation. It is a matter for debate as to whether there should be a means of discouraging the wholly frivolous complainer, or indeed the obdurate solicitor. In other areas of court procedure SCC has taken the view that the "frivolous" or "vexatious" complainer is a very rare bird. To introduce barriers to prevent "frivolous" complaints might deter genuine complaints. The existing common law provides sufficient remedies for those who believe they are being pursued maliciously through a complaints process.

In adjudicating complaints the 'Tribunal' will require guidance on what a client can reasonably expect of a solicitor. As has been recommended by the Royal Commission on Legal Services in Scotland, the Law Society should in consultation with consumer bodies, draw up a code of practice for solicitors which should be expressed in terms which are comprehensible to lay people. Obviously the decisions of the "Tribunal" and the Law Society's disciplinary process will contribute guidance on what is to be expected of solicitors.

The "Tribunal"

Adjudication would be undertaken by a "Tribunal".

In other fields the three-member tribunal seems to work well. It would be neither necessary nor desirable for the members to be full time. It would be possible for the "Council" also to be the body from whom the tribunal members were drawn. However, it might be better for the "Council" to be distanced from individual cases.

The question of composition of the "Tribunal" raises difficult issues. On the one hand lawyers might be too sympathetic to the solicitor's point of view (or might appear to be so). On the other hand lay people might find it difficult to deal with the complex legal issues which may arise.

There are good arguments for saying that the chairman of the adjudicating tribunal should be legally qualified. The tribunal
would often be dealing with complex legal issues. At the same time it is important that the elementary rules of natural justice should be followed. For these reasons other tribunals where previously there was no provision regarding the qualifications of the chairman now require legally qualified chairmen eg Supplementary Benefit Appeal Tribunals (now Social Security Appeal Tribunals).

The need for a legally qualified chairman might be less if there was provision for an appeal on a point of law.

On the other hand to have a legally qualified chairman again raises the question of the impartiality of the tribunal. This might be redressed by providing that the other members of the tribunal be lay people. Such members might come from voluntary bodies and advice agencies but it would be helpful if some at least came from other backgrounds. There is a danger (which applies also to the 'Council') of drawing members wholly from the ranks of "professional' volunteers". With a pool of members drawn from all parts of the country it ought to be possible for the tribunal to hold hearings near to the complainant's home. However, especially if solicitors are sitting on the tribunals, members might be chosen from neighbouring districts rather than being too local.

"Tribunal" Procedure

All the papers from the investigation, with such further written submissions as the parties wish to make would be passed to the tribunal members. For the reasons already given every complainant should have the right to a full hearing. If cases were dealt with on written papers only this could prejudice a complainant.

However, it would probably be desirable for the tribunal members to consider the written papers first. In some cases the tribunal might wish to issue a preliminary decision without a hearing. If this were accepted the matter could be concluded.

Procedure at the hearing should be sufficiently informal to allow complainers to use their own words. The investigator would present the case as he saw it. Both complainant and solicitor should be entitled to representation. In many cases much of the complainant's case will be presented by the investigator, but the complainant should still have the right to speak for himself or be represented.

Discipline

It is suggested that at both the investigation and adjudication stage the remedies should be those which provide redress for the complainant. "Discipline" of the solicitor should be left to the professional body and the existing Scottish Solicitors' Discipline Tribunal. There should however be a means of reporting decisions on complaints to the Law Society so that the Society can determine whether disciplinary action is required.
The Remedies

The investigator would have power to recommend a remedy; the tribunal would have power to enforce a remedy. The remedies available should be wide and flexible enough to provide appropriate redress for the client.

The remedies would include:

- explanation
- apology
- further work without charge to remedy any mistake
- remission of fees
- compensation for loss and/or inconvenience.

At present it is not possible for the complaints committee to require remission of fees or that further work be done or to award compensation. But in many cases only such outcomes will provide a client with suitable redress for his complaint.

We accept that the provision of such remedies means that the new complaints process will be dealing with issues of negligence and bad workmanship that have hitherto been dealt with solely by the courts. However, we believe it is important that the process deals with the whole range of different kinds of complaints against solicitors.

It might be thought desirable for a financial limit to be placed on awards of compensation. Cases where larger sums by way of compensation were claimed would be directed to the courts as at present, after the initial investigation stage. Alternatively the complainer could be given a choice between the tribunal and raising court proceedings. In any case the "Tribunal" should not have exclusive jurisdiction – the complainer should have the choice whether to use the complaints procedure or go to court.

Funding

The present complaints process is funded by the profession. The new procedure which envisages interviewing complainers more often than at present would probably involve more resources. However the profession has an interest in ensuring that the public has confidence in the way in which complaints against solicitors are dealt with. This is recognised by other professions and trades who pay for a complaints process wholly or in part e.g. the General Medical Council is paid for by a levy on doctors; the Insurance Ombudsman Bureau is paid for by the insurance industry, various trade associations subsidise arbitration schemes etc.

There is also a case for an element of Government funding. It is in the public interest that there be a good and effective complaints system. There is also the specific interest in the quality of work carried out through legal aid.

We therefore believe that the main source of funding for the new complaints body should be a levy on solicitors, though we also believe that the government should be prepared to consider funding to some extent.
8. CONCLUSION AND RECOMMENDATIONS

This paper reaches a number of broad provisional conclusions about how complaints against solicitors in Scotland should be dealt with:

(i) the machinery for dealing with consumer complaints against solicitors should be independent of the Law Society.

(ii) remedies for complainers and the discipline of solicitors should be distinguished and largely dealt with separately.

(iii) the primary aim of the complaints process should be to obtain redress for the client; the discipline of solicitors should continue to be dealt with by the Law Society and the statutory Discipline Tribunal.

(iv) the complaints procedure should be able to deal with all complaints whether legal aid or non-legal aid and whether involving negligence or professional mis-conduct. The new procedure should not however be exclusive - the client should continue to be able to take a case for negligence to the ordinary courts if he so wishes.

(v) the Law Society should in consultation with consumer organisations draw up a code of conduct for solicitors. This will, as far as possible, set out what the client can reasonably expect of his solicitor.

(vi) the broad structure of the complaints procedure should be as follows:

(a) An investigatory stage. Within this stage meetings with complainers should be an important part of the procedure.

(b) Emphasis on conciliation to resolve the problem, although this should never be forced upon the complainant.

(c) An adjudication stage for complaints not otherwise resolved. A tribunal is proposed with a wide range of remedies available.

(d) A monitoring and reviewing level - a Council is proposed.

(vii) at both the adjudication stage (the 'tribunal') and the monitoring and reviewing level (the 'Council') a majority of the membership of the bodies involved should be lay.

(viii) the complaints procedure should be mainly funded by a levy on the legal profession.
The Scottish Consumer Council would welcome any comments on these conclusions or any other aspects of this paper.

L48. January 1986
APPENDIX

NATIONAL CONSUMER COUNCIL RESEARCH ON SOLICITORS' COMPLAINTS PROCEDURES

To get an impression of the kind of system which might meet with the approval of the public, the National Consumer Council commissioned Market and Opinion Research International (MORI) to undertake research on our behalf (27). The research was carried out in the middle of May 1984, some time after the Glanville Davies affair had figured prominently in the news, so feelings were no longer running high among the general population.

Respondents were first asked

Q.1 "Who do you think should investigate complaints made about the standard of service provided by solicitors?"

The question was open-ended so that none of the responses were prompted. The replies were as follows:

- independent organisation/separate body: 24%
- government/government body/civil service: 11%
- independent person, not a solicitor: 10%
- solicitors/solicitors' organisation/body: 8%
- Law Society/Law Commission: 7%
- MPs/local MP: 6%
- Ombudsman: 6%
- judges/JP's/courts: 6%
- citizens advice bureaux/consumer advice: 5%
- police: 4%
- not the Law Society: 4%
- members of the general public: 3%
- local councillors: 2%
- other answers: 2%
- don't know/no answer: 3%
- 19%

(Base: all respondents = 1,992)

Although distinctions could not be drawn between various types of complaint, the replies indicate a significant preference for an independent body. This single preference remains far stronger than an aggregation of all responses opting for some form of professional organisation. It is also reasonable to assume that the second most favoured option (government/government body/civil service) represents, in the view of respondents, a desire for separate identity and authority. The third most popular choice - an unidentified independent person - again reflects similar sentiments.
Respondents were then asked to express preferences on the composition of a possible new complaints body.

Q.2 "It has been suggested that a new body should be set up to investigate complaints made against solicitors. Do you think this body should be made up...

... entirely of solicitors 3%
... a mixture of solicitors & other people 60%
... entirely of people who are not solicitors 34%
don't know 3%

(Base: all respondents - 1,992)

The results indicate an overwhelming majority in favour of lay involvement, whether total or partial. Clearly, most people want to retain some kind of balance between professional and lay involvement, although over one-third of respondents were in favour of completely excluding members of the profession.

Those respondents in favour of a mixture of professional and lay involvement were then asked for their views on how the most appropriate balance could be achieved.

Q.3 "If the body to investigate complaints were made up of a mixture of solicitors and other people, do you think the majority should be solicitors, the majority should be other people, or should it be split 50/50 between solicitors and other people?

majority 3%
50/50 60%
majority other people 36%
don't know

(Base: respondents in favour of a mixture - 1,200)

These results indicate a strong preference for a balance which enables the interests of the consumer and the profession to be equally represented. Once again, though, there is a considerable proportion of respondents in favour of a majority lay involvement.

When the results of questions 2 and 3 are analysed together, a slightly different picture emerges.
Those respondents indicating a preference for involvement by

a) all or a majority of solicitors - 5%
b) 50/50 - 36%
c) all or a majority of other people - 55%
d) don't know - 4%

(Base: all respondents - 1,992)

This makes option (c) a clear favourite, with over half the respondents preferring a lay majority.

Finally, we asked respondents about their involvement with solicitors. The replies, which correlate with previous research on this point, indicate an active use of solicitors:

Q.4 When, if ever, was the last time you consulted a solicitor?

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<th></th>
<th>%</th>
<th>cumulative</th>
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</tr>
<tr>
<td>over 6 months - 12 months ago</td>
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</tr>
<tr>
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<tr>
<td>never contacted one</td>
<td>3</td>
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