

Annual Report

of the

Scottish
Solicitors'
Discipline
Tribunal

**for the year to
31st October**

2001

**ANNUAL REPORT OF THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
for the year to 31st October 2001**

	<i>Date of</i>	<i>Date of</i>
<i>Re-appointment Appointment</i>		
<i>Solicitor Members</i>		
Mrs D.M. Boyd, Edinburgh	1993	1998
Miss M.E. Brown, Glasgow	1993	1998
A.M. Cockburn, Glasgow	1998	
G.L. Cunningham, Glasgow	2000	
J.W. Laughland, Ayr, Chairman (retired 1 March 2001)	1981	1996
Malcolm McPherson, Edinburgh	2001	
I.D.Morrison, Inverness	1999	
G.H. Pagan, Oban	1995	2000
G.F. Ritchie, Dundee, Chairman	1988 1998	
K.R. Robb, Falkirk	1998	
P.W. Rockwell, Aberdeen, Vice- Chairman	1995	2000
<i>Lay Members</i>		
Peter Burdon, Glasgow	2001	
Mrs Elizabeth Cameron, Edinburgh	2001	
Dr Bronwen Cohen, Edinburgh	1996	2001
R.J. Henry, Glasgow (retired 31 December 2000)	1991	2000
Gavin A. Hepburn, MBE, Edinburgh	1992	2000
Mrs Lorna Jackson, Edinburgh	1991	2001
Mrs Gillian Pearey, Aberlady	1996	2001
D.A.. Ross Stewart, OBE, Edinburgh (retired 31 Decem ber 2000)	1992	2000
John Spencely, FRIAS, Edinburgh	1993	2000
Professor Pauline Weetman, CA, Edinburgh	1993	2001
<i>Clerk</i>		
J.M. Barton, Edinburgh		

The Scottish Solicitors' Discipline Tribunal is an independent tribunal constituted under the provisions of Sections 50 to 54 and Schedule 4 of the Solicitors (Scotland) Act 1980 as amended.

Membership

Mr J.W. Laughland retired during the course of the year. He had been a member since 1981 and the profession is indebted to him for his long service to the Tribunal and particularly for his personal contribution as Chairman since 1991.

Mr R.J. Henry and Mr D.A. Ross Stewart, who had been lay members, also retired during the year and their contribution to the deliberations of the Tribunal was greatly appreciated.

General

It will be noted from the statistics for the year appearing in the Appendix that there was a slight increase in the number of Complaints which came before the Tribunal. The extent of the dishonesty in relation to three of the cases was of particular concern and in each of these cases, the respective solicitors were struck off the Roll. The same order was pronounced in regard to another solicitor and in relation to five other solicitors, their Practising Certificates were either suspended or restricted – thus requiring them to withdraw from private practice as a principal. In a number of cases, the solicitors were the subject of multiple charges and this is reflected in the Appendix under the heading of "Principal grounds on which professional misconduct is established".

Practice Management

There were three cases in which the books and financial records of the respective solicitors were the subject of successive inspections by the Law Society coupled with interviews by members of the Law Society's Guarantee Fund Committee and correspondence from the Chief Accountant.

In one case, the solicitor, whose practice had consisted almost entirely of conveyancing, began to take on Legal Aid and other Court work which latterly accounted for about half of his business. He did not have a cashier and relied on a book-keeper who called in one day each week and wrote up the solicitor's books. At the first material inspection in June 1997, various irregularities in recording were drawn to the solicitor's attention and he was subsequently interviewed by the Law Society. However at a further inspection in September 1998 there was still irregularity in the recording of entries; and when matters had not improved in March 1999, the Law Society petitioned the Court for the appointment of a judicial factor. The Tribunal concluded that the solicitor had ample notice that his financial arrangements were not in compliance with the Accounts Rules. In the absence of any allegation of dishonesty, the Tribunal stopped short of taking the ultimate sanction of striking the solicitor's name from the Roll but as he had culpably neglected to have

regard for the integrity of clients' monies and to put into effect systems to safeguard the monies entrusted to his care, the solicitor was suspended from practice for a period of five years. It was recognised that upon the expiry of that period, the solicitor would be entitled again to apply for a Practising Certificate, but it was noted that Section 15 of the Solicitors (Scotland) Act 1980 confers a discretion on the Council of the Law Society at that stage and it would be expected that the Council will have regard to the extent of the solicitor's subsequent experience of employment as a suspended solicitor within the profession in deciding whether to issue a certificate and in determining what restrictions would be appropriate in relation to the same.

In another case, the solicitor, who was also a sole practitioner, had a small conveyancing practice which he carried on from his home. He did not employ any staff but his wife provided some secretarial assistance. Both the solicitor and his wife had other business interests and the solicitor had substantial personal funds. Between January 1998 and April 2001, the solicitor was the subject of five inspections by the Law Society. Over this period, there were several interviews and various assurances were given but regrettably there were still shortcomings in the solicitor's record keeping. The Law Society inspectors also noted delay in the stamping and recording of security deeds. The Tribunal concluded that the solicitor did not have the capacity and confidence to cope with the management of a legal practice and an Order was made restricting any Practising Certificate to be held by him to ensure that for the foreseeable future, any employment that he might have within the profession would be with a firm which could provide appropriate supervision.

In a further case, the solicitor had been in partnership with his late father who had died shortly before the Complaint was heard. As in the other cases, there were a series of Law Society inspections and on each occasion, various irregularities were noted in regard to compliance with the Accounts Rules. Although the solicitor's late partner had been the designated cash room partner, and therefore within the firm, the partner principally responsible for compliance with the Accounts Rules, the Tribunal also had regard to Rule 18(1) of the Accounts Rules which imposes an obligation on all partners of a firm to ensure compliance with these Rules. The particular solicitor was first alerted to the Law Society's concerns in 1995 and he was also present at a meeting with the Law Society in 1998. It was indicated that the solicitor had ongoing assurances from his father, but the Tribunal concluded that the solicitor must

have been naive to allow matters to drift over four years, especially having regard to his father's then advancing years; and it was with that background that the Tribunal considered that the particular solicitor had to accept a significant share of the responsibility of failing to comply with the Accounts Rules. Having regard to the whole circumstances, the Tribunal concluded that the solicitor did not have the confidence and responsibility to cope with the management of a legal practice and an Order was made restricting his Practising Certificate to ensure that for the foreseeable future, any employment would be with a firm which could provide adequate supervision.

Conflict of Interest

The Tribunal was required to consider the very unusual circumstances resulting from a solicitor forming an intimate personal relationship with a party to proceedings in which the solicitor was already engaged. The essential facts were that the solicitor's partner was acting for a client who was involved in an acrimonious matrimonial dispute, and the solicitor became involved in a personal relationship with that client. The solicitor had previously accepted instructions to act on behalf of the 11 year old child of the marriage. The solicitor continued to accept instructions to represent the child even after she became a partner in the firm which was acting for the other party. There was no suggestion that the solicitor's relationship had materially affected the outcome of the proceedings, but it ought to have been apparent to the solicitor that an intimate personal relationship was different in kind from a professional association or social friendship and would inevitably give rise to a reasonable lay apprehension of bias. By exposing herself to these charges, the solicitor not only brought criticism upon herself but also put herself in a position where she would have been perceived as not being independent. The whole circumstances occurred over a comparatively short period but nevertheless in continuing to accept instructions to act for the child and persisting in these instructions after her change of firm, the solicitor committed a serious error of judgement and it was with these considerations that the solicitor was censured and fined.

In another case, the Tribunal made a finding of professional misconduct in relation to a solicitor's failure to comply with the provisions of the Solicitors (Scotland) Practice Rules 1986. Rule 3 of these Rules repeats the common law rule that a solicitor shall not act for two or more parties whose interests conflict. It was recognised when these rules were made that a solicitor may not always identify a conflict in relation to heritable property and Rule 5 contains a general

prohibition against a solicitor or a firm of solicitors acting in such a transaction. There are certain exceptions to this prohibition, for example in cases where the parties are related, or both parties are established clients, or there is no other reasonably available solicitor in the vicinity, but if the solicitor proposed to act for both parties under one of these exceptions, Rule 5(2) directs that

both parties shall be advised by the solicitor at the earliest practicable opportunity that the

solicitor or his firm, has been requested to act for both parties, and that if a dispute arises, they or one of them will require to consult an independent solicitor or solicitors

and the Rule concludes with the further direction:-

..... which advice shall be confirmed by the solicitor in writing as soon as may be practicable thereafter.

In the particular case, it was claimed that there was "no genuine conflict of interest", but the provisions of Rule 5 are supplementary and in addition to any considerations of conflict of interest; and it should have been a straightforward matter for the solicitor or his firm to have written to each of the parties to confirm the advice which was required under Rule 5(2).

Court Procedures

The Tribunal found a solicitor guilty of professional misconduct in that he had altered and lodged in Court a Joint Minute without the knowledge or consent of the party on whose behalf the Joint minute had already been signed. The circumstances were that the solicitor acted for a client and his wife and also for a company which was wholly owned by them. The company had been unsuccessful in a sheriff Court action and had been found liable in expenses. In an entirely separate action, the solicitor raised an action in the name of the client and his wife and their company against another party. The said company was required to lodge caution which was found from the proceeds of sale of a dwellinghouse which had been sold by the client and his wife. Eventually it was agreed to settle the second action on the basis of the defender receiving the sum of £3,000 by way of judicial expenses. The defender's representative wrote to the solicitor with a signed Joint Minute providing for the balance of the consigned monies to be released to the said company. However upon taking instructions, the solicitor's client insisted on the balance of the consigned

monies being released to him and not to the company. The solicitor caused the Joint Minute to be so amended without disclosing the same to the defender's representative, and the Sheriff Principal pronounced an Interlocutor in accordance with the Joint Minute in its amended form. The Respondent was unaware that in relation to the earlier action, an arrestment had been instructed against the Sheriff Clerk. This arrestment was unsuccessful as no monies fell to be released to the company. It was accepted that the solicitor had been unaware of the intended arrestment on the Sheriff Clerk and that his actings were not for the purpose of defeating such an arrestment. Nevertheless the solicitor altered a document which recorded the intended agreement between the parties to the action. In making a finding of professional misconduct, the Tribunal observed that those representing the defender had released that document on the implied understanding that it would not be altered, amended or varied except upon their express consent. Even although in this case the alteration did not affect the defender's interests, such alteration was nevertheless in breach of that implied element of trust. The question of whether a party's interests are affected, may not always be clear. Indeed it may be necessary to correct some clerical error, but in that event the solicitor should at least communicate with the other solicitor personally and obtain his express approval. This did not occur in this case, nor did the solicitor report to the Sheriff Principal that this change had been made. The solicitor's conduct in altering the Joint Minute was therefore contrary to established practice in a material matter, even although it did not affect the respective interests of the parties to the action.

Winding up a practice

Where a solicitor ceases to practise, for whatever reason, the solicitor still has a professional duty to deliver his client's files and papers or at least retain them for safe keeping. In the particular case, the Law Society had reason to write to a solicitor who had retired from practice. The solicitor failed to co-operate, and responded to the Law Society in an aggressive and intemperate manner. The obstruction on the part of the solicitor resulted in the Law Society being unable to deal with the particular letters of complaint and the Tribunal concluded that the inability of the Law Society to provide a satisfactory reply was in itself damaging to the reputation of the profession. Furthermore the solicitor's conduct displayed an attitude wholly unbecoming a member of the profession and the Tribunal concluded that the solicitor's disrespect for authority was such that he was not fit to remain a solicitor and accordingly an Order was made striking his name from the Roll.

Human Rights

The Tribunal dismissed a challenge by a solicitor to the independence of the Tribunal. At about the same time, the corresponding Tribunal in the Nursing Profession was the subject of a Judicial Review before the Court of Session, and in his opinion on that case, Lord Mackay of Drumadoon observed

.... the statutory disciplinary regime, to which enrolled solicitor in Scotland are subject, places the prosecutorial function upon the Council of the Law Society of Scotland (section 51 of the Solicitors Act 1980). The membership of the Scottish Solicitors' Discipline Tribunal must include a number of enrolled solicitors (Schedule 4 to the 1980 Act). By convention, as I understand it, members of the Council of the Law Society do not sit as members of the Tribunal. In that profession, accordingly, the objective of achieving the involvement of practising solicitors in the disciplinary body is met, whilst avoiding any overlap between those involved in the prosecutorial and adjudicatory functions. (Petition: Teharani Court of Session 25 January 2001 unreported)

An objection was taken to the Tribunal proceeding in a case where it was likely that the solicitor would be the subject of criminal proceedings. The Tribunal considered the matter carefully but was of the opinion that consideration also had to be given to the duty contained in Article 6(1) of the European Convention on Human Rights to ensure that proceedings are "within a reasonable time". The solicitor was no longer in practice but the adjudication of the Discipline Tribunal has a wider purpose than merely to exclude a solicitor who may no longer be fit to practise. The profession of solicitors is held in high standing by the public and where a solicitor's conduct may have fallen below that standard which is regarded as acceptable, it is in the interests of the profession that any apparent transgression is judged at the earliest date, irrespective of separate criminal proceedings which may be in contemplation. This is particularly so where the criminal process takes some time; and if the disciplinary proceedings were to be deferred, there would be a risk that the recollection of witnesses might be affected or that particular witnesses or records might not be available. In view of these circumstances, the Tribunal cannot exclude the possibility of disciplinary action preceding any criminal proceedings which might be contemplated; and

in the particular case the Tribunal was not satisfied that there was any compelling reason for deferring the proceedings until any criminal prosecution had been brought to a conclusion.

There was an objection to proceedings where a matter had been reported to the Law Society in 1998, and the Complaint had not been formally lodged with the Tribunal until October 2000. However it was ascertained that the Law Society's investigation procedure had continued until 30th June 2000 and it was only at that date when it was possible for Council of the Law Society to take a decision to prosecute the matter before the Tribunal – and that decision was intimated to the solicitor on 10th July 2000. There was no suggestion of any delay between the last mentioned date and the Complaint being lodged in October 2000, and the Tribunal concluded that there had not been a failure to take the proceedings "within a reasonable time".

In another case where a "Human Rights" plea was repelled, the solicitor intimated his intention to appeal against that decision and that he wished the appeal to be heard by the Court prior to any further proceedings before the Tribunal. There have been exceptional cases where the Tribunal has issued a written decision on a preliminary issue, thereby enabling a party to appeal against that decision. However the Tribunal has also to take into account the public interest and ask whether the solicitor would be prejudiced if the hearing were to proceed. In the particular matter, the material events had occurred some years previously and if the hearing had to await the outcome of an appeal, the memories of witnesses would have been further dimmed. In addition, it was noted that there was a relevant judicial authority covering the point; and in all the circumstances, the Tribunal was of the opinion that the procedural issues raised by the solicitor were not of such complexity so as to make the case one of the rare cases where an appeal before a final decision was appropriate.

Other Conduct

In the Report of the Tribunal for the year to 31st October 1999 reference was made to a case where a solicitor had been convicted of firearms offences. After further procedure, the Tribunal eventually directed that the name of the solicitor be struck off the Roll. That decision was the subject of an appeal which was heard by the Court; and in dismissing the appeal, the Court observed

... having regard to the way in which charges are expressed in an indictment, and the inherent gravity, in criminal terms, of any offence which attracts a substantial custodial sentence, we are satisfied that a bare knowledge of the offence and the sentence may well, and perhaps will usually, provide a sufficient basis for a disciplinary Tribunal to proceed, without further detail, to its assessment of the gravity of these matters in professional terms and in relation to the appropriate sanction. We think it worth quoting what the Tribunal said in relation to its determination of the appropriate sanction:

"Recent events have raised the public awareness of any offence involving a breach of the Firearms Acts. Moreover the public expects that members of the solicitors' profession shall maintain a high standard both in connection with their actings as a solicitor and in their private life. The criminal offence of which the respondent was convicted was of a personally disgraceful character. In the opinion of the Tribunal, the public perception of the solicitor's profession would be materially diminished if it were to be seen that a solicitor who has been convicted of such an offence as that of which the respondent was convicted and sentenced to a term of imprisonment for three years, were permitted to remain on the roll. Also it is a significant aspect of the legal profession that there is a close working relationship among solicitors, and between solicitors and the courts, frequently involving an element of trust and respect. Where a solicitor has been convicted of a serious offence such as that involving the respondent, other solicitors would find it difficult to establish this kind of relationship with such a solicitor; and it is with these considerations that the Tribunal considers that the respondent is no longer a fit and proper person to remain on the roll".

During the year, the Tribunal also had to consider a case where a solicitor had been convicted in the Sheriff Court on charges of breach of the peace, assault and resisting arrest, and had been fined a total of £900 with an Order to pay compensation of £100 to the victim of the assault. The Tribunal took into account the whole circumstances and in particular that the events related to a single incident and that the solicitor was not in practice at the time. Nevertheless the Tribunal considered it necessary to demonstrate to the public that the profession of solicitors seeks to maintain the highest standards of conduct and that a solicitor cannot separate his personal conduct from his membership of the profession. The Tribunal added that the profession could not tolerate conduct such as that displayed by the particular solicitor, and it was with these considerations that the Tribunal suspended the solicitor from practice for a period of one year.

In addition, there are two cases pending in which the Tribunal will be required to consider circumstances in which the respective solicitors were convicted of serious matters unrelated to their practice.

Publicity

Paragraph 14 of the Fourth Schedule of the Solicitors (Scotland) Act 1980 was amended by the Law Reform (Miscellaneous Provisions) Scotland Act 1980 to the effect that

Every decision of the Tribunal shall be signed by the Chairman or other person presiding and shall, subject to paragraph 14A, be published in full.

Paragraph 14A provides that

In carrying out their duty under paragraph 14, the Tribunal may refrain from publishing any names, places or other facts the publication of which would, in their opinion, damage, or be likely to damage, the interests of persons other than –

- (a) the solicitor against whom the complaint was made; or
 - (b) his partners; or
 - (c) his or their families,
- but where they so refrain they shall publish their reasons for so doing.

The effect of the foregoing is that the Tribunal is rarely required to exercise its discretion and publicity is accordingly given to practically every decision of the Tribunal. However in one case the Tribunal deferred giving publicity to a decision when it was likely that criminal proceedings would follow and there was a risk of possible prejudice at any subsequent trial. In other cases, the Tribunal ordered that the publicity should not extend to the identity of the solicitors's former clients.

Exceptionally, the Tribunal withheld the name of a solicitor where the identity of the solicitor might have risked the identification of a child whom the solicitor had represented.

Appreciations

It gives no pleasure to have to deal with cases where solicitors have failed to maintain the high standards expected of them and the Tribunal is indebted to the willingness of both the solicitor and lay members in giving their time for the preparation for and attendance at successive meetings and for the care and attention which they have given to the work of the Tribunal.

In December 2001 John Barton retired from being Clerk to the Tribunal, a post he has held since 1965. This is an exceptional record of service to the Tribunal, the profession and the public, who are indeed fortunate to have had the benefit of his able guidance in Tribunal business during a period of significant change. We wish him well in his retirement and welcome as his successor Ms Judith V. Lea.

G.F. RITCHIE
Chairman

APPENDIX
STATISTICS FOR THE YEAR TO 31st OCTOBER 2001

to		Year
	31/10/00	
Number of days on which the Tribunal met to hear complaints (16)	14	
Complaints heard	13	(16)
Complaints containing a Report under Section 53(1)(b) Solicitors (Scotland) Act 1980	-	(1)
Complaints outstanding or partly heard at end of year	11	(4)
Penalties imposed		
Solicitors struck off	4	(2)
Solicitors suspended from practice	3	(2)
Fines imposed	2	(1)
Practising Certificate restricted	2	(2)
Complaints dismissed or withdrawn with no finding of professional misconduct	-	(3)
Complaints resulting in finding of inadequate professional services	-	(-)
Appeals to Court of Session	2	(5)
Complaints received direct from members of public	3	(5)
Miscellaneous Applications	-	(-)
Appeals under Section 42A of the Solicitors (Scotland) Act 1980	4	(3)
Fines imposed		£3,000
£4,000-£10,000	-	(1)
£1,500-£3,000	1	(-)
Under £1,500	1	(-)
Appeals to Court of Session concluded during the year		
Appeals abandoned	1	(-)
Appeals heard	1	(1)
Successful appeals	-	(-)
Subject matter of complaints		
Purchase or sale of property	-	(-)
Conveyancing	5	(2)
Civil claims/actions		
non-matrimonial	2	(1)
matrimonial	1	(1)
Criminal proceedings	-	(2)
Trust and Executry	5	(1)
Accounts Rules	6	(2)
General Business	-	(4)
Non professional	1	(-)
Principal grounds on which professional misconduct established		
Failure to reply to correspondence (from clients, beneficiaries, their agents, and the Law Society of Scotland)	5	(2)
Trust/Executry delay	-	(-)
Delay in respect of court proceedings and prosecuting claims	1	(-)
Failure to complete conveyancing procedures in a proper manner	2	(2)
Failure to implement mandates requiring delivery of papers	1	(1)
Misleading the Law Society and other parties	2	(1)
Acting in a conflict of interest situation	1	(-)
Overcharging and failure to have accounts taxed	-	(-)
Failure to comply with Accounts Rules	6	(2)
Failure to comply with other professional obligations	3	(4)
Other conduct unbecoming a solicitor	6	(2)

**Distribution of solicitors convicted or found guilty
of professional misconduct**

Glasgow	2	(-)
Remainder of Strathclyde	2	(3)
Edinburgh	2	(2)
Remainder of Lothian, Border, Dumfries and Galloway	3	(-)
Grampian, Highlands and Islands	-	(1)
Tayside, Central and Fife	4	(2)
Outwith Scotland	-	(-)
	%	%
Sole practitioners	70	(25)
In two-partner firms	7.5	(63)
In larger firms	7.5	(12)
Not in practice as a principal	15	(-)