STANDING COMMITTEE
OF
TYNWALD COURT
OFFICIAL REPORT

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PROCEEDINGS
DAALTYN

Constitutional and Legal Affairs and Justice Committee

Legal Services

HANSARD

Douglas, Monday, 19th November 2018

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Members Present:

Chairman: Mrs J P Mrs Poole-Wilson MLC
Mr L L Hooper MHK
Mr C R Robertshaw MHK

Clerk:
Mr R I S Phillips

Assistant Clerk:
Miss F Gale

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Standing Committee of Tynwald on Constitutional and Legal Affairs and Justice

Legal Services

The Committee sat in public at 10.30 a.m.
in the Legislative Council Chamber,
Legislative Buildings, Douglas

[MRS POOLE-WILSON *in the Chair*]

Procedural

The Chairman (Mrs Poole-Wilson): Good morning and welcome to the public meeting of the Constitutional and Legal Affairs and Justice Committee.

I am Jane Poole Wilson MLC and I chair this Committee. With me are the other members of the Committee, Mr Lawrie Hooper MHK and Mr Chris Robertshaw MHK.

The Constitutional and Legal Affairs and Justice Committee is a Standing Committee of Tynwald with a wide scrutiny remit. Today we will be hearing evidence on the topic of legal services in the Isle of Man.

This inquiry is an amalgam of our previously announced inquiry into the regulation of legal services in the Isle of Man with reference to the role of the Law Society and the Advocates' Disciplinary Tribunal (ADT), and our more recently announced inquiry into the process of becoming a Manx advocate. This inquiry will also include consideration of the proposed Public Defender Unit.

Today we will be hearing from representatives of the Isle of Man Law Society.

Before we begin, could I please ask everyone to ensure that any mobile phones are switched off or on silent, so that we do not have any interruptions; and for the purposes of *Hansard* I will also be ensuring that we do not have two people speaking at once.

EVIDENCE OF
Ms Jane Gray, President of the Isle of Man Law Society,
and Mrs Kathryn Clough, Mr Peter Clucas, Mr Terence McDonald, Mr Tim Swift
and Mrs Victoria Unsworth, members of Isle of Man Law Society Council

Q160. The Chairman: Thank you all for attending today. For the record, could you please state your name and the capacity in which you are appearing here today.

Ms Gray: Yes. Good morning. My name is Jane Gray and I am here appearing as the President of the Law Society.

The Chairman: Thank you.

Mr Clucas: Peter Clucas, a member of the Isle of Man Council of the Law Society.

Mrs Clough: Kathryn Clough, a member of the Council of the Isle of Man Law Society.

Mr Swift: Tim Swift, a member of the Law Society.

Mr McDonald: Terence McDonald. I am also a member of the Law Society and Council.

Mrs Unsworth: Vicki Unsworth, also a member of the Law Society Council.

Q161. The Chairman: Thank you for your submission, which we have received and had an opportunity to consider. Is there anything you would like to add to that submission before we ask some questions about the information we have received from you?

Ms Gray: We do feel that we have supplied quite extensive answers to the areas which you have raised by way of your email of 7th September, those submissions being filed with yourselves on 30th October, and we do feel that those are quite full in respect of those responses. However, we are open if you feel it necessary to ask any questions outside of those areas.

Q162. The Chairman: Okay, thank you.

Perhaps if we could begin with some questions, and we will all ask you questions at different points. If I could perhaps start with the issue of the legal background and the differences between the Isle of Man and neighbouring jurisdictions, perhaps particularly the jurisdiction of England and Wales, how difficult would you say it would be, for example, for an English solicitor or barrister to understand the law of the Isle of Man?

Mr Clucas: I think that question … I am not quite sure what that question really means, in the sense that if you have got an experienced and trained lawyer from England and Wales I would expect them to be able to understand Manx law; I would not expect them to know Manx law. The gap in between knowing and understanding is that you have to actually apply your mind to what Manx law is. So, if the question was would an English lawyer automatically come into this jurisdiction and say, 'Well, I know what Manx law is because I know what the laws of England and Wales are,' then I would say no. Notwithstanding there are degrees of overlap in many areas, there is a danger of glossing over where the gaps are, the differences.

Q163. The Chairman: So, as an experienced lawyer from another jurisdiction, particularly England and Wales, in applying your mind to those differences what would you say are the real differences that would require significant application of mind?

Mr Clucas: Well, I think there are two areas that spring to my mind immediately. Really, it comes down to what the sources of law are. I do not have to tell this distinguished panel that the primary source of law is obviously Acts of Tynwald and secondary legislation that is made under those Acts of Tynwald, but equally I suspect the panel will be very aware that when we enact Acts of Tynwald, two things: one, we sometimes enact bespoke legislation for the Isle of Man; secondly, when we perhaps look to England and Wales, where I think the question is particularly aimed at – if we looked at that jurisdiction and Parliament in England and Wales, to legislation that they have passed that we may then subsequently look at and adopt, we adopt it very often with modifications, and modifications may mean not just slightly changing the law but quite often missing bits out that they have in England and Wales.

And then a third area is in relation to the common law. During my lifetime as a lawyer in the Isle of Man I have seen a very significant move away from just blindly saying, 'What is the

common law of the Isle of Man?' and if it does not address the issue, 'What is the common law in England and Wales?' and that should provide the answer. Even where in instances nowadays where the common law of England and Wales may provide an answer, it does not necessarily mean that the Manx courts will look to England and Wales common law to provide the answer for the Isle of Man, so they will interpret the law, whether it is interpreting statutory law or interpreting the common law in the Isle of Man, with a much broader view on worldwide common law jurisdictions nowadays.

I am not saying that is an exhaustive answer, but it provides some examples of where you would say someone from England and Wales needs to know how the Isle of Man has enacted its Acts and passed its secondary legislation and then interpreted and applied it to understand … without necessarily seeing it all come from England and Wales with just a different type of motif at the top of the Act.

Q164. The Chairman: So the danger is the assumption that it is all the same when you have explained the ways in which it can be different, but in terms of similarities – as you have referenced common law jurisdictions, and the Island is a common law jurisdiction in common with a number of other common law jurisdictions – what would you expect of a lawyer from another jurisdiction in terms of their practical experience, skill set and so on and their ability to apply their mind and understand the differences between Manx law and the law of their home jurisdiction?

Mr Clucas: Well, I think the answer has to be a lawyer who is prepared to apply their mind to it, who is qualified in England and Wales, or for that matter in Scotland, or for that matter in any of the leading common law jurisdictions. I would expect them to be able to apply their mind to Manx law. The proof is in the pudding in that we have many Manx advocates who have come to the Isle of Man having previously been qualified lawyers in other jurisdictions and particularly other common law jurisdictions, who have passed the Manx Bar exams and become qualified Manx advocates in a relatively linear process without expressing any great difficulties.

***Mr McDonald*:** If I could deal with one personal issue from about 15 years ago, when in fact the prosecution department obtained an opinion from an English criminal lawyer, QC Treasury counsel, and in fact he had given the opinion based on English law; the actual offence did not exist in this country. And that is the problem: foreign lawyers would not actually know that there was a difference in the law.

Q165. The Clerk: But surely temporary Deemsters come from England all the time, don't they?

***Mr McDonald*:** Yes, but they are guided by counsel.

Q166. The Clerk: But they do not have to take an exam?

***Mr McDonald*:** No, but they are guided by counsel. The offence is there before them and they are guided by counsel with regard to those differences. In fact, if we are talking about say a criminal Deemster, basically he is just a chairman. It is the jury who make the decision and before he sums up, if he is a sensible foreign Deemster, he will make himself aware of the law, but the person who in fact guides the Deemster is counsel. It is counsel who reminds any Deemster of what the law is.

Mr Swift: I think if I can add to that, that is why we are called 'counsel', because one of the functions of a courtroom lawyer is to counsel the Deemster as to the legal principles and to interpret those for them to then adjudicate on that.

With regard to actually coming over here, I came over here some eight years ago. I had been qualified for 25 years as a solicitor. I had been a partner in two firms in the north-west for 15 years and I have been a part-time judge for eight years. I fully accepted and understood why there was a need for the requalification and I can say from personal experience that Manx law … If you come over here and expect to apply English principles – you are all trained as lawyers, but the nuances and differences if you do not have the knowledge can actually mean that you are not doing your job properly. And there are various areas where the law is very different indeed. In one practical area, which is in civil litigation, we introduced rules in 2009. They were originally based on the English rules, but now our rules are quite different in major areas to those which are in England and Wales because they have changed over there and they have not followed the same procedure as in England and Wales.

So, from personal experience the need and breadth of knowledge … I used to practise in professional negligence work. You need to have a knowledge of how conveyancing works here, what land law is, what criminal work involves, what procedures are involved. You need to have that breadth of knowledge. And certainly in relation to various areas of work you need to have a large area of knowledge. For example, if you are a commercial lawyer you might get involved in some litigious matters and therefore you need to have a knowledge of that, and then you deal within your own practice or with colleagues with the various ramifications of that. So a breadth of knowledge is vital. Although we are all specialists – or most are specialists – that breadth of knowledge is important.

I certainly accepted and understood the reason for requalification and I did not find it onerous. It was onerous, but no more onerous than appearing in court.

Q167. The Clerk: But were you not expected to take papers in things that you knew about already? Was it all so different, or was it in fact a bit unnecessary in some cases?

Mr Swift: I do not think it was unnecessary, because certainly to do with the land law areas, constitutional areas and commercial areas they are all quite different.

Q168. The Clerk: How many papers did you have to take?

Mr Swift: The normal four papers which cover the whole range of Manx law.

Q169. The Clerk: Criminal law?

Mr Swift: Criminal law, yes.

Q170. The Clerk: Do you do any criminal law?

Mr Swift: I do not do criminal work, but I do act for people who do in the criminal law work.

Q171. The Clerk: You can see what I am driving at. There are quite a lot of jurisdictions that allow common law trained lawyers to qualify on a rather faster level on the basis that they realise that if you have sat as a temporary judge and you are a solicitor you know, much better than some 22-year-old with a law degree, how things really work and you could adapt much faster.

Mr Swift: Well, there is the area where you have experience, and certainly experience is vital, but there is no replacement for the knowledge.

Mrs Unsworth: If I can address the point, the position in the Isle of Man is if you are qualified in another jurisdiction you only have to do 12 months' articles, so it is a quicker qualification

process in the Isle of Man for somebody who is qualified and experienced in another common law jurisdiction. So they are not going through the same two-year process that somebody who comes straight out of university is. So there is a difference in the process, but the exam process is one which is very important in order to understand those differences, whether they be fundamental or statutory differences, or procedural differences. The reference that Tim made to our Rules of Court in civil court – that yes, the law of torts is fundamentally the same here; there are differences but it is fundamentally the same, but the exams focus on the procedure applied to a claim in a Manx court, not to the fundamental basics of the law of tort, for example. And the same in criminal: some of our offences are different, our sentencing policy is very different, and the criminal exam focuses on those differences. And again the procedure … our Police Powers and Procedures Act is different to the Police and Criminal Evidence Act of England and Wales, so there are significant differences procedurally, which it is important that those coming from other jurisdictions understand.

If we looked at this from a different angle, if I want to go and qualify as an English solicitor having got an English law degree and having passed the legal practice boards, both of which were undertaken in England, I still have to sit a set of exams, I still have to meet additional criteria to show that I am competent to practise in England and Wales. So it is not only an Isle of Man jurisdiction issue; the same would apply if I wanted to go to Jersey and practise before the courts of Jersey, and again if I wanted to go to Guernsey and practise before the courts of Guernsey. So we are not the only jurisdiction within our immediate neighbourhood that applies this sort of requalification with exams and tests to prove that you are competent to practise. I think that is very important to remember: it is not unique to the Isle of Man.

Mr Clucas: Can I just add three things, very briefly? One is I am not aware that we can reciprocally do it the other way round. England and Wales seem to think we are significantly different, that we cannot just go into their jurisdiction and cherry pick practice areas to say, 'I have been doing law in a specialised area in the Isle of Man for 30 years, so please give me a practising certificate to do it in your jurisdiction.'

The second point is that I think there is something in saying even where … If I can take an example that you may be familiar with, contract law is an area particularly perhaps where one would say Manx law, both statute and common law, has tended to stay in place to a closer degree with the laws of England and Wales, and you will get things like in England the Unfair Contract Terms Act and in the Isle of Man it is called the Misrepresentation and Unfair Contract Terms Act, which is actually a bolting together of their Misrepresentation Act and their Unfair Contract Terms Act into one statute in the Isle of Man. The Clerk's question, yes, on one level he is completely right, of course, that somebody who has been working with the Misrepresentation Act and the Unfair Contract Terms Act in England for 25 years is going to be absolutely familiar with how it works, is going to be absolutely familiar with the principles that the courts in England and Wales have established by, through case law, interpreting the English Acts as to how that legislation is meant to be applied – but they do not know it is called the Misrepresentation and Unfair Contract Terms Act unless they do some study of Manx law. My trivial point to make at that point is that if you address a Deemster in a skeleton argument and get it wrong, they will get pretty miffed at you and they expect you to quote the Manx case law under the Manx Act, and just because you have trained in England you will not know that unless you have studied it.

You might say, 'Well, what difference does it make?' Well, on one level I see exactly where you are coming from, but on another level it comes down to the integrity of being a Manx lawyer rather than an English lawyer in a separate jurisdiction.

***Mr McDonald*:** The basic problem is you come here with a lack of knowledge, and that is where you make a mistake because you do not know that the law is different. Even where we may have the same title, we will have Manxified it often. When I first came it very much annoyed me because I thought, 'I know this Act,' and then I would look at it and think, 'Oh, my

gosh, no, that particular section is not exactly the same because it has been Manxified.' This is where the problem can … How often do we get people coming in saying, 'I've got a negligence claim, I've fallen over, and I want you to do it on a no-win no-fee basis'? Well, we do not have it here. We do not have in the Highways Act here – is it 1954? There are major differences.

Q172. The Clerk: But the law changes all the time. Once you take and pass an exam, your fundamental skill that people expect you to have is that you keep up to date. *(Interjection by Mr McDonald)* Yes, of course, but aren't you really just saying that somehow there is something preventing common lawyers from another jurisdiction learning a fresh set of rules which have slightly different names, slightly different emphases? What is the reason why you have to sit an exam?

***Mr McDonald*:** To ensure that you do know that the law is different. The law is different; the land law is completely different. You see, even if you are a litigation lawyer dealing with a variety of cases, if there is a particular problem to do with a bit of land you need to know our law is different. As my learned friend has said, we just could not go to England, Jersey, Guernsey or France.

In some ways, to be perfectly frank, I am rather amazed that … 'Are you certain that you are legally qualified?' I have actually asked that question. *(Laughter)*

Q173. The Chairman: My one comment there is my own specialism by background is, of course, employment law, and it is perfectly open to me to go down to an employment tribunal here and represent someone.

***Mr McDonald*:** Well, that is wrong.

The Chairman: But it is in fact –

***Mr McDonald*:** The Law Society –

Q174. The Chairman: I do not have to say I am not an Manx advocate.

***Mr McDonald*:** Exactly, but in fact we have been rather upset about that, but the Employment Tribunal decided to allow anybody to come and actually do that, so it is not in particular, and with all due respect our employment law is different, so in fact –

The Chairman: I agree, and I –

***Mr McDonald*:** That is a very bad example. So you are saying you are quite happy to go along to a Manx tribunal not knowing Manx law and represent somebody?

Q175. The Clerk: Excuse me, sorry, the Equality Act has just rewritten all of Manx employment law. Should everybody who is practising in that retake the exam?

***Mr McDonald*:** No, but they should bring themselves up to date on it.

Q176. The Clerk: Well, like any common lawyer.

The Chairman: I think my point is –

***Mr McDonald*:** Yes, but we know it is different.

Q177. Mr Hooper: That is quite a relevant area, actually. Employment law, as Mrs Poole-Wilson has just identified and you have just said yourselves, is very different to the UK, but we do have an Employment Tribunal that allows non-Manx advocates to represent people at the Employment Tribunal.

Does the Law Society have any evidence of people who have been badly represented, poorly represented, inadequately represented as a result of them allowing non-Manx advocates to represent clients in front of the Tribunal?

***Mr McDonald*:** Well, that is difficult to actually –

Mr Hooper: I am only asking because that seems to be the fundamental argument underlying your case here.

***Mr McDonald*:** That is very difficult because tribunals especially make decisions on a variety of factors, so the only people who would know that perhaps are the Tribunal, and perhaps you should address the Tribunal and ask them.

Mr Swift: I think the only thing I would say in conclusion would be that all our neighbouring jurisdictions accept the need and requirement to be qualified within their own jurisdiction in order to practise there.

Q178. Mr Hooper: I do not think there is any real question about that at all, actually. The question is more about the way that individuals become deemed to be qualified. So if you want to qualify as a UK solicitor, for example, from here, from the Republic of Ireland or from another common law jurisdiction, you can go through fast-track schemes where you can get practising certificates in specific areas, whereas the Isle of Man does not allow that. It requires that you undertake a broad set of examinations across the spectrum of Manx law. It requires that you undertake a two-year pupillage, essentially, with a Manx firm. That is quite a restrictive and quite an onerous process –

Mrs Unsworth: Can I stop you?

Mr Hooper: – and the question really is: is that necessary?

Mrs Unsworth: That is not correct. If you are qualified in another jurisdiction you do not need to undertake a two-year pupillage; there is a fast-track process which is a 12-month training contract. Also, it is incorrect to say that qualifying here I can go to England and get a limited practice certificate without more. I have to take a set of exams and I have to show that I am competent in a wider range of areas than the area that I am qualified in, which is civil commercial litigation. I would have to do a broader set of exams and show a set of competences which go through advocacy, debates, letter writing and preparing memos. You have to go through a skills test that is no more onerous in the Isle of Man to qualify here than it is to go to England.

If I can come back to Mrs Poole-Wilson's question, in the Isle of Man there are only certain areas of law which are protected areas of law in which you must be a Manx advocate specifically to practise in, and employment is not one of those areas. As a professional from another jurisdiction you must have a practising certificate in that jurisdiction, and one of your professional conduct rules, exactly the same as one of our professional conduct rules, is you must not practise in an area of law unless you have the relevant expertise and experience to do so. So if Mrs Poole-Wilson decided, as an employment lawyer, to walk into a commercial practice and start giving advice on a complex commercial transaction she would be committing a disciplinary offence; whereas if she is an employment expert and she goes into an employment

tribunal in the Isle of Man, yes the law is different but as an officer of the court in England and Wales, as a proper professional, Mrs Poole-Wilson will ensure that she has recognised the differences for Isle of Man law and will ensure that she protects her clients' interests by applying the law correctly.

At the end of the day, the requirement to qualify in this jurisdiction and for any other jurisdiction is not about us as professionals; it is about ensuring public protection and that those people who are allowed to go and represent members of the public, particularly in court matters, where they are probably at a stage in their life when they are vulnerable or they are going through something that is quite traumatic or difficult for them to process … that they have competent legal representation, and the way to test competence is to have a set of assessments.

There are changes in England and Wales coming through to assess competence in a different way to what the present situation is. The Isle of Man Law Society is very alive to that and we too are reviewing our own route to qualification both for those coming through the university route, coming out at the age of 22 or 23, and also for those coming through from other jurisdictions. So we are alive to the changes of our immediate neighbouring jurisdictions and we will amend our own processes – we will have to because our process is set out in statute and certain of those requirements will go – and we will reflect upon how other jurisdictions' qualified professionals qualify in this jurisdiction.

So we are not closed to changing, but we need to assess that those coming from another jurisdiction are competent, to protect the public, and ultimately that is a function of the Law Society.

Q179. Mr Hooper: Hold on a second. That is not the case, because you have just said there is no assessment. If someone wants to practise employment law on the Isle of Man, they are entitled to do so provided that they are, in their own view, competent to do so.

***Mr McDonald*:** Yes, but I am saying –

Mr Hooper: There is not regulation around that. The regulation is specifically around reserved areas of law, as you have already said.

Mrs Unsworth: But if they are regulated in their own jurisdiction –

Q180. Mr Hooper: That is the question I am trying to ask: if that is acceptable for some areas of law where there are admitted differences, why is that approach not acceptable in other areas of law which are currently reserved?

The Clerk: Terence McDonald.

***Mr McDonald*:** I have explained to you that in fact the Law Society is against that. However, the Employment Tribunal have decided that. We cannot argue with that, but in fact you have answered your own question. You should not allow people who do not have experience of employment law to represent people who have a complaint in relation to Manx employment law. So that is a question which should be addressed to the Tribunal. We have tried to in previous years and they have ignored that. But I agree with you, there should be no difference. Only Manx-qualified lawyers should appear before employment tribunals.

Q181. The Clerk: Can qualified English solicitors do conveyancing on the Isle of Man, as long as they do not go to court?

Mrs Unsworth: No. You must be a Manx advocate to –

Q182. The Clerk: Can you be a registered legal practitioner?

Mrs Unsworth: No. You have to be a Manx advocate to convey land. That is one of the protected areas.

Q183. The Clerk: But you can give advice about it, rather than just finish it off?

Mrs Unsworth: We have conveyancers who are English solicitors, who are part of the conveyancing process but ultimately the advocate signs off the process, signs off the documentation to convey the land, and ultimately if something goes wrong in that process then it is the advocates' firm that (1) would be culpable and negligent, so the compensation would be paid by the insurance; and (2) it is the advocate's firm who would go before the Advocates Disciplinary Tribunal if there was a disciplinary offence, in the same way that any member of staff of a law firm can make a mistake or do things … if you have got paralegals, or you might have English solicitors working in a firm, in a different field than conveyancing, who might give advice and get it wrong. At the end of the day we are all human, and the reason we have got protection for insurance and disciplinary tribunals in place is so that those mistakes can be dealt with, but ultimately it is the firm's responsibility to ensure that their staff are trained and giving the correct advice.

Q184. The Clerk: Yes, but registered legal practitioners are working at the appropriate level to give advice; they are not working below their level of competence. So there are quite a few people who are not Manx advocates in the sense that they have the certificate, but they are effectively acting as lawyers giving advice to a high degree of expertise.

Mr Clucas: Could I come in on that and say I agree with you, they are, but I think the next level of questioning is you have got to say really it can come down to what you are holding yourself out as and what your insurance position is.

At the end of the day the client is looking for two things. They are looking for you to get it right and get a process done, and quite often that is what they are focused on and they are not focused on what qualification you have necessarily got straight after your name, especially if you are demonstrating competency to get it done. But they also want the comfort that when it goes wrong – and it was not meant to go wrong, but human beings make mistakes; we all make mistakes and things go wrong – there is a process to pick it up, and in particular there is usually an insurance policy backing the lawyer who is giving that.

So it comes down to two things, really: is the lawyer doing something that they are allowed to do as a matter of law, because if they are not that might affect their insurance position; and are they holding themselves out as being something that they are not? If they are very honest, if they are not in a restricted practice area – for example, we have talked about employment not being a restricted practice area – anyone can give legal advice. You can go to anybody down the pub tonight and take some legal advice, as long as they are being open to you and saying, 'I haven't got a qualification in the world and I don't know anything about the law but here's some legal advice.'

Q185. The Clerk: But they cannot take a fee for it.

Mr Clucas: No, but it is a point of, really, just transparency. That is all I am saying. It is a point of transparency if you are saying … And then quite often you get non-Manx-qualified people giving advice in some of these areas but they are doing it under the guise of an Isle of Man firm of advocates and it is the firm of advocates ultimately that is giving the advice. They are not acting in their personal capacity and it is the firm of advocates that has the insurance cover.

Q186. The Clerk: Have you ever instructed a senior counsel from England to come and appear in a Manx court?

Mr Clucas: I have on many occasions and I have got them, obviously, subject to getting them a licence to appear, because there is a licence in process and it is not an automatic right.

Q187. The Clerk: Picking up on Mr McDonald's earlier point.

***Mr McDonald*:** Yes.

Mr Clucas: And in my invariable experience, however senior they are they want to work with a Manx advocate, for two reasons: even if they are effectively leading the case and leading the argument, they want to ensure that a Manx advocate is there to ensure that they do not trip over the points I was making before about slight modifications they did not know about or gaps in the law, that the leading Manx case law is being cited to the Deemster; and they want to know that Manx procedure and practice is being followed and that they do not make a fool of themselves in a Manx court. So they work very closely with Manx counsel in my experience and effectively the more senior they are the closer they like to work with Manx counsel; they have a higher reputation to protect.

Q188. The Clerk: So you could have a situation where two leading counsel from England are appearing before a judge who is a temporary judge from England, so effectively the people who speak up are qualified elsewhere?

Mr Clucas: That has happened, so of course it could happen, yes. But of course Manx counsel are in court as well.

The Clerk: Of course, yes.

Mr Swift: And of course that is covered by specific situations, so the everyday running of Manx courts is by Manx advocates, but specific areas get licensed counsel for particular types of cases because we are an international jurisdiction.

Mrs Clough: Can I just follow up on one point there as well. There are a number of authorities now which are available online, dealing with applications for the appointment of Manx counsel. On many of those occasions those applications have been refused and it does make it very clear that there are very limited circumstances in which it would be appropriate. As Mr Clucas has said, in those circumstances as well there would be the back-up and support and guidance from a suitably qualified Manx advocate to ensure that the statute or the common law, whichever it was, was being properly followed in that particular case.

If I could just pick up on one point as well whilst I am speaking, going back to the employment point and the question you raise as to whether or not there had been any complaints about non-Manx-qualified advocates and the representation that they provided, I do not know the answer to that off the top of my head, for two reasons. First of all, the employment area is not an area that I specialise in; it would be something I would have to go away and make an enquiry about to see if there were any such cases. But secondly, if that were to be the case, as the Council of the Law Society we would not necessarily know that because the complaint would not be about a Manx advocate, so it would not necessarily come to our attention; it would perhaps go to a different jurisdiction as may be appropriate. If it is necessary and you wanted us to make enquiries, then no doubt we could see what information we could provide, but I do not necessarily know the answer to that question as we sit here today.

The Chairman: Thank you.
Mr Robertshaw.

Q189. Mr Robertshaw: Thank you very much.

We touched at the beginning in our exchanges on the issue of the relationship between knowledge and exams and specifically we were interested in, as the Chairman indicated, the transition through exams and the adoption of Manx law knowledge in that transition. In my reading of the information you very kindly provided to us I had got the impression – and you will correct me if I am wrong here – that there was a very clear need in the exam process to have accumulated a lot of knowledge which then resides in your mind, as it were.

I just want to ask you if you would be kind enough to respond to the Cambridge Exam Board, which I think is the highest exam board in the UK with regard to exams as a whole, and their concerned expression last week when they were starting to call into question the whole concept of how exams are working insofar as, historically, exams at various levels – it would seem to me including yours – rest very strongly on the issue of acquiring knowledge, knowing it and applying it in the exam, rather than necessarily having a different capacity and a different ability to access knowledge on a reference basis. In other words, Cambridge Exam Board are saying the world is changing quickly, we have got to be more flexible, people are going to have different roles and therefore it is not specifically a question of accumulating knowledge in one's mind but being able to exhibit the capacity to access it.

I just think that quite profound thought process that is now going on with regard to the senior exam board in the UK has relevance here. Would you agree that that might be the case, that the issue we should be examining in a solicitor transferring from England and Wales to the Isle of Man should be in a capacity to know how to access Manx law rather than being specifically tested upon it? Anybody?

Mrs Unsworth: I have not read the paper that you refer to specifically, so I cannot address the commentary in that paper. However, I do not necessarily disagree that … and we all know those people, whether we were at school or university, who had a photographic memory almost – they could remember and regurgitate for the purpose of an exam but they could not apply the information that they had learned in a practical way. Therefore it is very important, we feel, that there are practical elements to exams.

Particularly as a lawyer one of your fundamental skills is knowing where to go for the answer, not necessarily knowing the answer off the top of your head, and I can assure you that practising lawyers do not sit at their desks thinking, 'Oh, well, when I sat the Manx Bar exams I remember learning something about this – what did I learn?' You would go and look it up and dig around, and that is a very important focus.

When you do your law degree there is an entire first-year syllabus that goes into how to find law, how to apply law in a practical sense, how to look at a statute, how to find case law and bring that together. As the SRA are making their changes to the exam process in England and Wales, and part of that is looking at whether in fact a law degree is required at all – and this is going back to the system some 20-plus years ago – we are watching that very carefully with a view very much to changing to ensure that our exam process here mirrors what is required of competent advocates here. That is not necessarily a process of remember and regurgitate over the course of four days. However, it is very important for an advocate to have that ability to remember and recall an awful amount of information, because when you are in court, for example, you do not have the luxury of being asked a question by the Deemster and saying, 'Ah, I didn't think about that – can I have half an hour to go away and do some research?' You have to have the ability to retain a lot of information – law, case law and the case in itself, the factual matrix of your case – in your head in order to deal with the court case. So, in itself, that memory and recall is still fundamental to the job that we do as lawyers.

Q190. Mr Robertshaw: But surely in a court environment you are being very specific, and if the professional concerned had done their job properly they would have done the research and therefore would have easy recall to that specific information.

The issue I am testing here is the information you have provided me, which suggests very strongly that you rely in the exam process on conversion to memory. Where is the process you are examining on capacity to be able to use those resources rather than entirely on memory and knowledge already contained in the brain? I do not see that you have told us that. You are saying that it is important, but is the balance between those two matters expressed in the conversion exam process at the moment?

Mrs Unsworth: Yes. So, for example, if I take the head 1 exam, which is the civil paper, the exam is a practical-based exam – for 70% of the marks it is a practical-based exam – and it starts from the beginning of a case and the questions throughout go from the start of the case to the end of the case. You need to know your fundamental law. Whether it is a breach of contract case or whether it is a personal injury case, that is your fundamental legal knowledge. But you also need to understand the Rules of Court, which you have in the exam room with you. You are given a practical scenario. You have to read the scenario, you have to apply it to the legal cause of action and then you have to use your Rules of Court to answer the question in a practical manner to say 'This is the advice that I would give, this is the step that I would next take.'

So it is not just all about recall of the law and putting that on a page, and in every single exam paper there are practical scenarios in which you are asked to advise your client and then there are some essay-type questions where you may get a quote and 'discuss' or there may be a 'compare and contrast the difference between a 1931 Act company and a 2006 Act company', for example. You do not necessarily need to be able to give advice but you need to understand the differences between the two companies, so that might be a more essay-style question. But there is both a practical application and a test of knowledge and recall on most papers and you cannot get through the Manx Bar exams without … It is compulsory on each paper to answer a practical-based question, so you could not do it all based on essay-type questions, recall and regurgitate. So there is a practical aspect to that, which is all about understanding, particularly with the civil paper and the criminal paper … On the criminal paper you have the Police Powers and Procedures Act codes with you and you have to apply those codes to the scenario that you are given.

So there is a practical aspect to it, but we are reviewing the entire process as to what is going on in England, and in England they are moving away from an exam-based set. They are considering moving away from a degree altogether to go back to a time where you could do five years' articles without having a degree, so you could be sat next to your principal for five years in the way of an apprenticeship. So you are learning on the job, but there is still a set of assessments in that process to show that you are competent in the ability to practise as a lawyer. That is one aspect that we are considering as to whether that is an appropriate mechanism for qualification also in the Isle of Man or whether we feel as a jurisdiction there still has to be that basic level of educational attainment, or whether there is a balance somewhere in between the two.

Mrs Clough: Can I just add one point on that as well. The process of exams is obviously just one part of the qualification in the Isle of Man. As my colleague Mrs Unsworth has already indicated, that is part of either a one-year or a two-year training contract, and during that time within the firm and assisting other advocates you will be required to demonstrate certain abilities such that at the end of that period, when there is an interview with the Law Society, it is clear that you have demonstrated a wide variety of competence, of which the exams are just one part.

Q191. The Clerk: In that 12-month period, how many areas of law are you expected to work in: one, or several?

Mrs Clough: I am going to pass you to Mrs Unsworth about this.

Mrs Unsworth: You must sit in three different seats, three different areas of law, one of which must be contentious and one of which must be non-contentious.

Q192. The Clerk: And how is it supervised?

Mrs Unsworth: By the principal. We do not have an express set of times, so we do not say you must do a minimum of six months in each seat, because whilst that may be acceptable for a large firm, in the smaller firms if you do general practice you may do a will in the morning and you may be sat in a criminal court in the afternoon. So they have to fill out a training record, which is submitted on a six-monthly basis and reviewed by the Council of the Law Society's committee that deals with qualification. We review that to ensure that they are meeting the requirements. They have to show a certain set of skills which are listed in the handbook – and that mirrors the set of skills that you must perform in England and Wales – so that we can assess that they are covering a broad aspect of law and covering the skills that are necessary.

Ultimately it is the training principal's requirement to ensure that their trainee is trained to the requisite standard. The principal has to sign their training record every six months and at the end of the process, when they come to apply to be commissioned, the principal signs a declaration saying that they have been suitably trained and that they are fit and competent to enter the profession as an advocate.

Q193. The Clerk: Does anybody ever fail their articles?

Mrs Unsworth: It has been known.

***Mr McDonald*:** And on several occasions we have, to use a Scouse term, 'knocked somebody back' to go back and get further training.

Mr Swift: I think there are four basic principles which are applicable to Manx advocates, doctors, accountants, all professionals. There is a basic knowledge they must possess, because without that they cannot actually function; they must have the knowledge of how to find out information and they must have the ability to apply that. That is the fundamental area and those are the fundamental points which need to be tested. The way you become a professional is to have those key areas tested to become qualified, and those are essential in order to protect the public.

The Law Society in England and Wales are looking at how they can change that to address those major concerns, and we are flexible with that. We are not saying anything is written in stone, because things are not, but I think you have got to be … For a profession, whether it is doctor, surveyor, anybody, those are the key areas. You must have the knowledge, you must know where to find further knowledge and you must be able to apply it, and you must be able to demonstrate to the public that you are qualified to do so.

Q194. The Clerk: Is it true that one major difference between being a Manx advocate and other professions is that once you get your certificate that is it for life and that there is no continuing professional development that you have to undertake, no sense of proving that you remain competent?

Mrs Unsworth: We do not have a requirement of a number of hours of CPD. We do not say you must do 30 hours of CPD annually and you must produce your certificates to us. We have never had that. We do have a practice rule that says that an advocate must only practise in areas of law in which they are experienced and are competent to do so. So that is a requirement on the advocate to ensure that they are not going off on a folly of their own, doing things that they do not know how to do or they are not up to date on. And if they do that, then they can go before the ADT and ultimately, if it was a serious enough breach, they could be struck off from practice.

In England and Wales what happened was they had a compulsory CPD requirement. What they found in the SRO was that solicitors were going along at the end of the CPD year to any old court just to get their hours up; so they were not doing relevant CPD, they were just meeting the requirement to put a number on a piece of paper and file it as a return. So that system did not work and in England and Wales they have abolished compulsory CPD to a reporting factor, where you just have to confirm that you remain up to date and competent.

We are not averse to putting in place a system where we have practitioners say 'I am up to date and competent', but we do not feel that it is a sensible way forward to dictate a specific number of hours, because somebody in a developing and fast-paced, changing area of law may need 30 hours of CPD, but somebody who is doing an area of law where there is not that much change might not need that level of CPD. So one size does not fit all. A practitioner must be able to assess what level of updating and knowledge base they need to continue on an ongoing basis.

Q195. The Chairman: Thank you.

Can I ask, as a fused profession in the Isle of Man – because it is not immediately clear to me from the documentation you sent through about the exam syllabus and what is covered – to what extent is advocacy as a skill set examined, tested? Can you let me know a little bit about that, please?

Mrs Unsworth: Advocacy is not examined presently; however, it is in our training handbook that trainees are expected to attend the advocacy training that is put on annually.

We provide currently a minimum of a two-day advocacy course, which covers both civil and criminal advocacy skills. That is provided by off-Island providers who fly in with a number of barristers who deliver that training over the course of two days.

In addition, our local judiciary very kindly give up their time at weekends to preside over mock courts, which we expect the trainees to attend. In a safe environment, where there is no client at risk, no lives at risk, they can stand up and they can practise their advocacy skills. We use real-case scenarios. They have the access to all of the legal materials that an advocate would have and they also have access to mentors, who are senior practitioners who have agreed to provide their time for free to assist in the process. They get up on their feet and they have a go at advocacy and they get feedback on the day both from the senior advocates and also the judiciary, but there is that peer review as well, which is very important because standing up in court and speaking can be very scary, particularly when you are newly qualified, and the pressure is only enhanced by having your client sat behind you, drilling their eyes into the back of your head, making sure that you are word perfect with their case. So, to ensure that we can temper that fear factor, we do provide that in-the-courtroom training to get that skill set, but it is not examined presently.

***Mr McDonald*:** But we are considering that because we do feel it is a vital area, bearing in mind, of course, that a lot of advocates – well, not a lot, but not every advocate wishes to go to court.

While we are on that point – and I am sure that we will come on to it – this is the importance of this idea of the Public Defender Unit, because young advocates actually get more training in the summary courts. Most advocates who go into commercial and litigation have actually done

their basic training in the criminal summary courts – I am sure we will come to it – and that apparently is going to disappear, and that is a major training area.

Q196. The Chairman: We will come back to the public defender proposals, actually, because it is an area we would like to talk to you about, but just to –

Mr Swift: Just one last point about the fused profession – that is of course something which is very different to us here than to England and Wales. I was a solicitor. I had experience of advocacy but the actual skill sets of a solicitor are quite different to a barrister, and so that is something where we are very different, and in order to be able to provide a good service you have to have both sets of skills.

Q197. The Chairman: My one question to follow on is that what you have described about the new trainee who has just done their academic qualifications and is now training to go into the legal profession … Does the same approach apply for the transferring solicitor, barrister, person from another jurisdiction who potentially, in transferring to the Isle of Man, has already built up a specialism, an area of practice, and it is their intention in line with practice rules, whether you look at them here or in their home jurisdiction, to stick to what they know because that is what they are competent at and they would not be advising in an area that they were not competent in? But perhaps if they were not going to appear in court – it was never their intention to be an advocate – would the process you have just described apply equally for the transferring lawyer?

Mrs Unsworth: It does apply equally to the transferring. In recent times we have had a number of transferring solicitors in the commercial field who have gone through that process, and when asked for feedback on the process I have not yet received any criticism of them having to go and attend the advocacy training or to sit in three different seats and do a non-contentious seat and a contentious seat. I have not had any kickback on that from any of those qualified in other jurisdictions who have come through, and in fact it has been positive feedback that we have had from all of them because it has just reinvigorated some of the skills that they had long forgotten and just gave them a fresh perspective on how to do their job in the field that they are specialised in.

The Chairman: Thank you.

Q198. Mr Robertshaw: I just want to come back to a point made a few moments ago and perhaps understand what you are saying to me a little bit better. You have said that from a professional point of view it is the accumulation of knowledge, being able to find out and then applying it, and I get that. Where I am troubled is what you are saying there in relation to the advice we have received in writing specifically relating to the transition of an English solicitor to a Manx advocate. What is it in the exam that we test? Is it the process of being able to find out? In other words, during the exam process is there opportunity for the examinee to be able to access and go and find that information out? And to what extent do we recognise that, as a professional coming from another jurisdiction – in this case, England and Wales – they already have exhibited a capacity to express knowledge and the capacity to apply it?

What I am trying to get to here is: are we honing in, in the right way, in our exam process so that we are not replicating competencies that we have already acknowledged?

Mr Swift: Well, I think one of the issues is that the Law Society does not control the actual papers themselves, and that is something which we are quite keen on becoming more involved in.

Q199. Mr Robertshaw: Can I interrupt? Who does? Sorry.

Mr Swift: It is controlled by the Deemsters with external examiners.

Q200. The Clerk: Who are the external examiners?

Mr Swift: We do not know.

Q201. The Clerk: They are people in England?

Mrs Unsworth: Yes.

Q202. The Clerk: Not Manx advocates?

Mrs Unsworth: No.

Q203. The Clerk: So Manx advocates are not setting the exam for Manx advocates?

***Mr McDonald*:** No, and this is something which –

Q204. The Clerk: Sorry, is that true or not?

Mrs Unsworth: It is true.

***Mr McDonald*:** Yes, it is true and this is something which we have been very concerned about for a long time, but we are hoping in fact … I am glad that Mr Robertshaw is pulling a face – sorry, is expressing a certain surprise – because that has concerned us for a very long time and we are hoping what will come from this Committee is that the examination process should come to us.

It is the way it has grown. Every other professional organisation controls its exams. Mr Hooper, who I understand is a professional accountant, his exam was set by his professional body. It has grown. You can imagine in 1732 a couple of Deemsters examining somebody, and so it has grown up like that. So yes, this is a fundamental point. We need to set the exam in discussion with the Deemsters, and a certain external element there has to be. I teach professional examinations – chartered secretaries and accountants – and where I always feel very satisfied is that the exams that my students sit are set externally. They are not set in the university. I also taught at university and I was sometimes … Well, no, I will not go into that. There has to be an external element.

Mrs Clough: Can I just pick up on that a bit further. Just coming back to the broad scope of your question, I think it comes back to a large degree to what my colleague Mrs Unsworth has already said, that the whole process of examinations and whether that continues or whether there is another element to it is something which, as a Society, is currently under review, partly because it is something we always have to keep under review to ensure that the Society remains highly qualified and has a very good reputation and is there to protect the public, but also in recognition of changes which are ongoing in England and Wales. So I think that is a process in which the review will continue to make sure that the aims of the Society are met and that everybody is well qualified.

Coming back, if I may, as well to your point as to somebody coming out of a university degree and a law course as distinct from somebody converting from an English solicitor and whether or not their skill set is recognised, I think the answer to your question has to be yes, because again as Mrs Unsworth has already said, there is only a need to do a one-year training contract as

opposed to the two-year training contract, and I think – and again I am sure one of my colleagues will correct me if I am wrong – a part of what is behind that is recognition that there is a certain skill set already there. It is the conversion point which does become fairly important then, but there is that recognition there in allowing there to be a 12-month qualification period.

Mr Clucas: I just want to add something, just so that it is on the record and the Committee know it – they might well know this already, but I do not think it does any harm to put it on the record. One of the issues that we just have to live with in qualifying as a Manx advocate is we just do not have the compendious versions of textbooks and reference materials that one would have … and certainly coming from England and Wales it was taken as given that you would expect a mature jurisdiction would have. That is a differentiating factor which you cannot get away from. So, even in a sense if I take the example of the most learned and competent English solicitor coming to the Isle of Man, I would have no doubt as a matter of starting point to say that person would easily requalify as an Isle of Man lawyer, but for them to say, 'Oh, yes, that's all right, I only need these three textbooks, that's all I ever look at – that's all I've ever looked at for 30 years,' I would say, 'You won't find any of them dealing with Manx law.'

So there has to be a process of – to address Mr Robertshaw's point, in a sense – how the exam is tailored. I think there is a legitimate argument you can have about how exams are tailored and we do not have the … Our hand is not controlling exactly how the exams are prepared for new qualifying people at the moment, but the way the exams are tailored, for instance, at the moment – and we are where we are because of where we have come from – you have to immerse yourself into Manx law to a degree to be able to pass those exams and to show you have got a competency in Manx law to know where the sources of Manx law are, because you will not find them just on a nice little shelf, all in one line, saying everything you need to know about Manx law is on that shelf. Learning how to find the law is a skill in the Isle of Man which is a little bit more difficult than, I suggest, in some other jurisdictions.

Q205. The Clerk: This is not meant remotely unkindly, actually, because you have put your finger on something really serious, but would it be unfair to say that the process of qualifying as a Manx advocate is out of date and opaque, because there is a process run by Mrs Unsworth very ably where she trains people, who are sent off to be examined by people who you do not know and they may or may not pass, and there is no syllabus that is really like anywhere else and there are no textbooks. *(Interjection by Mr Clucas)* There is a syllabus – sorry, I stand corrected – but there are no textbooks and no materials.

Mr Clucas: It is not for me to challenge what you have just said. To say it is sent to a set of external examiners we do not know … The Deemsters have a role in the examination process. I do not know the full ins and outs of that role and no doubt Deemsters can appear before this Committee and they can be asked, but just for the record I think that needs to be said.

Q206. The Clerk: I am not trying to put words into your mouth, far from it – genuinely.

Mr Clucas: No, I know you are not, but I am just saying that the process is not totally divorced from the Isle of Man.

Q207. The Clerk: No, but it is opaque.

Mr Clucas: Certainly there is a degree ... I do not know how much it is opaque and how much is not; I just do not know, but there may be others before you who know more about that. That is the only reason I hesitate there.

Q208. The Clerk: I am waiting for Mrs Unsworth to say no, it is limited. *(Laughter)*

Mrs Unsworth: I think to be fair to the examiners I would not say it is opaque. I do not know who marked my law degree and I do not know who marked my legal practice forms. I do not know the identity of the examiners when I am at university. In the Isle of Man I know that the Deemsters – the First Deemster and the Second Deemster – are part of the examiners and there are two external Deemsters who are academics. I do not know their identities. Do I need to know their identities? Probably not.

What we do get from the examiners after each round of exams have been marked is feedback. It is generic feedback which goes through the overall issues covered on that paper and where they think the candidates were perhaps lacking or misunderstood what was being asked of them. So, as part of the training process that we as the Law Society deliver, we go through past papers and the feedback with candidates because that is the best that we can do, because we do not have the resources and textbooks that you might have in England and Wales. So I would not say it is entirely opaque. If you go back through the past papers, there is a syllabus; it is pretty wide, but if you go back through past papers there are themes and elements that return year on year. Certainly the issues tested on heads 1 and 2 – that is your civil paper and your criminal paper – are relatively the same processes you are being tested on. In respect the other two heads, head 3 and head 4, you do actually have all the statutes available to you during the exam, so you can take in all of your statutes that cover the issues that may arise in heads 3 and 4.

So I do not think 'opaque' is the word that I would use. Yes, there is certainly room for improvement.

Q209. The Chairman: Okay, I think we have exhausted the process of qualifying as a – Sorry, Mr McDonald, briefly, please.

***Mr McDonald*:** One point: we would wish to keep the Deemsters' involvement because I think it is important in a small jurisdiction to keep the Deemsters involved in the examination process.

Q210. The Chairman: Okay, thank you.

Just moving on, the issue of an area of reform has already come up, which you have talked about. Who, for the Law Society, do you see as the go-to person in Government? Where there is something that needs addressing, changing, who do you see as the Department, the Minister? Who do you go to?

Ms Gray: We do have a relationship with Chris Thomas. Juan Moore – who is the Chief Executive of the Law Society – and I have quarterly meetings with that Minister, and during those meetings … We hope that that is a dual relationship in a sense; it is not just all about the Law Society and things where we feel certain pieces of legislation may need updating, but also listening to what Mr Thomas has to say in respect of issues that he has had raised by his constituents in respect of looking at what do we need to actually discuss for the benefit of the residents of the Isle of Man.

Q211. The Chairman: So that is the legislation reform and issues that Mr Thomas's constituents might raise that would be of interest to the Law Society?

Ms Gray: Yes.

We also had a relationship with Daphne Caine when she had her previous position as the Children's Champion.

We have a quarterly meeting known as the Family Court User Group Meeting. That is chaired by His Worship the High Bailiff, John Needham, and also the First Deemster, Deemster Corlett, and issues are raised there in respect of Family Court matters that arise that need looking at.

There have been a number of matters that have arisen during those meetings. One that is pretty much at the top of the list is the fact that the Isle of Man does not have any services in respect of supervised contact for private proceedings.

Q212. The Chairman: Yes, in fact I was going to say that is something that you have identified in your submission. I suppose my question is: you say this has been raised on several occasions at that group. (***Ms Gray:*** Yes.) My question would be when was it first raised, and secondly who is dealing with that? Who is going to address that, make that change?

Ms Gray: That problem – it must have been over a year from when that was first raised. Letters and correspondence have gone to the Attorney General. We feel that, really, other than the Attorney General, we are not sure actually who else we feel can actually push this forward for us.

But it certainly is a major concern for the residents of the Isle of Man because what you find is that parents, if there is no facility for supervised contact – and these matters can take months going through the court, for various different reasons … and something that I will also address later on within our submissions.

For instance, you may have a married couple or a relationship may have broken down. They may have young children. Often you find the situation where one of the parents may deny the other contact with the children. They may put forward various different reasons as to why that contact cannot take place. Often it is because there is an awful lot of bitterness in the breakdown of the relationship or the father is not paying maintenance and the mother might go, 'Well, if he's not going to pay for his children, then he's not going to see them.' It is really all part of that bitterness and the breakdown of the relationship. You will find that one of these parents will then come to seek legal advice. We then try and negotiate with the other party, or negotiate with their advocate if they have one by that time. Often it is a case of making an application to court. That may take a number of weeks. When you first attend court it will only, first of all, be an initial 10 minutes' directions appointment where the court will have to look to see is this opposed, is this agreed. This process can take months and during all this time that poor parent is going without seeing their children. The children are already very distressed because they have suddenly either had to move out of the family home, they have not got both parents there, they are feeling very lost and they are not having that continued relationship with one parent.

Q213. The Chairman: But as you say, this issue, with all of that impact, has been going on for over a year.

Ms Gray: At least a year. I could not give you the exact date, but it has been quite some time now. Those services were being provided on a charitable basis by the Children's Centre and that was withdrawn, and since that time we have not had anybody to actually fill that gap. I am aware that there are some private companies that do offer the service, but often in a number of these cases they are not in a position to pay for these services.

The Chairman: Thank you.

Q214. Mr Robertshaw: If I have interpreted correctly what you have just said, you were indicating some support for a politician in, in this case, Daphne Caine's role as it was, Children's Champion, which was quite intentionally broad based. Since then we have seen a change of ownership of that particular role and also a diminution of that role in the sense that now it seems to be just cared-for children. Are you comfortable making an expression about bringing that political role down?

Ms Gray: I do believe that Daphne Caine did an awful lot of work. She really had, from what I can see, put her heart and soul into what she was doing in respect of championing for the children of the Isle of Man. I know that she did quite an in-depth, lengthy report. I am not sure as to whether any of her recommendations and issues that she raised were actually seriously looked at at the end of the day.

Q215. Mr Hooper: Can I just ask for clarity, then: the quarterly Family Court User Group meetings – is Mr Baker, the new Children's Champion, attending those?

And the second question: Mr Thomas and the quarterly meetings that you have with him, in what capacity is he meeting with you? He has about 400 different hats, as far as I can tell – it would be nice to know which one of those he is meeting with you … with which hat on.

Ms Gray: We first approached Mr Thomas in respect of seeing whether … Advocates are at the forefront of legislation. They are working within the legislation. The Government is the one that is actually making it. It makes sense to be able to build some form of relationship between those two bodies. That was the idea behind those regular meetings. Often we find maybe the Law Society might approach a Member of parliament on a particular issue and say, 'Look we've got this – is there something you can help with on this?' At the time, I felt that it was important to be able to have a working regular relationship with Government for the sole purpose of being able to work together for the benefit of the Isle of Man.

Q216. Mr Hooper: So that is in his role as Chair of the Legislative Subcommittee of the Council of Ministers, or in his role as Minister for Policy and Reform? I am just trying to wrap my head round exactly what the relationship is. Is it basically a private relationship between the Law Society and Mr Thomas, or did you approach him because he has a specific role within Government and that is the best person, you think, as the conduit for that relationship?

Ms Gray: It is more that he is Policy and Reform and he is legislation, and often where there are gaps within legislation those things will crop up. As advocates we are likely at first hand to see those gaps in legislation and resources, and it was in that respect that we were approaching Mr Thomas.

Q217. The Clerk: You approached him, not the other way round?

Ms Gray: That is correct, yes.

Mrs Unsworth: If I can just add to that, the Law Society is represented on a whole host of different committees with different politicians – there is the Criminal Justice Board, for example; there is a legislative committee; I think there is a DfE committee – so we do sit on many different committees with lots of different politicians who are relevant to the area being addressed, and we are represented on those committees so we do have a working relationship with numerous different politicians in the relevant field they are addressing.

Q218. The Chairman: It is a very generic question if there is multiple representation on different committees, but what priority do you feel issues of … whether it is law reform or issues such as the supervised contact or other areas that you raise, how do you know where those issues are going and how they are being addressed and what priority is given to them?

***Mr McDonald*:** Well, that is the actual point, isn't it, really? We do need a channel. There has to be somebody we need to speak to who can direct us. In England there is the Lord Chancellor – now we do not know who the Lord Chancellor is, anyway – but there has to be somebody who perhaps we can raise it with and say, 'Look, where should this go?'

Mr Swift: Yes, I think both the Law Society and Tynwald have the interests of the Manx people at heart, and we have knowledge which will be of assistance to Tynwald and Tynwald has knowledge which would assist the Society and I think that would be very useful to have a specific channel.

Q219. The Clerk: So a focal point to someone with ministerial responsibility for justice, whatever you badge it, would be useful?

Mr Swift: Well, we want to discuss this in the committee, but personally actually I think that would be very useful.

Mrs Clough: Can I just add one more point on that. We have set out, in the most recent submission that was provided to you, exactly what the functions of the Law Society are. One of those functions is to assist in and promote the reform of law. That obviously feeds into the need that there will be for the function of protecting the public as well. I think that kind of channel or conduit would assist in ensuring the protection of the public at the same time as enabling the Society to fulfil its functions in terms of the promotion of law and the reform of the law.

The Chairman: Thank you.
Could we perhaps move on –? Sorry.

Ms Gray: If I may, just to follow on from that, it is very frustrating for the Society, in that we do have limited channels in respect of where we can raise our concerns. Obviously a number of concerns can go to the Attorney General. If we have concerns about legal aid, previously they were raised with the Legal Aid Committee, but we do find that these concerns do not necessarily get addressed and the problems are still ongoing, from what I can see, or certainly increasing, and we do need to have some sort of channel that we can go down to say, 'Look, there's a big problem here and this really needs addressing.' One of the areas that you have raised is in respect of legal aid – I am sure that that, in good time, will come up later on in this meeting, but there is a problem in respect of that, yes.

Q220. Mr Robertshaw: So really we are saying here that the Law Society needs a capacity, a platform, to express its concerns in a transparent and clear way, and that you are –?

Ms Gray: Absolutely, definitely. On the transparency side of things I find, in our experience, that a number of these committees' meetings are held out as being confidential. That has got to stop.

Q221. The Chairman: Thank you.
Perhaps if we could move on to talk a bit more about the role of the Law Society and in particular your dual role as both a regulator and a representative body for the profession, I wondered if you could talk a little bit about how you manage I suppose what is an inherent conflict in that one of your functions is to protect the public, to regulate the profession in the interests of protecting the public, but equally you are still acting as a representative body. So, if you could talk to us a little bit about how you manage that inherent conflict.

Mrs Clough: If I can start on that very briefly, I think we have touched on this in the most recent submission and in the previous submission, that as the Society or as the Council there are occasions where matters are raised with us that we have to consider that might not be in our personal interest or might not necessarily be in the interests of an individual advocate. We have to consider those issues and we have to determine whether or not a complaint needs to be made to the ADT or whether there needs to be any kind of reprimand and such like. Answering

that very broadly – we have touched on this in our submissions – as the Council we do recognise that there are times when we may have to do things and make decisions that may be designed to protect the public and may not necessarily be in our own interests, but we recognise that and we have to deal with that on a day-to-day basis, and in my experience on the Council it is something that we have most certainly done.

Q222. The Chairman: We touched on transparency just a minute ago in terms of actually raising things with different parts of Government and having that more transparent, and I think a couple of the things that you have touched on in various submissions you have sent to us … Last time we met, in April, we talked about the Breaches Committee and the idea that the Law Society, the Council, has power on recommendation from the committee to reprimand and to impose fines. We talked a bit about whether those decisions are published and whether there is any openness and transparency around that, and I think the answer was you would need to consult the members of the profession on that. I just wondered how, again, you resolve that sense of … when you become aware of things in the Council that might be a significant issue from a public perspective about behaviours, service levels etc., how you are managing that through perhaps your Breaches Committee, but how the public is aware of what some of the issues and matters might be.

Mrs Clough: If I can start on that again, briefly, if I may. In terms of matters that come to our attention in Council, whether they be matters that have been raised by the judiciary or by the Police or other members of the Society, if those are matters which are raised which we believe raise concerns from an education point of view, they are matters which are most certainly taken on board and then we will consider whether or not some training needs to be put on and such like to address any specific areas if there have been any concerns.

The other way that is also dealt with if there are matters is we have a weekly newsletter which goes out to all members of the Society and any issues of concern or any matters of education and such like can be set out within the newsletter to make sure that those concerns are circulated to all members of the Society and raise them.

I think the third point is if matters are referred to the ADT and there are adverse findings against an advocate, those are matters which are made public and there is a notice put in the newspaper so the public is very much aware if there has been a reprimand as a result of a referral to the ADT.

Q223. The Chairman: We did talk extensively last time and I do not necessarily want to talk again about the ADT and so on at this point, but I suppose the difference was that the publicity that goes with the ADT does not seem to be at the same level when it is dealt with internally within the Society through the Breaches Committee.

***Mr McDonald*:** In terms of regulation, the real serious regulation is done by the ADT. You say that perhaps we should publish matters which we have dealt with internally, but those matters are not matters which … It is the level, so some of them are … If they were really serious – in other words if the public were affected – we would in fact refer ourselves to the ADT.

The way complaints work is that all firms have to have an internal procedure and it is dealt with by another advocate or sometimes the senior partner. My experience from my practice is that most – in fact, I would say 90% – of the complaints are dealt with, because often it is a misunderstanding or perhaps a person is not getting on with that particular advocate. If not satisfied then, they can go to the complaints procedure and, I think as we said, that is dealt with completely externally. Again, my experience is that all the ones that my firm has dealt with have been satisfied. It is amazing, really – when somebody listens to an external person they perhaps see things differently.

Often it is about fees – people feel that they are being charged too much for a certain job, or a certain job was badly done. My experience is that that particular procedure, the complaints procedure, is very satisfactory. But then again, if a person is not happy, anybody can go to the ADT. My learned friends will comment on this, but this is the big problem, really. There does not appear to be a syphoning procedure, because some people go with the most amazing complaints, but we do not regulate.

When it comes down to it, it is the ADT which deals with serious complaints and I honestly do not feel it is a good idea for the internal matters we deal with to be published, because I really do not see the relevance.

Mr Swift: I think what we need to address is that we certainly regulate the profession. The position is that if an internal complaint is not resolve, then there is conciliation service which is set up. That is completely independent, so there is no conflict there. If it cannot be resolved by that and it is a serious matter, then it is within the ambit of the ADT. Again, we do not control that, and so that is an independent way of supervising and enforcing procedures.

With regard to publicity, certainly in relation to convictions in the ADT they are published and that is right and proper. With conciliation, that is very personal and private because we are dealing with quite confidential matters a lot of the time, so there is that balance, but certainly in the ADT that is published and that is where the serious matters are involved.

Mr Clucas: Can I just come in on this. We need to be very precise as well about what we are talking about, because the vetting of the issue that comes before the Society and usually before its Council can often dictate how the matter is dealt with.

Three procedures immediately come to my mind: the involvement of the ADT and the interaction between the Society and its Council and matters going to the ADT; the second is the conciliation process, which is an independent conciliator, and how things might come before the conciliator; and the third is the internal mechanics of the Society to deal with complaints, but under our constitution we can only deal with complaints between members. Our internal mechanisms do not deal with complaints by external parties, including clients of our membership, so where it is a complaint by a client and therefore a matter that is perhaps a consumer-driven issue, that is always going to be a matter where there could be a complaint to the Law Society. We may get involved to try and bring about conciliation, or it may be something that is brought to our attention that is so serious it has to go to the ADT, but then the issue is of course that the client himself has every right to report the advocate to the ADT, so to a certain degree it is not something that is going to be swept under the carpet. The Law Society cannot sweep it under the carpet itself because the client who is making the complaint has the right to take it to the ADT as well.

The only area that I can think of that has the potential to give rise to the concern that your question was obviously raising, is in the issue of … The practice rules in relation to client moneys require that any advocate who keeps client moneys must comply with what is called the Advocates' Accounts Rules, and part of the compliance with the Advocates' Accounts Rules requires the Law Society receiving annually an external accountant's report upon the maintenance of the client account and compliance by that advocate or that practice with the accounts rules towards that client account. We get that report. It may not surprise you that now and again we get qualified reports. The qualification could be pretty minor or it could be quite serious and we have to make a decision as Council as to whether it is a question of speaking to an advocate and saying, 'How did this happen? It is a one-off, it is not very serious – you did not comply with the rule but it is not that serious. How are you going to make sure it does not happen again?' or sending them to the ADT because it is a serious breach of the accounts rules. I can see from where you are, saying, 'Well, you are sitting in judgement over your membership on that decision,' and we are, but we also have a track record of sending matters to the ADT where they are serious breaches of the accounts rules.

Q224. Mr Hooper: Sorry, can I just jump in on that? How do you propose to demonstrate that? None of your internal decisions are published, so you are making a statement here that you have a very good track record wherever they are serious –

Mr Clucas: I think I am addressing the question that was asked to identify an area where the Council could be accused of … saying 'You're not being transparent on that point,' because yes, I am saying it is being dealt with and I believe it is dealt with in a completely proper way but it is open to that criticism.

***Mr McDonald*:** To give an example of a minor infringement – my learned friends can perhaps correct me – once you have sent out the invoice, and if perhaps you have client money to pay the invoice, you must move that within 14 days from the client account into your office account. I have to say that is a minor infringement. Nobody has lost because the client has paid the bill; however, it has not been moved from the client account to the office account. Are we going to publish that?

Mrs Clough: Can I just pick up on a point raised by Mr Clucas. The question that was raised was how can we demonstrate these things. We obviously cannot demonstrate, as we sit here, matters which have been referred as accountancy issues where we have dealt with them internally, but we can demonstrate matters which have been referred to the ADT because where there has been an adverse finding it comes back to the fact that that is a matter of record. So it may well be that there are matters where it is public record where there has been a Law Society referral to the ADT in respect of accounts breaches. So that is something which can be demonstrated.

I think another matter which can be demonstrated, and it is slightly off that point but I think it comes back to your initial question concerning matters of conflict, is a point which I think we referred to the last time we were before you but it is also picked up on in the most recent submissions. It was a matter concerning the master policy and insurance and the case involving Appleby, which was the First Deemster sitting in his capacity as the Visitor, which is the technical term. That does demonstrate quite clearly matters which may not be in everybody's interest as members of the Society but overall was considered as something that was a difficult decision, and in fact the wording of Deemster Doyle in the judgment, which is set out in the submissions which you have got, does specifically make reference to being a member of the Society where you may have to do something you perceive is not in your own personal interest. That was specifically recognised in that case, so I think that does demonstrate that we can evidence that where there are matters which may cause conflict a decision has to be taken, and matters in that case were referred to the Visitor.

The Chairman: Can I ask a specific question –?

Mr Clucas: Just Mr Hooper's question – and I am trying to be helpful, really, because I think having accepted that I have identified an area where there is not full transparency, Mr Hooper's question was: how are you going to address that lack of transparency? I will try not to make Law Society policy on the hoof by myself in front of this Committee is the first answer. *(Laughter)* So I am not; I am making a non-binding statement now.

The Attorney General is an *ex officio* member of the Law Society Council. He does not have unrestricted rights of access to all our working papers, but there is no reason in areas such as that … We do minute every decision we make. We might not publish those minutes, but there is certainly an opportunity for somebody such as the Attorney General to have an overview in that area, or a standard reporting process where our decisions in relation to breaches of accounts rules, where we do not report in to the ADT, that we share those with somebody like the Attorney General, who is an *ex officio* member of our Council anyway.

***Mr McDonald*:** The Attorney General sees all the minutes. When we say we do not publish, we do not publish in public.

Mr Clucas: No, that is not correct. He might get copies of our minutes, but certain matters would be redacted.

Q225. The Clerk: But you have not thought of issuing an annual report for the guidance of your members, pointing out some of the less serious breaches that may be quite common that are a mistake –?

Mr Clucas: I think it is right on occasions where, if we see something that we feel the membership as a whole need informing about, we mention things in our newsletter from time to time.

Mrs Gray: We have done that. Our annual general meeting reports are issued prior to those meetings and we have raised previous disciplinary matters from the ADT. We have not, obviously, named them in those reports but we have raised the circumstances, how that came around and how it was dealt with.

Mr Swift: I think the answer is we are doing some things and we could probably do a little bit more.

Mr Clucas: I think I agree, and I think you have also got to look at the parallels with, for example, prosecutions: where in the chain does it become public knowledge? If you have got someone who is arrested, does that need to be published? If it goes to the CPS? Does the reasoning why the charges are not taken forward? When does that happen? You have got to make a decision as to where in that chain of process you have to have the publicity for the interests of everyone.

Q226. The Chairman: I think that is what we discussed last time. There is a difference between the decision-making process and the end decision, where the end decision …. it is important that there is some light shone on decisions that are made and why they are made.

Just one specific question I wanted to ask in your comment about the position of sole practitioners, which we touched on last time we met as well, and how they … You talked about internal complaints mechanisms – they are required, but if you are a sole practitioner you are effectively marking your own homework; who do you go to? I think the submission you sent back in was that a sole practitioner would refer to another advocate and I just wondered if you could elaborate on what regulation there is around that. If I have a problem this week and I refer to one of you as an advocate and you deal with that and look into it and it is resolved, and perhaps it is resolved properly, then perhaps in a few months' time if I have another issue I might refer to another advocate. So where is the oversight, I suppose, across the potential that you have a series of issues that are not serious enough to go to the ADT but might show a pattern of practice and so on that, as the regulator, the Law Society, you might be interested in?

***Mr McDonald*:** That also applies in tort practices – we do not know what complaints have gone to practices which have been dealt with by the internal procedure. If people are not satisfied they can go to the conciliation procedure, and if they are still not satisfied they can complain to the ADT. As I say, an awful lot of complaints into the ADT are fairly trivial, and of course a lot of people do write to the Law Society. The Chief Executive receives certain complaints and he deals with them in a professional way.

Let's make it clear: like you, we are here to protect the public. This idea that we have something to hide … It does not help anybody if there is a problem and it is not solved.

Mrs Clough: Can I just follow on that, if I may, briefly – and I am coming back to not the most recent submission but the previous submission to that.

I am not aware of a situation that has arisen such as the one that you have specified. I think perhaps the reason for that is that my understanding – and I am sure my colleagues will correct me if I am wrong – is that the way the system would work with a sole practitioner – and they can refer their complaints to another advocate – would be that they would generally have a relationship with a particular firm, so the referral would normally, in my experience, be going to the same external person in any event. If there were to be a situation which we were not aware of and it was brought to our attention, then we would obviously look at whether or not there is a need to consider that further.

Again, as we have said before, the matters which are set out in our practice rules and byelaws and other related rules are matters which are always kept under review. And I think as we have set out as well, issues such as the need to have a complaints policy is set out within a client care letter, which can be reviewed on the actions of a firm and it is also a requirement within our practice rules as well. So that is something which the firms need to do, and if there was to be a situation such as the one that you have referred to, then obviously that would be something that we would look at to see how it has arisen and if it is something which can be resolved going forward.

Mr Clucas: It hardly needs saying, though, in the modern age that consumers at every level, if they want to escalate something they will raise it fairly quickly with whoever they think is appropriate, whether that person is the appropriate person or not. So the idea that a dissatisfied client of a law firm who remains dissatisfied will play along in a system that keeps it all hidden from public view is not my experience.

Q227. Mr Hooper: Two questions. There has been a lot of reference to the ADT as the principal regulator. It is my understanding that the ADT only deals with issues of professional misconduct, so there will be instances of complaints that are maybe not to the level of professional misconduct but are not addressed adequately within a firm's internal processes. Again, my understanding is that the only route that the customer has to go down then would be the conciliation process that the Law Society has. If they are not satisfied by that process but the complaint is not of the nature of professional misconduct, where do they go?

***Mr McDonald*:** To a different advocate.

Q228. Mr Hooper: Well, that is what my question is: is there a gap there?

***Mr McDonald*:** No, there is no gap, and let's make it clear: advocates have no hesitation to sue another advocate if they have been negligent, because that is what lawyers do. So if in fact they have a genuine complaint, they go and see another advocate.

Q229. Mr Hooper: So it is the position of the Law Society, then, that there is a gap in regulation there because there is no body that can take regulatory action to enforce that complaint, to make sure that complaint is adequately dealt with? The position of the Law Society is, 'Well, it is not serious enough for professional misconduct but we cannot help you resolve it ourselves, so you will have to find another lawyer and sue them'? That is the gap I am aiming for. Does that exist, or is my understanding lacking there?

Mr Swift: No, I think what we are looking at is this, in that if you are looking at professional misconduct, that goes to the ADT. You have an issue of service complaint – I think that is what you are addressing. If service complaints are sufficiently serious, then that becomes an issue of

professional misconduct because that is one of the areas which professional misconduct governs.

I think you will have read in our submissions that we were looking at service complaints not going to the ADT and that we should have a regulatory body set up maybe akin to the conciliation service to fill that gap. Its powers and scope would have to be looked at, but in our submissions we suggested that because we identified that conciliation and mediation is excellent – I use it in my practice – but in a complaints procedure that is vital. In serious issues the ADT is necessary because you have to have the regulatory force and punishment behind it. Some service complaints do end up in the ADT and that is not appropriate.

So I think there is an area there which should be explored certainly to fill that gap, although it is not a very wide gap because, essentially, if it is a serious service complaint it becomes a professional conduct issue. If nobody answers a letter, for example, initially that might be a service complaint but it eventually would become a professional conduct issue.

Mr Clucas: I was not quite clear what type of complaint you were actually talking about, because conduct complaints clearly can go to the ADT even if they are quite minor, and the ADT has a filter process if they consider they are too minor even to go forward to a full disciplinary hearing. Service complaints really do tend to suggest a failure to provide … You are into the territory of negligence, really, aren't you – negligent standards of service?

***Mr McDonald*:** As I say, you would see another advocate, and let me tell you: advocates do not hesitate to sue other advocates.

Q230. Mr Hooper: Okay. The second question I have got relates to comments about referring or publishing the information and publishing only serious breaches, which the ADT do anyway. But it was interesting, the comment that was made by Mr McDonald about breaches of Rule 19 in respect of the 14-day payment period.

***Mr McDonald*:** Is it Rule 19?

Q231. Mr Hooper: Yes, actually, there is a very recent – in fact the most recent case published on the ADT's website, one of the issues was a contravention of that exact rule.

***Mr McDonald*:** Yes, but it was a fairly serious one.

Q232. Mr Hooper: Arguably, yes, but that is my question, really: if it is left up to the Law Society to determine the level of that seriousness, is there a gap there as well in that you are saying it is the Law Society itself making a decision behind closed doors as to what should or should not be referred?

Mr Clucas: Haven't we just answered that question?

Q233. Mr Hooper: No, not satisfactorily. That is my challenge here. I am still trying to get into that gap between things the ADT will determine themselves are too minor and things the Law Society will determine not to refer.

Mr Clucas: We cannot speak for the ADT in terms of where they set the bar and what they consider too minor or not too minor. All we can answer is what we, as Council, determine to send to the ADT. I think we have accepted that we sit in judgement of our membership behind closed doors and make a decision where we can evidence those cases that we send to the ADT, but we cannot evidence those cases that we decide fall below the bar. That is the point, I suggest – that we had answered that question by saying we have recognised that and we have, I

believe, suggested something that might be done to give some greater transparency on that, but we have recognised it.

***Mr McDonald*:** I seem to get the impression that there is a perception that we hide things. Let's make it clear: we do not hide things, because after all we are lawyers – it is important that if there is a problem it is dealt with.

Q234. The Chairman: I think, Mr McDonald, what you will hear a lot of Tynwald representatives say is that for constituents, for members of the public who access legal services, there can be a sense of not being able to navigate easily sometimes because a lot of what we are talking about and dealing with in terms of rules, regulations and the law, is not necessarily something that members of the public can navigate. So I accept that you are sincere in saying what you say. I think the point has come up that it is about evidencing that the right thing is being done, not only that the right thing hopefully is being done but how we achieve transparency to show that the appropriate action is being taken and regulation is in place.

I am sorry – at this point I am mindful that we are running towards the end of our time with you this morning and I just wondered if we could move on and touch on a couple of other things before we close.

The first one is the public defender ongoing consultation and work around the possibility of such a scheme in the Isle of Man. Your submission is clear that you see that any potential such scheme would be problematic and you believe it is not viable, and I wonder if you could explain a bit more why you think any such scheme would not be viable in the Isle of Man.

Mrs Gray: Yes, thank you. Following the SAVE campaign that was presented to Tynwald on 19th June, the Law Society did prepare a briefing to Tynwald and I would like to ask as to whether you had opportunity to read through that briefing paper.

The Chairman: Yes, we did, thank you.

Mrs Gray: Thank you. That numbered a number of points as to why the Law Society felt that a public defence unit would not be viable in the Isle of Man. This is quite a big subject, so are you looking as to is it viable in respect of efficiency, whether it is going to work, looking at the cost side of things – and then I can deal with those individually?

Q235. The Chairman: Well, we have seen your submission and I am aware that you have highlighted the different aspects, and indeed I think it was Mr McDonald who touched upon the fact that advocacy skills are often acquired by junior advocates acting in the summary courts, so I suppose … Perhaps if we turn the question around: is there any way in which you think such a scheme could potentially be viable, that it could be designed in a way that would assuage the concerns that you have raised, whether it is about the ability of trainee or junior advocates to acquire advocacy skills, the ability to provide appropriate representation for individuals in a criminal position? There are obviously public defender schemes and models in different jurisdictions that are up and running, so is there any way in which you would think such a scheme might be viable in the Isle of Man?

Mrs Gray: I think first of all we have to look at what here in the Isle of Man we have. It is a very small jurisdiction; there are around 87,000 people as a population. Some of these other jurisdictions that have been raised who are supportive of implementing the scheme have compared implementing a scheme here in the Isle of Man to one that is happening in the US and Australia and Scotland, but when you look a bit deeper into those schemes and how they are run, it is only in the US where defendants do not actually have an option to have a lawyer from the private sector. If I look at the smaller jurisdictions and moving up, Scotland has around 1,100

solicitors in the criminal field but there are only around 26 that belong to the public defence unit. All of these jurisdictions – bar the US – around the world run in parallel to a private practitioner section, and running in parallel it is only a small percentage – it is not half and half; it is literally a *de minimis* percentage. It has been recognised in Australia that the public defence unit that they have there needs the services of the private sector because otherwise people will have difficulties in accessing justice to the courts.

So that is our first point, that we have 24 criminal practising advocates here on the Island, so to introduce a public defence unit is certainly not a viable option. And also, in looking at the paper that was introduced in June, it did not seem to be particularly clear whether this was just going to be the summary courts. Was it going to cover General Gaol? Was it going to cover all of the criminal justice system? The police station?

The concern of the Law Society is that at the minute you have got highly regulated, functioning, criminal advocates practising in this area and you are going to then look at replacing them with either six advocates or 10 advocates. So you are taking 24 out and putting in between six and 10. How will that actually work? How will that look? What will happen if you have a five-handed affray coming to the court or you have a matter of three juveniles? And if there are going to be six advocates, some are going to have to be working on those matters in house, some are going to have to be at court, some of them might have been at the police station all night and then will not be able to come in because they are restricted. One might be on the sick, one might be on maternity leave. It is just not a viable option in respect of … The Isle of Man by its very nature has a higher percentage of conflict of interests.

Q236. Mr Hooper: So it would be your view, then, that there are no circumstances in which a Public Defender Scheme could work on the Isle of Man?

***Mr McDonald*:** No.

Q237. Mr Hooper: I am asking that because the question that was asked is: what circumstances do you feel that it might possibly work, and –?

Mr Clucas: Can I just clarify a point that Mrs Gray was making, which might not have come clear from what she said. When she said those other jurisdictions, bar the USA, all have a public defender system that works in parallel with a private criminal Bar, the point was it works in parallel with a private criminal Bar that allows publicly funded access to justice through that private section of the Bar.

Q238. The Chairman: So legal aid remains in place?

Mr Clucas: I am not naïve – in some of these jurisdictions pressure on the legal aid funding is enormous and cuts have been made, but it is still there. What we are being told is that the public defence scheme that is being considered in the Isle of Man would be a replacement of the legal aid scheme.

Q239. The Clerk: Would your attitude change if private members of the Bar were able to work on an agency basis for the Public Defender Scheme, so if they had full-time advocates it would be complemented with regular employment of others who were experienced criminal advocates?

***Mr McDonald*:** But isn't that what legal aid is?

The Clerk: Absolutely, that –

***Mr McDonald*:** My fear is that, ignoring everything, whether we had 10 or 12 – my learned friend has mentioned maternity leave, working on cases, six weeks' holiday, illness, etc. – the important factor is that a person has to have trust.

Coming back to finance, I know – I worked in public service for nine years and cost is important. This Public Defender Scheme will be cost limited and there will come a point where things will not be done because it is costing, whereas a private advocate being paid through legal aid will feel that a certain forensic has to be carried out and he will fight – and I mean fight – the legal aid officer for it, and that advocate must prove that that particular expert report or whatever is required. My fear is that what is going to happen in the Civil Service is 'We haven't got the money and it's not going to be done.' We have already had criticism in terms of disclosure in a recent court case where the prosecution – this is on the Isle of Man – had been criticised twice. We know the situation in England with reference to disclosure. What the prosecution say in England is, 'We haven't got enough staff – we can't even go to … ourselves.' Well, the same will apply to the Public Defender Scheme. They will say 'We haven't got time', and if all the evidence is not before the court, how can we have justice? This is what it is all about; it is not about the money.

Mrs Gray: We are not saying that it could not work; it could work, but the number of advocates that they are saying they would use to form a public defence unit is not adequate.

The Clerk: I think what we are trying to explore –

Mrs Gray: You would need so many more advocates, and at the minute … This document that was put under the SAVE campaign in respect of the expenses, they took the highest legal aid expenditure year, 2015-16, to say it was £2.3 million, but actually, looking at the last 10 years' figures of legal aid, the average legal aid expenditure was £1.7 million and that also included all of the courts; it was not just the summary courts which they were looking at. So they would need an awful lot more advocates, and the concern is that … Say, for instance, they turned round and said, 'Yes, okay, we'll do it under 10 instead of six,' and then it did not work and they found that somebody was going to be unrepresented because there was distrust from a member of the public that they did not want to be represented by a member of the public defence unit or there was a conflict and that person is going to end up in court without actually being represented, they would then need to go back to the private sector to say … which they have done at one time. The prosecutions were under-resourced at one stage and they were then having to approach the private Bar to say 'Could you please help us because we don't have enough prosecutors?' And those prosecutors did not charge the legal aid rate to the Government, they charged their fee-paying rate.

We also see this across other areas of Government, such as court welfare officers – the idea that this could be dealt with by two court welfare officers. You find that one of them has gone off sick and they have then have to go back into the private sector and pay a fee that is two to three times more the salary they were actually paying their court welfare officers. So we are already seeing this going on in other areas and this is exactly what we, as a Society, feel would go on as a public defence unit.

Also, once you are a year or two years down the line and you realise 'Actually, we cannot do this on six advocates, we're going to get more' … We have seen the number of prosecutors increase exponentially over the years – it is now triple what it was 10 years ago – and they will end up having to get more and more people to come in. And if they do not – if they say, 'Well, okay, we really cannot afford it because we have not got the budget' – then there are going to be inadequate resources in respect of that advocate going the extra mile for his client, which again we have seen issues with in the UK where the prosecution, again resourced and underfunded, have not been able to put in the hours in respect of disclosure and there have been miscarriages of justice in the UK.

So you have got two factors here. You have got either once you have got the public defence scheme up and running you realise 'Actually, we haven't got enough advocates, so we're going to have to increase it,' which means increasing the expenditure to what is currently under the legal aid side of things; or you become under-resourced and then there is going to be an injustice somewhere down the line. Once the Government is in that situation it will not be able to reverse out of it, once it has made that decision, because there will not be a criminal Bar left. You will not be able to turn around and say 'This is really not working,' or 'This has tripled our expenses and now we're going to have to put it back to where it was,' because it will never be as it was; there will not be a criminal Bar.

The Chairman: Okay, thank you.
Mr Hooper, you had a …?

Q240. Mr Hooper: Well, that was the question I was going to ask you, actually. So the key problem that you see with the PDS proposal is simply that they are not going to resource it properly? So if the PDS was resourced adequately, do you think it could work?

Mr Swift: I think the issue is twofold. It is the actual funding – we cannot see a saving. And secondly, service – we cannot see the service being as good as it is now.

***Mr McDonald*:** And I have a fundamental issue in that you should not have the state detecting crime, the state prosecuting crime and the state defending crime. That is a fundamental human rights issue.

Q241. The Chairman: We will not have time at this point to take your answer on this, but I do not think we have seen so far in your submissions – and perhaps you would correct me if I am wrong … No doubt you will be aware one of the potential drivers about the idea of some sort of public defence scheme is around the legal aid costs and so on. I do not know if the Law Society has any comment or thoughts – and perhaps if you do you would put them in writing to us, given we are running out of time – as to what reform might be appropriate of our current legal aid system to recognise that that is probably one of the factors that has at least driven the exploration of the idea of a public defence scheme. But I will not ask for your comment on that at this point.
Mr Robertshaw, you had a question.

Q242. Mr Robertshaw: Yes, indeed. As we sit here this afternoon opposite each other, Lawrie and I sit here as a result of an electoral process which is constantly under review by ourselves and – as I look at my last returning officer – very eminently overseen by many advocates who fulfil the role of returning officers. Jane sits here as a consequence of a process which is constantly under review by us as to how we form and run our electoral college to elect our LegCo Members.
Can I just turn the spotlight round the other way and can I ask you if you are satisfied that you are reviewing your electoral process to the Council regularly enough? Does it follow the same strict type of rules in order to get elected? For example, is it completely secret in its process? And also, are you satisfied about how you take the next stage up and submit your proposals for who should sit on the ADT? I know we are not covering the ADT today, but in asking the ADT members how long they have been there, their term of office seemed to be fairly long and extensive. You have very eminently shown yourselves this morning, if I may say so, to be very competent in representing your Council, but do you think your electoral process should be reviewed, both as Council members and how you elect the ADT representation?

Mrs Clough: Can I start off on that, if I may? Not specifically the ADT side but in terms of Council and members of Council, the process which is followed is set out in our byelaws. It is open to any member of the Society to put themselves forward to sit on Council. We have an AGM every year in January and at that time it is open for anybody to stand.

In terms of the membership of Council itself, there is a requirement for two members of Council to retire every … three years? Okay, we can always clarify the time, but there is a requirement that two members of Council must stand for re-election at every AGM, so annually there will always be an opportunity if somebody wishes to go on Council and they are dissatisfied with something to put themselves forward for election on to Council. As part of that process it is open for anyone to put together a manifesto. That may be something which consists of 'I'd like to go on Council because I'd like to help', or it may be a document which runs quite extensively and sets out the desires and wishes of the individual. But I think my first point there is that there is a process for any member of Council, if they wish to put themselves forward for election.

With regard to the positions of Vice-President and President, again that is a process where an individual has to be elected to become President. It is part of our rules that that individual can only remain as President of the Law Society for a period of two years. At the end of that two years there will then have to be somebody who replaces them. Historically, it has often been the case that the individual who is Vice-President will put themselves forward as President, but that does not have to be the case; even if they do, they may not be elected as President. So there is that process there for there to be changes on Council on quite a regular basis.

Another point I would add to that is that as a membership of Council we do have a variety of individuals coming across a wide range of professions. We have got before you today members from very small firms right through to the larger firms, so there is a wide range of representation of all sizes of firms and a complete cross-reference of the areas of law which individuals on Council do actually represent.

I have had helpfully passed to me, back on a point I was raising … Our byelaws do state that 'ordinary members of Council shall retire in order of date of election and in case of equal seniority the order of retirement shall be determined by lot'. I can give an example of that. I think some four years ago there were five new members of Council, so when we came up for re-election there were five people but only two needed to retire. That was determined by drawing of lots for who would retire when. So there is that process to be able to put new members on Council, to replace the President, the Vice-President and such like.

The process which is followed for election at an AGM is by way of ballots by members of the Society, whether that be in person or by way of proxy.

Mr Clucas: Being absolutely precise about that, our byelaws provide that 'every question to be determined at a general meeting' – that would include elections for members to Council – 'is done by a show of hands unless a ballot shall be demanded by any five ordinary members present'. So it is a matter for the membership whether they want to have an open show of hands for the election of members or whether they call for a ballot, and if it was a ballot it would be done in private.

Q243. Mr Hooper: Just for clarity, 'members' in this instance relates to individual advocates rather than firms? So a firm would not be allowed –?

Mr Clucas: 'Member' refers to an individual advocate. The byelaw then says – I am ignoring the word 'associate' because I do not want to overcomplicate the answer here; but it refers to 'individuals', I will stress that – 'only ordinary members shall have a vote at an AGM and each ordinary member shall have one vote.'

Q244. Mr Robertshaw: Can I just pursue this issue of proxy? Those of you who were recently returning officers will recall that we changed our process on how careful we are with proxies. We felt that perhaps we were remiss in some areas and it was quite a significant change. How does your proxy system work? Is it by post, by mail; or does somebody come in with a clutch of proxies from an office? What actually happens?

Ms Unsworth: In practice what happens is a proxy form must be at the halls of the Law Society at 9 a.m. on the day of the meeting. So if I wanted to appoint Mr McDonald as my proxy I have to fill in a form and that appoints Mr McDonald – or it can appoint the President or anybody – to stand in my proxy. I fill in a form. I must deliver that to the Law Society halls. They have a proxy register for the morning of the meeting and they will then issue proxy votes to either a named proxy or, if it is the President, the President. If I want to vote in a specific way, then I will give instructions to Mr McDonald as to how I expect him to exercise my vote and he will exercise my vote in that way. Alternatively, I can say, 'I don't have strong views: vote however you see fit.'

Q245. Mr Robertshaw: I think perhaps I should be more specific about an area of concern that I have got. If you had a significant practice with a number of advocates with the right to vote – it is a busy practice, not everybody turns up for the AGM, the senior turns up: does the senior bring the proxies with him or her? As an individual advocate within that practice who is not attending the AGM, how much freedom do they think they have got, when in fact their senior may very well be standing for office, to feel that they can clearly hand them the proxy and say, 'I'm actually voting for somebody else'?

Mr Clucas: Can I answer that? Firstly, the rule says: 'Any ordinary member may in writing appoint any other ordinary member as proxy to vote at any general meeting. A member must lodge his proxy with the General Secretary of the Law Society at least one hour before the time fixed for the general meeting.' So the proxy is given effectively to the Chief Executive of the Law Society ahead of the meeting.

Q246. Mr Robertshaw: By whom?

Mr Clucas: By the person who wants to appoint the proxy.

Q247. Mr Robertshaw: Okay, so those proxies arrive at the AGM, or prior to the AGM, completely independent from the senior member who may very well be standing for office?

Mr Clucas: Let me explain. It may or it may not.

Q248. Mr Robertshaw: It may?

Mr Clucas: Let me explain. The requirement is that the original proxy has to be lodged with the Chief Executive one hour before the meeting, but somebody … Take, for instance, my firm. I work for one of the larger firms. Say I was the only person going to the meeting from the firm, I would have copies of the proxies so I know what my instructions are from the individual members. I would either have a specific instruction or I would be given discretion by member as to how to vote.

Q249. Mr Robertshaw: Are you comfortable with that?

Mr Clucas: It is really very similar to what would happen at a general meeting of a corporate body.

Q250. Mr Robertshaw: Can I just put the thought with you that it might be more transparently fair if a proxy were submitted to the Chief Executive an hour before, completely independently and in private to him or her, whoever the Chief Executive might be?

Mr Clucas: Well, the proxyholder needs to know who is going to the meeting and the proxyholder needs to know whose proxies he is holding, or he cannot vote for that person.

***Mr McDonald*:** Yes, it is like an AGM of a company, you can have your tick, because we have other resolutions as well as electing people. In fact, I am beginning to warm towards what you are saying, actually.

Mr Robertshaw: Thank you. You are a fine returning officer!

***Mr McDonald*:** Yes, and I can see that there is a possibility of perhaps the proxy deciding certain issues, or perhaps even … So yes, I do feel that you have raised a very important point, and without going any further I think that we should discuss this and report back. I think I have got your thinking now, yes.

Q251. Mr Robertshaw: Thank you. That is all I would ask you to clarify.

Mr Clucas: Again, it is an example of a question where not all circumstances fit the general concern.

Mr Robertshaw: Yes, quite.

Mr Clucas: There will be some instances … For instance, if there was an extraordinary general meeting where the only resolution on it was to increase the annual subscription fees for individual lawyers tenfold – you know I am making a point – and as a matter of contractual between a firm and its individual advocates that it employs it is a part of their terms and conditions of employment that the firm will pay their professional subscription fee, the firm has a legitimate interest in that vote because it is going to affect the firm, not the individual advocate.

Q252. Mr Robertshaw: As our returning officers, all I would say to you in closing this point is that we constantly review the clarity and fairness of our electoral process and then you interpret that and deliver it, and all I think we are saying to you – and I think you are responding – is that perhaps it would be a good thing to look at your electoral process.

***Mr McDonald*:** I can see your point. There is a certain opaqueness; there is not sufficient transparency, in fact, I can think of in one certain area.

Mr Robertshaw: Thank you.

Mr Clucas: I am not disagreeing with that either, and I am associating myself with that answer. I am just making it clear that if we do need to address it, again one answer might not fit all situations. That is the only thing for me.

Mr Swift: And I think you also raised the issue of the ADT.

Mr Robertshaw: I did, yes.

Mr Swift: Thankfully for the meeting we had on the previous occasion, since that date we have actually entered into communication with the ADT. They have agreed to meet and that is one of the issues which we are going to raise with them.

Mr Robertshaw: Thank you.

The Chairman: It seems a shame to close, because we have not covered various things we would very much have liked to cover with you – Yes?

Mrs Gray: I wondered if I could just raise one particular area that is very much of concern to the Law Society at this particular time, and it was also raised in your questions in respect of legal aid provision: is this adequate? Legal aid at this moment, particularly civil not criminal legal aid … There seem to be a number of issues in respect of the administration of it and also the problems on administration that have been incurred because of decisions made by the Legal Aid Committee adding conditions to the actual certificates.

Our real concern at this particular time, because of the backlog administratively in the Legal Aid Office, is that certificates are not being granted on time, certificates are not being granted for a number of weeks or a number of months. I explained earlier the process in respect of, giving you an example, contact. If there is no legal aid certificate, they cannot progress that matter at all. I will give a for instance. You have also talked about mediation, about how live that particular issue was. If clients are represented under a legal aid certificate then they are also entitled to legal aid for mediation. Often mediation is at the forefront of both the advocate and also the courts, and this issue will be raised. If both parties are agreeable or a situation is such that it is suitable for mediation, then the matter within the court will be adjourned in order for the parties to be able to go and mediate. We then, as advocates, will apply for legal aid funding.

I have one particular matter where I am still waiting 10 weeks down the line to get agreement from the Legal Aid Office. That matter has had to adjourn twice now in the court proceedings because we have had to turn round to the court saying, 'Sorry, we are not on any further progression in this matter because the parties have not been able to mediate because we haven't had a legal aid certificate in place.' This is just one matter – I have numerous matters in my office because I am a legal aid practitioner – where I do not have a valid legal aid certificate because we have been given eight hours or 10 hours and those 10 hours have run out. We have gone back and said, 'Right, well, we need another 10 hours to progress to the next stage,' and we are waiting weeks and weeks.

Q253. The Chairman: Can I ask – we have read your submission on some of the challenges with legal aid – how long has this particular state of affairs –?

Mrs Gray: It has been going on for years.

Q254. The Chairman: And what, again, has been the conduit to try and raise this particular concern, the administrative –?

Mrs Gray: Part of the problem has come around because the Legal Aid Committee have placed conditions on legal aid certificates. At one time you had an open certificate – 'Yes, your client can be given legal aid to pursue an application for contact' – but now you do not get that. First of all, you can wait months to actually get your first certificate. Then it might say 'subject to negotiation', but by that time you have negotiated as far as you possibly can. So you then get the certificate, which you cannot do anything with. You go back to Legal Aid and you say, 'Okay, well, we've done all that – we do need now to make this application.' So then you wait weeks and weeks again for them to come back and say, 'Okay, well, we'll give you the fee to make that application and you can attend the directions appointments.'

Q255. The Chairman: So can I ask, because I am hearing two things if I am not misunderstanding the point: one is the administration of legal aid and the time that seems to be involved between making requests to extend legal aid and receiving a certificate that enables you to progress the matter; and the other is not having an open certificate in the first place so you can just get on with the job.

Mrs Gray: But also, with certificates, these are all assessed at the end of the day by the costs assessor when we put a bill of costs in. If they feel that we have spent an inordinate amount of time on a particular matter, then he would just say, 'Well, you're not going to get payment for that.' It is not like we have got a free run on a certificate and we just put in a bill and it is going to get paid. This bill will be assessed at the end of the day by the costs assessor. These conditions – and they are not only one: the first one will be 'Subject to negotiation'; the next one might be 'We'll give you four hours'; or the next one 'We'll give you another four hours'; or 'It's only subject to attending directions, but again you've only got six hours.' And then your case will be adjourned for a court welfare officer's report. Often that will be a condition, so your certificate is only valid up to the court welfare officer's report and then you will have to report back.

There are various different conditions and after each condition that you have met you will have to go back to the Legal Aid Office. That puts administrative burden on the Legal Aid Office because they have to look at that every single time. And I am not sure as to whether these conditions are actually, in respect of the concerns raised for the Legal Aid expenditure and to keep a tab on it, actually doing what they are supposed to be doing, because at the end of the day these bills are assessed.

Ms Unsworth: To answer your question, we were having meetings with the Legal Aid Committee, who are a statutory committee put together, and also set up a Legal Aid Users Group, which is the certifying officer and members of the profession, legal aid practitioners who come to that meeting. The Legal Aid Users Group meeting was a forum in which to raise day-to-day issues such as delays or issues of mediation, and with the previous Legal Aid Certifying Officer, Mr Montgomery, we made massive progress in streamlining some of the administrative functions. We did not get it to the stage we needed to, but we did make big progress.

With the Legal Aid Committee, however, there is not a single advocate on that committee, notwithstanding the statutory function allowing for an advocate. What that means is we are dealing with largely civil servants or people from private enterprise who, quite frankly, have never been through a legal aid process themselves – because they earn good money so they would not qualify for legal aid – and also they have never understood what we do as a legal aid lawyer and the process that we have to go through. We invited them to come into legal aid practices – my firm opened its door and said, 'You can come in and shadow us and see what we do,' and they turned us down on that option – because we felt that they needed to understand and be educated in terms of what we did and base policy upon the role of the legal aid advocate.

Unfortunately, those meetings broke down earlier this year –

Q256. The Chairman: Is this the User Group meetings, do you mean now?

Ms Unsworth: The User Group meetings have ceased as a result of Mr Montgomery retiring and there is presently only an interim certifying officer in place as a holding pattern, because a certifying officer has not yet been recruited. So those meetings with an interim certifying officer – it is not appropriate for those meetings to proceed because it changes on a day-to-day basis – should be led by the person who is going to be running that office.

The Legal Aid Committee meetings that we had – and there was a small committee from Council who met with those people – broke down earlier this year as a result of us challenging a policy decision that they made without notice, with legal vires, which then meant that

unfortunately advocates just were not going to get paid, and it was retrospective. So we challenged that and unfortunately that relationship has broken down and they will no longer meet with us. We are trying to reinstate that meeting, but these issues are extremely difficult and no matter how many times we explain to them the problems that we are facing on a daily basis as legal aid lawyers, we are not making the progress we should be.

The result of that is access to justice is not being achieved and advocates are working *pro bono* because we are officers of the court and there are decisions on judgments on line that we can find where the judges say, 'You're on record, you're the advocate – the fact that you haven't got legal aid is not my problem: do your job.' So we are having to do our job without any funding whatsoever, and all because an administrative system is not working. In a family context that could have massive repercussions where children are not seeing their parents – and that is not right, that is not access to justice and that is not what either us or the Government should be offering.

Q257. The Chairman: Can I ask – because we are running completely over time, and I thank you for your patience in staying on with us – is there any way that you would be able to put in writing to this Committee some of the detail around the process that you have experienced with regard to your relationship with the Legal Aid Committee, and some specifics, if possible, on what the policy issues are, what your concerns are, and similarly what you found beneficial about the User Group and what you would see as the future, where you would like to see improvements, what you think would make a difference to improving the current administration of legal aid? That would be very helpful to this Committee.

Also, another matter that we have not managed to ask you questions about, but it would be very helpful to this Committee if you could again put something in writing to us: you indicated in your submission that there were some aspects of Jane O'Rourke's evidence to the Committee that you felt were now out of date – please, if you could advise us on what specifically you feel is out of date, that would be helpful to this Committee.

And a third area: you have talked about youth justice and the problems with that as well at the moment and you have referred to the importance of having an early prevention scheme, but I do not think I read anything on what that would look like – again, the concrete aspects of early prevention, and I think again from your perspective as practitioners or members of the Council who are criminal practitioners who have a view on what should be done, how things could be improved. Detail on that for this Committee would be extremely helpful.

Is there anything else that we have not managed to cover that you would like to hear more …?

Is there anything else that you would like to say in conclusion before we close?

Mr Swift: I think what I would like to say is that we are very anxious to engage, and that is the most important thing as far as we are concerned. We are not in a trench; we want to engage with relevant parties to make it better for the Manx people, and that is what we find frustrating at times.

The Chairman: Thank you.

Thank you all very much for your time this morning. The Committee will now sit in private.

The Committee sat in private at 12.58 p.m.