



OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities, Human Rights and Civil Justice Committee

Tuesday 3 October 2023

Session 6



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Tuesday 3 October 2023

CONTENTS

	Col.
INTERESTS	1
SUBORDINATE LEGISLATION	2
Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 4) Regulations 2023 [Draft]	2
REGULATION OF LEGAL SERVICES (SCOTLAND) BILL: STAGE 1	5

EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE

19th Meeting 2023, Session 6

CONVENER

Kaukab Stewart (Glasgow Kelvin) (SNP)

DEPUTY CONVENER

*Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

*Karen Adam (Banffshire and Buchan Coast) (SNP)

*Meghan Gallacher (Central Scotland) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

Paul O’Kane (West Scotland) (Lab)

*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Martin Brown (Scottish Government)

Siobhian Brown (Minister for Victims and Community Safety)

Vicky Crichton (Scottish Legal Complaints Commission)

Sharon Horwitz (Competition and Markets Authority)

Tracey Reilly (Consumer Scotland)

Dr Marsha Scott (Scottish Women’s Aid)

Kevin Stewart (Aberdeen Central) (SNP) (Committee Substitute)

Shona Urquhart (Scottish Government)

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 3 October 2023

*[The Deputy Convener opened the meeting at
09:45]*

Interests

The Deputy Convener (Maggie Chapman): Good morning, everyone, and welcome to the 19th meeting in 2023 of the Equalities, Human Rights and Civil Justice Committee. We have apologies today from the convener, Kaukab Stewart, and Paul O’Kane. However, Kevin Stewart is attending our meeting as a substitute for the convener, and I welcome him to the meeting. Karen Adam and Meghan Gallacher are attending the meeting virtually.

Agenda item 1 is a declaration of interests. I invite Kevin Stewart to declare any relevant interests.

Kevin Stewart (Aberdeen Central) (SNP): I have no relevant interests, convener.

The Deputy Convener: Thank you very much for that.

Subordinate Legislation

Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 4) Regulations 2023 [Draft]

09:45

The Deputy Convener: Agenda item 2 is consideration of an affirmative instrument. For this item, I welcome to the meeting Siobhian Brown, Minister for Victims and Community Safety, and her officials: Shona Urquhart, legal aid policy lead, and Martin Brown, solicitor, legal directorate, Scottish Government. Thank you for joining us this morning—you are all very welcome.

I refer members to paper 1 and invite the minister to say a few words about the instrument.

The Minister for Victims and Community Safety (Siobhian Brown): Good morning, convener, and good morning, committee. Thank you for the opportunity to speak to the committee about the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 4) Regulations 2023.

The instrument has been brought forward to deliver changes to existing legal aid regulations, primarily to ensure continuing access to justice in Scotland. It makes provision to ensure that legal advice and assistance will be available to persons arrested under section 27 of the National Security Act 2023. Schedule 6 of that act will, if commenced, create a procedural framework for the arrest of persons reasonably suspected to be involved in “foreign power threat activity”.

Current provision for legal advice and assistance does not cover all the circumstances of detention for such activity, and the regulations will make further provision to ensure that an appropriate regime is in place so that advice and assistance by way of representation can be provided to persons arrested under these provisions in the 2023 act. Without additional provision, there is a risk of persons arrested under the 2023 act being unable to access legal advice, assistance or representation. Similar provision is already in place for those detained under anti-terrorism legislation.

The instrument will also make provision for any carer support payment to be disregarded by the Scottish Legal Aid Board when assessing a person’s financial eligibility for civil legal aid, or children’s legal assistance, and for such payments to be excluded from the recovery where a person has a liability to the Scottish legal aid fund as a result of civil legal aid proceedings. Carer support payment is intended to improve outcomes for unpaid carers by providing financial assistance to

those providing regular and substantial care to someone in receipt of a qualifying disability benefit.

Finally, the instrument makes minor amendments and corrections to regulations relating to counsel fees in respect of civil and criminal legal aid.

Convener, that was a brief overview of the regulations and their context. I am happy to answer questions.

The Deputy Convener: Thank you very much for that, minister.

I see that colleagues have no questions or comments, but I have one question that I would like to ask. The instrument makes provision for carer support payments to be disregarded. Is it your expectation that they will always be disregarded by the Scottish Legal Aid Board?

Siobhian Brown: I will bring in Martin Brown to answer that question.

Martin Brown (Scottish Government): My understanding is that that would be the expectation. It is a policy question, but I expect that that will be done. The way in which we have disregarded these payments mirrors the way in which other payments have been disregarded to ensure that they are not counted for eligibility.

The Deputy Convener: And there will be communication and clear information available to people to ensure that they know about this.

Martin Brown: I think that that would be a question for the Scottish Legal Aid Board.

Shona Urquhart (Scottish Government): It is expected that those who qualify for this payment would always be eligible for legal aid. It means that, from the administration side of things, the Scottish Legal Aid Board can simply disregard it—it does not have to include it. However, people who receive the payment would qualify anyway.

The Deputy Convener: Thank you—that was helpful.

I should let folk know that Fulton MacGregor has joined us online, as he has been unable to get here because of train issues.

As there are no other questions, I thank the minister very much for her evidence, and we will move straight on to item 3, which is formal consideration of the motion. I ask the minister to move motion S6M-10545.

Motion moved,

That the Equalities, Human Rights and Civil Justice Committee recommends that the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 4) Regulations 2023 [draft] be approved.—[*Siobhian Brown*]

Motion agreed to.

The Deputy Convener: I now invite the committee to agree to delegate to me the publication of a short factual report on our deliberations on the affirmative Scottish statutory instrument that we have just considered. Are we agreed?

Members indicated agreement.

The Deputy Convener: That completes consideration of the affirmative instrument, and I thank the minister and her officials for joining us.

There will be a short suspension while witnesses change over.

09:51

Meeting suspended.

09:53

On resuming—

Regulation of Legal Services (Scotland) Bill: Stage 1

The Deputy Convener: The next agenda item is the beginning of our evidence taking on the Regulation of Legal Services (Scotland) Bill.

I welcome to the meeting our panel of witnesses: Vicky Crichton, secretary, Scottish Legal Complaints Commission consumer panel; Sharon Horwitz, legal director, Competition and Markets Authority; Tracey Reilly, head of consumer markets, Consumer Scotland; and Dr Marsha Scott, chief executive officer, Scottish Women's Aid. Thank you for joining us this morning.

I refer members to papers 2 and 3, and I invite the witnesses to make a short opening statement, starting with Vicky Crichton.

Vicky Crichton (Scottish Legal Complaints Commission Consumer Panel): Good morning, everyone.

I am director of public policy at the Scottish Legal Complaints Commission. In that role, I provide the secretariat to the independent consumer panel, and I am here today to represent its views.

The consumer panel is an independent advisory panel that was set up in 2015 to assist the SLCC in understanding and taking account of consumers' interests, and its remit is to provide feedback to the SLCC from a consumer viewpoint, including making recommendations on how the SLCC can improve its policies and processes on legal complaints, suggesting topics for research connected to legal consumers and expressing a view on matters related to consumer complaints.

The panel's members include representatives from Citizens Advice Scotland, the Competition and Markets Authority, Consumer Scotland, Scottish Women's Aid, Which?, Young Scot and representatives from academia. As many of those organisations are represented in their own right on the panel today, the panel has asked me to present its collective and shared views.

The panel wants a regulatory system that puts consumer interests at its heart and which seeks to promote consumer confidence and protect consumers, particularly those who might be more vulnerable, from risk or detriment. Its views on the regulation of legal services relate to the aim of achieving those outcomes.

Sharon Horwitz (Competition and Markets Authority): Thank you, convener and committee

members, for this opportunity to set out the Competition and Markets Authority's views on the bill.

The role of the CMA is to help people, businesses and the United Kingdom economy by promoting competitive markets and tackling unfair behaviour. It has significant experience of working in the legal services sector, with various market studies and reviews across the whole of the UK. That work includes the research report that we published in 2020 on the Scottish legal services sector; it followed the independent Robertson review and was intended to support the Scottish Government's consideration of how to implement the report's recommendations. We have continued our work in that area, notably responding to the Scottish Government's consultation prior to the bill's introduction and the call for views that followed it.

In summary, we want to make three main points to the committee. First, we welcome and agree with the view that regulatory reform is required, and we think that many aspects of the bill have the potential to deliver improvements for consumers in Scotland. However, we want to use this opportunity to reassert one of the main findings of our work, namely that the optimal regulatory model—a model in which the regulator is truly independent of the representative bodies—is, in our view, the most effective way of achieving and maintaining the best outcomes for consumers, through the protection of consumer interests and the promotion of competition, as well as wider public interest issues.

Such a model is also consistent with better regulation principles and avoids the risk of regulatory decision making being compromised by the potentially opposing interests of the profession, because of the fundamental tension between the roles of the regulator and the professional body. We believe that the bill is a missed opportunity in that regard.

Secondly, despite our concerns with the current model, we acknowledge that the Government has proposed some checks and balances aimed at trying to ensure that the regulators exercise their regulatory functions appropriately under sections 19 and 20. Under those provisions, the CMA, Consumer Scotland and the Scottish Parliament are allowed to refer regulatory failures to the Scottish ministers.

However, the CMA has questions about how that oversight role would operate in practice and how effective a safeguard it might provide. The CMA's remit is cross-economy, and our decisions on what markets to examine and when are discretionary, informed by where we think we can deliver the best outcomes. There is a risk of

tension if the CMA is given a public role under legislation that requires on-going monitoring.

Thirdly, we consider that preserving the profession's independence from Government is an important aspect of its independence, and it is important for securing various public interest considerations such as protecting the legal rights of individuals and ensuring access to justice. The CMA believes that, under the regulatory arrangements proposed in the bill, the Scottish Government has a more significant role than would be the case with an independent regulator.

That is all that I wish to say, but I am happy and willing to explore these issues further with the committee.

Tracey Reilly (Consumer Scotland): Consumer Scotland is a non-ministerial body that was set up a little over a year ago and whose role is to advocate for consumers' interests. The legal services market is a very important one for consumers, because gaining access to legal services can help them obtain redress across a range of other markets. The way that legal services are regulated and delivered can affect how consumers experience that market, and having services that are designed in a more inclusive way can help manage any risks to consumers.

We think that the bill addresses a range of important public and consumer interest considerations, and we particularly welcome the regulatory objectives being set out in primary legislation and, in particular, the consumer principles that are now set out in the bill. We would like to see the new regulatory framework applied so that it delivers tangible improvements for consumers. In that regard, we think it important to monitor the on-going impact of the reforms so that we can understand whether the market is meeting consumer needs and whether the regulatory framework is promoting opportunities for better outcomes and minimising any risks of consumer harm.

10:00

We believe that there would be significant public interest and consumer benefit in having a system of independent regulation. That said, we also believe that the bill represents a step forward from the status quo and think that co-regulation can be made to work. Given that co-regulation will result in a system that might be relatively complicated for consumers to navigate, we think that further checks and balances will be required in turn to secure consumer confidence.

We acknowledge that the proposed ministerial powers of intervention in the market are the subject of strong stakeholder views, but we

believe that some oversight provision is necessary, because of the model that has been chosen. We think it unlikely that such powers would have been required, had an independent regulatory model been chosen.

As for other aspects of the bill, we support the move towards entity regulation and the provision for alternative business structures. We generally welcome all the proposed changes to the complaints system and I look forward to sharing further views on the detail of the bill as the session progresses.

Dr Marsha Scott (Scottish Women's Aid): Good morning, everybody.

I welcome this discussion—and, indeed, mark it as a milestone. I will sketch out for you why. First, for those of you who are not familiar with us, Scottish Women's Aid is a national domestic abuse organisation. We are an umbrella for 34 services from Shetland to Dunoon to the Borders, and we learn from the feedback loops that we have enabled and which we nurture with consumers, service users and staff who work in grass-roots organisations around Scotland.

When I came into post eight years ago, I toured the 34 services—which took me far longer than I thought it would, partly because of the delightful geography of Scotland. My first question to the managers in those services was: what are the two biggest issues that the women and children with whom they work have to deal with, and what are the barriers to supporting them?

Their first answer will not come as any surprise: stable funding was, of course, the first problem for all of them. However, that is a subject for another committee meeting.

The second answer, which was unanimous around the network, related to problems with legal services for women and children, and the multiple dysfunctions in the criminal and civil justice systems that resulted in women and children rarely having access to their human rights with regard to access to justice. The Scottish Government—and the larger legal context—very rarely enabled women to enjoy the rights that the Government across the UK has committed to under international mechanisms.

Figuring out how to change the system has clearly been a long process for us. From our perspective, the regulation of legal services is a small but very important part of it, and we engaged with not just the independent review of legal aid but the independent review of the regulation of legal services—the Robertson review—and Martyn Evans's work in our attempts to try to shake the foundations of some of the assumptions that go into the way in which justice is not delivered in

Scotland for women and children living with domestic abuse.

As part of that, we have tested a new model for legal services; however, we have had to have that work privately funded, which shows how difficult it is to challenge the way in which services are provided in Scotland. The Legal Education Foundation funded a series of projects for us, one of which delivered services in a new model at Edinburgh Women's Aid—and I am delighted to say that the Scottish Government has now committed to extending that project for three years as we look at the new model.

In many ways, the features of the new model cross over with the discussions at hand, but perhaps the most important feature of the model is that it works from a human rights rather than a consumer perspective. Although I will probably agree with everything that my colleagues on the panel will say, I think that it is a mistake to think about access to justice as a consumer product. In fact, because of the way in which legal aid is set up in Scotland, for women experiencing domestic abuse, 90-plus per cent of them who experience financial abuse are still subject to a means test for legal aid. Moreover, when they succeed in getting legal aid, the aid covers only a patchwork of some of their legal needs.

Our model looks at associating, as Martyn Evans suggested, a family law specialist solicitor with an advice agency like Women's Aid. One of the big barriers to setting up the model was the regulation against advice agencies like Women's Aid and advocacy organisations being able to directly address the problems in service by hiring solicitors and providing a one-stop shop, so to speak, of support and services for women and children. As a result, we really welcome the proposal in the bill to change that situation so that certain organisations such as ours can support women more directly by hiring solicitors, given the expensive hoops that we have had to go through just to provide a service in Edinburgh Women's Aid. However, we take issue with some aspects of the bill in that respect, and I will be happy to discuss that issue in more detail later.

I would welcome it if the committee considered the fact that this area has been heavily influenced by vested interests for many years in Scotland. The bill provides an opportunity to begin to try to pivot—to use the new phrase—Scotland in the direction of a justice system that delivers the human rights that women and children expect to have but which they rarely do have. This is so important in a civil setting, partly because the way in which the system operates now has an enormously chilling effect on women's likelihood of calling the police and of engaging with the criminal

justice system, given how badly the civil justice system treats them.

Therefore, I welcome many aspects of the bill. We are concerned about the Government's decision not to go with an independent regulator, and I am happy to get into the details of that.

However, I just wanted to take this opportunity to say that the system is very much broken, from our perspective, but there are seeds of innovation that seem to be growing. However, if this bill—and, indeed, some of its innovations—is not passed, that will possibly make the growth of a new system almost impossible.

The Deputy Convener: Thank you very much. We will move to questions and I will come to my colleagues in turn. Dr Scott, you talked about the chilling effect of the current system. Could you unpick that and say a bit more about the specific issues that women and children in particular have in accessing the legal system?

Dr Scott: By far the biggest violation of human rights in the way that our civil justice system works is what happens with women who are involved in the criminal justice system who have children. One of the critical aspects that we know of is that when women consider whether to seek help, whether it is by calling the police or talking to a social worker or whatever mechanism, they are afraid, for good reason, that child protection processes will get involved that will mean that they may wind up being taken to task for failure to protect their children, rather than being offered the resources of the system to help them to protect their children by managing the dangerous behaviour of the perpetrator or the accused.

On legal services, women go through a criminal justice process and there may even be a conviction in the criminal courts, but when there is consideration of child contact, custody and visitation questions in a civil setting, that process can be completely disconnected from the criminal process. Women are then often placed in a situation where they are not able to access legal services at any point in all of this. The current lack of access to any lawyer, with legal aid or otherwise, in vast swathes of Scotland is extraordinary. We have had accounts from Grampian, Shetland and Orkney—that is, mostly but not entirely, rural services—of staff making 50 calls to try to find a solicitor, whether those are legal aid or otherwise. The system is in crisis.

Finding a lawyer who can give advice is difficult. However, even if a woman gets advice for some elements of what is happening to her—and that is almost always civil legal advice—by the time she gets that advice, goes through the process and finds a lawyer, she is often enmeshed in

processes in court that, had she had the advice at the beginning, she would not have gone near.

That is what our new model tests: the minute that a woman accesses support, it asks whether she has legal issues or legal questions. The head solicitor in Edinburgh Women's Aid, Gillian Baker, says that her biggest job is keeping women out of court and explaining to them when they do not need to and should not engage with certain court processes.

The difficulty is that, first the advice that women need is hard to find and secondly, when they do find it, it is very rarely domestic abuse competent or readily available and affordable for the solicitor to provide and certainly not affordable for the victims who we work with. Providing a free, at-the-point-of-need service is the model that needs to be tested. I am sorry that that was a long answer.

Kevin Stewart: I would like to follow up on some of the comments that Dr Scott has just made, in particular the statement that people on the ground are following up 40 or 50 solicitors. Obviously there will be some advantage to charities to be able to directly employ legal professionals. Dr Scott, do you think that there may be difficulties from certain quarters if charities are using the same solicitors again and again? How do we get over that in order to build trust between the solicitors who are employed by charities and the women you represent?

10:15

Dr Scott: I am not sure what you are concerned about here. First, the fact that there is a solicitor associated with a particular service would build trust rather than challenge it. Are you worried about other elements of the system?

Kevin Stewart: I am playing devil's advocate here and I am thinking of a particular case that I was involved in many, many years ago where an individual thought that a solicitor was being thrust upon them. If a solicitor is associated with a particular charity, how do you deal with situations where some women may not want to use that solicitor? How do you get around that? Does that go back to the 50 calls to get a solicitor or what can we do to build up that trust?

Dr Scott: Having spent a lot of time in women's aid services, I find the scenario that you have painted hard to associate with what I know about how those services are provided. First, no woman or child in our services has services thrust upon them. Our problem is finding the services that they need. If a woman accessed a service in this model and wanted legal representation and for whatever reason was not happy with the solicitor or solicitors who were available through women's aid, of course she would be supported to access legal

aid or whatever the system offers her under those circumstances. Given our experience in Edinburgh, where one full-time solicitor was not even close to enough, it would be a relief to the system if a woman had another solicitor and could access them.

Kevin Stewart: I told you that I was playing devil's advocate. As you know from previous encounters, I always do. You paint the scenario of one solicitor not being enough for Edinburgh Women's Aid. Is there the opportunity between the 34 organisations that you represent to have a pool of people so that there is choice for women who may not want to go to one particular solicitor for whatever reason?

Dr Scott: We are not yet clear what we would be able to offer. That is absolutely a possibility. We are meeting with the Legal Education Foundation this afternoon, as we have made it through to a second-tier application, to pull together staff and survivors in some of the more rural areas to talk about what a model would look like for them. Unlike in Edinburgh, one full-time solicitor would not necessarily be needed in very small services. However, with the geographical challenges, we do not know what the best model would be there. We are trying to pull together a piece of work on that, which would be funded.

The other thing that we have suggested to the access to justice officials, given the problem with finding any solicitor, is an additional solicitor funded through the programme in Edinburgh Women's Aid to at least provide telephone advice. The Scottish Legal Aid Board is working with us to do a brief intervention to help services access where there might be an available solicitor and to get good data about where the worst problems are. We will have more information as we develop the model. I am not convinced that a central belt model is appropriate in other areas.

That was a long-winded answer to say that what you suggested would certainly be a possibility.

Kevin Stewart: It was not at all long-winded. You are right to highlight that what may work in some of the larger cities may not work elsewhere.

I am interested in what you have to say about access to telephone advice. Having experienced cases where some people who I have been dealing with have found it very difficult to access a solicitor at all, having that telephone line as a last resort is probably a good approach. Do you have any examples from anywhere in the country where solicitors have provided telephone services for some of your clients as a last resort?

Dr Scott: In Covid times, services were provided by telephone, Zoom and Teams. Services were almost exclusively provided that way.

It is a difficult problem and it is one of the things that we need to find out, working directly with survivors and staff. There is a trade-off between face-to-face and ready access to services for more rural areas. I am not sure how to solve that and we will need to find out from survivors how to prioritise. A telephone service or a video service can be delivered, as we all know now, from anywhere quickly, assuming there is signal, which is another issue in some areas. However, I am not ready to accept that people living in rural and island communities should have to accept the fact that they are not going to get the same face-to-face service that people might get in the central belt of Scotland.

Kevin Stewart: I have a brief final question. What you are describing is an approach that has to be person-centred in order to meet the needs of particular individuals. Is that what we should aim for no matter what, whether someone lives in a city, a village or a remote rural or island setting?

Dr Scott: That is what would distinguish this approach from the current approach in Scotland's services, which are not designed to provide access to justice, but are designed to tick a box.

The Deputy Convener: Following on from that point, Tracey Reilly, what are the issues that you have come across in relation to access to services and, where services are available, quality and cost?

Tracey Reilly: I do not disagree with what Dr Scott says about there being a broader issue of how people access services. It is not just a question of consumer rights; it is broadly a question of how people access legal services. That access may come in a variety of shapes, including through advice bodies or private practice solicitors.

There is limited Scottish Government research on the consumer experience of accessing legal services. That was picked up in the Robertson review and has not been resolved since then. We are currently conducting some survey work on that and hope to be able to share the results with the committee during the passage of the bill, although it will probably not be available until the turn of the year. It is a complex landscape for consumers. The Robertson review described it as being

"cluttered"

and

"a confused and complex landscape, hard for those inside and outside the sector to understand."

It is difficult to take issue with that description.

The studies that we have, such as those by the CMA, have found significant barriers for consumers in choosing legal services and finding

information on cost and on gauging the quality and value for money of the service that they receive. The CMA also found that there is unmet need for legal services and low engagement by consumers in being able to question whether the providers that they are looking at are able to meet their needs.

The Law Society introduced new price transparency guidance in 2021 but I have not yet seen any publicly available analysis of how that has impacted on the market for consumers.

Like Dr Scott, we have a particular concern for consumers who are in vulnerable circumstances. It might be that they have low financial resilience, have had difficult life events or have issues with their capacity to understand. People often seek legal advice when they are stressed or when they need to spend a significant amount of money, such as when they are making bequests under a will, buying a house or are involved in criminal proceedings.

If that stress is combined with a situation where legal professionals often have greater technical knowledge and can use very complex language, it can make it difficult for consumers to navigate the market in a confident way. Then there are other vulnerabilities, such as escaping from abuse or caring or a range of other factors. That is why it is so important that regulation has the ability to set strong and appropriate standards and that complaints based on whether a provider has met those standards can be dealt with as quickly and as easily as possible. I am happy to give more detail on that.

The Deputy Convener: Thank you very much, that is helpful. In your view, as the bill is currently drafted, do we have the capacity to set the strong regulatory standards that you say are so vital?

Tracey Reilly: The regulatory objectives are far more directly set out in the bill, and having the consumer principles there is helpful because it gives us something that we can hold things up against. The consumer principles deal with issues such as access, which would also include affordability, and choice, so that is in the bill. What is important for us is that that is monitored. There is no evidence base to show whether those principles are being met currently. Our research will hopefully set a baseline, but it is important that there is on-going research to see what is happening and whether the objectives of the reform are being met.

The Deputy Convener: Thank you. Your point about the lack of data and of a coherent story is well made.

Sharon Horwitz, I will come to you with a similar question on the barriers and some of the

challenges that people currently face. Do you think that the bill will address those challenges?

Sharon Horwitz: Tracey Reilly referred to some of the findings from the CMA and I echo what she said about the lack of information, which we picked up on in the Robertson review as well. We come at this from a competition and consumer protection perspective. What I am going to say is largely based on what we found in 2020 when we did our research.

The key point, and it is one that we have already made, is that there are important characteristics of legal services that affect the way that consumers engage and that are relevant to the competition assessment. Consumers purchase legal services infrequently and under time pressure and often in distressing circumstances—divorce, following a bereavement and various other scenarios that we have been talking about.

Reliance on clear and timely information about price and quality is paramount, but we found that price transparency is lacking. We did some research with providers and found that at the time only 6 per cent of providers published prices on their websites, 72 per cent had no plans to do so and only 18 per cent had a website. Only 16 per cent of those who had a website referred to third-party ratings. We identified those barriers for consumers in shopping around effectively, as well as limiting incentives on providers to compete vigorously. The lack of transparency combined with the characteristics of legal services that I have just mentioned make it very difficult for consumers to shop around to assess quality and that softens competition.

Therefore, we found that competition was not working well. A good way to illustrate that is that we found very large differences in price persisting over time when we compared prices for specific scenarios, like for like. For example, the price for a standard will could vary from £110 to £200—obviously those prices come from our 2020 work. The price for an undefended divorce might vary from £300 to £925. The combination of that with providers using different types of pricing—sometimes an hourly fee, sometimes not—makes it very difficult for consumers to compare and shop around. That analysis suggests that consumers could make significant savings if they were provided with sufficient information so that they could shop around effectively.

We identified various measures aimed at facilitating competition that would empower consumers by improving the availability of the information. Those recommendations were aimed at increasing the transparency of price, service and quality—quality being very difficult for consumers to judge—to enable them to shop

around, get a better deal and secure good outcomes.

However, it is not just about price and quality. It is about improving information to enable consumers to identify their legal needs and navigate a sector that many find complex. It is also important to give greater access to regulatory information across the sector to help consumers to make more informed choices and offer opportunities for third parties to use the information to develop new and innovative tools for consumers, such as price comparison websites.

We made recommendations and, as we have noted, the Law Society published price transparency guidance. Our main recommendation to the Law Society was to evaluate whether that guidance was having an impact on driving change. Our advice was to consider turning that into a rule change, and that has not happened.

10:30

We talked a bit about the difficulty of evaluating whether or not there has been a real change in the provision of more transparent information and, if so, if that has had an impact on competition.

We also made recommendations to the Scottish Government to build on existing work. For example, in response to the legal aid review recommendations, work was done on developing an information hub. There was work on the mygov.scot website, which was about giving information to enable consumers to navigate the market and measures to make regulatory data more available. We also recommended that Consumer Scotland, which was not yet established, take on an active role in driving, delivering and monitoring information initiatives, ensuring that they are inclusive to all consumers. That was the competition aspect of what we found.

We also looked at regulation. We recognised that any regulation is important to protect consumer interests but it is also important that it is proportionate in order to avoid unnecessary costs being passed on to consumers and to minimise any adverse impact on competition. Sometimes regulation can have the impact of inhibiting competition to the detriment of consumers.

We identified some concerns about the impact of regulation and the fact that it had not sufficiently kept pace with the needs of the Scottish legal services sector. We recommended a focus on the removal of unnecessary regulatory restrictions, on how Scottish legal services providers operate, where we felt that they might have had an adverse effect on growth, innovation and the providers' ability to compete on an equal footing.

Most of our recommendations focused on implementing the alternative business structure regime but there were a number of other recommendations, such as on ensuring a level playing field in professions, reducing barriers faced by commercial attorneys, for example, and about solicitor advocates. That is the work that we did in 2020.

There are aspects of the bill that are positive—we have talked about the objectives being set out clearly. There are aspects of defining legal services and the definition of reserved activities, all of which are important. However, from our perspective, the important thing is flexibility and an ability to adapt regulation so that it is not disproportionate and does not add unnecessary costs. Although putting things in legislation can be good, if that is at the expense of the ability to adapt to changing needs, there are risks from the perspective of competition and consumer protection.

The Deputy Convener: Thank you very much, that is helpful. I know that other members will want to dig into some of those issues in more detail, particularly on ABS and some of the reserved issues.

Vicky Crichton, from your perspective and that of the consumer panel on complaints, what are the barriers or issues that come up most often in relation to access, given the system as it currently is, and what are the likely benefits of the bill?

Vicky Crichton: One of the things that Sharon Horwitz mentioned in relation to access was price transparency. Citizens Advice Scotland provided in its briefing to the committee some polling looking at the impact of consumers' perceptions of the cost of legal services on access. It found a suggestion that in some cases consumers would be reticent about seeking legal advice if they were concerned about what the cost of that might be, because they could not afford it or because it might escalate as the case continued. The panel would have a concern if there were consumers who would benefit from legal advice, who have a problem that they think might have that aspect to it, but who are not seeking that because they are not confident of what the charge for it might be.

That links into regulation in the sense that the consumer panel's view is that regulation should be consumer focused and should be about supporting consumers to have access to good quality legal services. The willingness of the regulator to seek consumer input, to undertake consumer research and understand consumer views and to act on that where that might be in conflict with the profession's interest is important. That is a core part of why the panel has said that the independent regulation—regulation that is independent from the Government but also from

the profession that it regulates—would help to protect consumer interests because it would help to ensure that that is a core part of how the regulator discharges its duties.

The Deputy Convener: Thank you. Kevin Stewart, I saw your hand but I will bring in Annie Wells first and then I will come to you.

Annie Wells (Glasgow) (Con): Good morning, panel. Some of my questions have been answered, so thank you very much for that—it saves my voice. Vicky Crichton touched on how an independent regulator would help consumers. What would be the role of the Lord President if there was an independent regulator? I want to try to get right in my head where the two would sit. Would an independent regulator or the proposal in the bill be preferable to the current system?

I will go to Vicky Crichton first, because she started to touch on that issue.

Vicky Crichton: First, the consumer panel does not have a clear view on the role of the Lord President specifically. However, a regulator that is independent of Government and of the profession that it regulates is part of creating public and consumer confidence in the regulator and confidence that it is taking an independent view. That is an important part of why the panel supported the recommendations for a single independent regulator. Having such a regulator looking across the entire legal services market would be the best way to ensure that that is discharged.

As Tracey Reilly said, the model that the Government proposes in the bill brings in a number of those aspects of independence. That will make for a more complex landscape, and complexity often will make it more difficult for the average member of the public or consumer to understand. That can lead to mistrust or misunderstanding about how the regulator acts, so a clearer model would be preferable. Certainly, however, the independent aspects that the bill brings forward are welcome.

Tracey Reilly: One of the most challenging issues with a co-regulatory system is the consumer confidence angle. I know that the SLCC has previously done polling on this, and the figures indicated that only 19 per cent of the public thought that it was acceptable for an organisation to represent lawyers and regulate them and that only 21 per cent were confident that a body with both functions would deal with complaints fairly. That is a challenging position to start from in setting out a co-regulatory regime.

A co-regulatory system can deliver benefits if it is well designed, sufficiently resourced and robustly structured. However, if you do not have an independent regulator and you do not have an

oversight regulator, the system needs to have extra checks and balances in it, and that leads to some of the more controversial aspects of the bill.

The bill contains a number of measures that attempt to reduce risks around transparency and address concerns about accountability. For example, there are provisions on regulators having to publish reports and being subject to freedom of information. There are improvements on the status quo in there. However, at the end of the day, we think that independent regulation would be a cleaner and leaner system, with fewer bodies.

A co-regulatory system has multiple touchpoints. Consumers will have two organisations investigating a complaint—if it has service and conduct aspects—and two reports. It is difficult for consumers to navigate that and understand it easily. Those are the challenges. It is not impossible to make co-regulation work, but it has to be structured in a way that allows for checks and balances.

Sharon Horwitz: Why do we say that independent regulation is important? I touched on this at the outset. We think that it is the best way to ensure that regulation can protect consumer interests, including by promoting competition among providers. That will lead to improved choice and innovation and support wider public interest issues. I mentioned that it is consistent with better regulation principles and the need for clear objectives and accountability that underpin best practice and regulation.

Where the same entity represents and regulates, there can be a lack of transparency about the nature of its activities. There is also a risk that regulatory decision making is compromised because there are the opposing interests of the profession. There is a fundamental tension between the aims of the role of a regulator and those of a professional body. A representative body principally seeks to promote the profession's interests, while a regulator looks to protect the interests of the consumer and the wider public.

For example, a professional body regulating the sector is less likely to be open to business models that may increase competition from outside the profession. It may also focus on regulating quality by setting too high a bar, which may deter competition in a way that is unhelpful for consumers and may raise costs that are passed on to consumers. There is a fundamental tension that leads to suboptimal regulatory outcomes. No model can remove that tension beyond a model that delivers independence.

The model that has been proposed, with regulatory committees, will not be effective because it is not substantially different from the current arrangement. Yes, there are elements that

will improve matters. We have talked a bit about transparency and accountability and the provisions relating to the Freedom of Information (Scotland) Act 2002. Those provisions are all helpful, but that does not remove the fundamental tension.

In our research report, we gave examples of things that have happened in practice and problems with the current regulatory model. Those are examples of where the conflict of interest may have led the Law Society or the Faculty of Advocates to prioritise the interests of members over those of consumers in setting regulation.

More generally, there is the fact that the regulator is subject to competing objectives, whereas an independent regulator can set objectives in a way that is clear and more focused. The effect on a regulator's regulatory incentives may, as I have said, prevent or limit change that could benefit consumers. That means that there is a lack of a strong voice that is empowered and incentivised to drive change.

There is also the issue of public trust. We talked about the SLCC research that showed that consumers do not have trust in the model—that is very important as well. There are lots of reasons why the independent role will deliver benefits.

We also considered the arguments against. Arguments were put to us as to why the model proposed in the bill is better, but we did not accept those arguments. There were arguments about a loss of professional insight and expertise, which we do not think is right. An independent regulator would draw on expertise—it would clearly have to draw on the expertise of the representative bodies and would be expected to appoint professional expertise. There were arguments about costs being increased with an independent regulator model, but that is not necessarily true. You cannot look at costs in isolation; you need to do a net cost benefit impact and weigh up the increase in costs and the administrative cost against the potential for significant gains for consumers from independent regulation.

Various models were put to us. The model envisaged in the bill is an example of another model, but we think that, to overcome the challenges created by that tension, you have to put in place checks and balances that create complexity, and you end up pretty much with the second of the options that was considered: an oversight regulator. Most of us agreed that that creates a more complex system than is warranted and one that is disproportionate for a sector the size of the one in Scotland.

From our perspective, the independent regulator model is the only way to overcome those problems in a way that is less complicated and less costly.

10:45

Dr Scott: I will add to that, although it was far more expert than what I will say, and I know that I will not use the right language, so I apologise for that.

We are well aware that we are trying to shift a system that is based on centuries of discrimination and a disproportionate lack of access to justice. For instance, the independent inspection of policing essentially delivers an opportunity for us to try to level the playing field between the people who have much less power and those who have a lot of power, such as the Lord President.

Although I hear all the arguments about not creating new expensive institutions, I am thinking about the social security institution in Scotland. From our work on women's poverty and children's poverty, we are well aware of the enormous differences in the way that the social security administration in Scotland operates. That is because it had, to a degree, a blank sheet of paper and was able to begin to develop processes that were person centred and human-rights based, which is not the tradition in the provision of social security in the UK more widely.

We have an opportunity to do something similar: to pivot the system away from maintaining the imbalances of power and the privilege that have been so inimical to human rights for women and children experiencing domestic abuse and create a regulatory body that is based on the principles that these folks, I am sure, can cite in their sleep but that is also committed to the outcomes of improving human rights and access to justice. Frankly, using a system that for centuries has denied those things to try to create, with the best intentions in the world, a regulatory system is—I suppose this is in the cynic in me speaking—unlikely to deliver much different and improved experiences for women and children on the ground.

Annie Wells: Thank you.

The Deputy Convener: Kevin Stewart has a brief supplementary question.

Kevin Stewart: I have two brief points. I want to go back to Ms Horwitz's comment on shopping around effectively. We have all had experiences of finding it difficult to find a tariff for certain things, but there are also situations where monopolies exist because of specialism. From a consumer point of view, what does that monopoly situation do to folks who seek advice in specialist areas?

Sharon Horwitz: When you say monopolies, what do you have in mind?

Kevin Stewart: I will give an example that goes back a number of years so that we do not identify anyone. False disposition of land does not happen

regularly but, when it does, folks are pushed to certain specialists who, basically, can charge what they like, because they are the specialists. Could those monopoly situations be ironed out to a degree with the proposed legislation?

Sharon Horwitz: I go back to what I said about the need to drive competition, the need for choice and the need for consumers to understand the options when they have a particular legal problem. I am not sure that the bill necessarily can address that. There is the shopping-around aspect and the aspect of navigating the market. There is a need for information so that consumers know what sort of service will resolve their legal needs.

If there is only a limited number of providers and an obscure service, we cannot do much to overcome that, other than to ensure that regulation is set up to facilitate innovation and the provision of legal services by alternative providers. One key aspect of our research is about the need to enable consumers to make judgments about the use of alternative providers—sometimes unauthorised providers, depending on the nature of the service—who may be able to deliver a service that is of adequate quality but at a lower cost. It is about having those options and consumers understanding what is available—that is what will drive competition.

Kevin Stewart: I do not want to put words in your mouth, but you talked earlier about the flexibility of using regulation rather than primary legislation. In the sort of cases that I mentioned, would that flexibility in using regulation be helpful in allowing necessary adjustments to try to drive out such situations?

Sharon Horwitz: Yes. That would be where the role of an independent regulator could be quite important, because of their ability to identify such areas and put in place appropriate regulation that facilitates innovation, new business models and new providers of service and that sets a minimum level of quality. Setting standards at a very high level makes it difficult to encourage entry and is not necessarily required, given the risk. Part of the role of an independent regulator is about having targeted risk-based regulation and the flexibility to adapt and to recognise and permit the entry of new business models.

Kevin Stewart: My next question again goes back to a point that Ms Horwitz made but is for Ms Crichton. Ms Horwitz quoted Scottish Legal Complaints Commission data on certain aspects. When gathering that data, did you ask a question about trust in the Scottish Legal Complaints Commission? If so, what were the findings from that?

Vicky Crichton: In that piece of research, there was not a particular question on trust in the SLCC

or in other particular organisations; it was about trust in the complaints process and independent complaints processes.

Kevin Stewart: I think that that was a missed opportunity. It is grand to ask about the complaints process, but there is often a feeling of distrust in certain organisations as well. It would be interesting to see whether we could access any data on that particular subject. Thank you very much.

Meghan Gallacher (Central Scotland) (Con): I welcome all the witnesses. We have talked a lot about the performance of regulators. In its current form, the bill gives the Scottish Government new powers to review the performance of regulators. Some people have argued that that could undermine the independence of the legal profession from the state. I am interested in whether the witnesses think that there is a risk that the bill could jeopardise the independence of the legal profession.

Sharon Horwitz: We have talked a lot about the regulator being independent of the representative body. Equally, we recognise the importance of the regulator being independent of the Government. In that context, we note that the committee received a letter last week from the Minister for Victims and Community Safety.

As I said in my opening remarks, we have concerns about a lack of independence from the Government. In our previous legal services work, we have always recognised the importance of independence from the Government. An independent legal profession is important in securing various public interest considerations, such as protecting the legal rights of individuals and ensuring access to justice so that individuals can participate equally in society. It is also important to uphold the principle of the rule of law and to ensure that the legal sector can make decisions in the public interest, free from actual or perceived interference from Government institutions. We are definitely in agreement about the importance of maintaining the independence of legal decision making from Government involvement.

However, maintaining independence from the Government does not require, as some stakeholders have suggested, regulation to be overseen by the existing professional bodies, and it does not weaken the argument for separating regulatory and representative functions. There are many successful examples of organisations that have been established as public bodies operating independently of Government while remaining open to public scrutiny and accountability. The CMA is one such example. It is perfectly possible for such bodies to be subject to obligations from the Government—in relation to ensuring

transparency and accountability, public appointments processes and various other mechanisms—without that undermining their independence.

That is definitely an important aspect. We also think that, if the underlying model that had been chosen had involved independent regulation, there would be less need for Government involvement in the regulation of legal services.

Meghan Gallacher: Do any of the other witnesses have a view on the independence of the legal profession from the state?

Tracey Reilly: I very much agree with Sharon Horwitz's comments. We certainly see the force of the argument that professional bodies should be independent of Government and be able to freely voice frank opinions and take cases that challenge the authority of the Government. However, we also see the need for a regulatory system that is capable of meeting the needs of consumers.

If we go for an independent regulatory model, our view is that the powers of intervention probably would not be necessary, because the design of that model would ensure a degree of separation. As one of the two bodies named in relation to the proposed powers of intervention, we do not see the power being used unless as a last resort or a backstop when other approaches have been unsuccessful. The power would be used only after considering evidence and after due process. That due process would have to include seeking and considering the views of stakeholders, including professional bodies.

If you have read our submission, you will know that our main concern is that we are not sure what evidence base would be needed to allow us to use the powers appropriately. If we do not have the evidence, there is the risk that referrals will be made to the Scottish ministers on a limited evidence base, and those would clearly be open to challenge for quite right reasons. There is also the risk of failing to make a referral simply because we do not have the evidence base, and that could be interpreted as everything being fine, whereas, in fact, we might not necessarily think that everything is fine but might not have the evidence to say otherwise.

It goes back to the point that I made earlier. We need to be clear about the evidence that is needed to underpin the powers and who is responsible for producing it. Bits of evidence could be used. For example, in other jurisdictions, regulators have access to and can publish aggregate first-tier complaint data—the data that firms see. If you combined that with data from regulators, you could get a much richer picture about the areas that generate complaints and what is problematic. You could look at the tracker surveys that the Legal

Services Board runs—one is in the field at the moment—and, indeed, at stakeholder views.

In relation to what would be needed to exercise the powers, the regulatory committees might raise issues and say, “This is not working.”

I recognise that the powers have attracted strong comments. However, if the powers are taken out of the bill in their entirety, my fear is about what would happen if, in three, five or 10 years’ time, it was decided that the system was not delivering on the regulatory objectives. Would we be stuck in that only primary legislation could be used to correct that? That goes back to the point that Mr Stewart made about whether there is sufficient flexibility in the regime to adapt to changing circumstances and challenges that we might not be able to see right now.

11:00

Meghan Gallacher: As Tracey Reilly mentioned, the bill is not clear on what evidence would be needed for a recommendation to be made to Scottish Government ministers. Would having to come up with such evidence place an additional administrative burden on people? Tracey Reilly also said that, given that it is not clear cut exactly what evidence would be required, the system could be ineffective in that, if there was not the right evidence, cases could not be taken further. Could you expand on that?

Tracey Reilly: Sure. It is not clear to us who would have the responsibility for producing the evidence. If it were to be Consumer Scotland, we would want to be confident that resource was in place to deliver that. We have models that provide a precedent for that. For example, we get dedicated funding across the energy, post and water markets. That is levy generated and allows us to do a lot of detailed on-going work on those markets.

We work across a large variety of sectors, including housing, finance and general consumer protection. If we were required to work in the legal services market on a regular, yearly basis to produce that evidence, that would inevitably diminish the resources that were available for our work across those other sectors. Concentrating our efforts in one area could risk reducing our effectiveness across other areas.

Meghan Gallacher: Thank you.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning to the panel. I would like to explore two areas. The first is the proposal to make it an offence to use the title of lawyer when there is an

“intent to deceive ... in connection with providing ... legal services”.

As this is our first evidence session, I am looking for comments on where the witnesses stand on that provision. By extension, is there any risk that regulating the title of lawyer unduly restricts the work of other unregulated lawyers, such as paralegals, legal academics and so on? I am looking for a broad view on where you stand on the provision. I am quite happy to hear from you in any order. *[Interruption.]* Do not all rush.

Sharon Horwitz: We have views on title regulation based on the legal services work that we have done over time. Professional titles have the potential to affect consumer decision making. We have talked about the inherent difficulties that consumers of legal services face in observing quality directly. Consumers sometimes rely on titles such as “solicitor” when navigating the market and use that as an indicator of quality. Although that can be a useful and practical way of helping consumers to find at least an indication of a minimum level of quality, our concerns are that it also has the potential to limit the scope for competition and that has a consequence in terms of affordability because it may result in consumers avoiding, for example, unauthorised providers completely, regardless of the level of quality and consumer protection that those providers may offer and regardless of the value for money that the consumer could obtain by using those alternatives. The provision may also result in a barrier to entry for other providers.

We know that the bill’s proposal to protect the term lawyer is designed to address a legitimate concern that consumers may assume that the term lawyer means that the provider is subject to regulation and they might end up willingly choosing an unauthorised provider without understanding the consequences, but that is not necessarily the case. I have already talked about the unintended negative consequences on competition if the bill makes it harder for consumers to use those alternatives, even when they might benefit from using them.

While we understand that there is some legitimate concern, compelling evidence of the detriment suffered by consumers because the terms lawyer or advocate or other titles are not regulated or currently protected has not been presented to us. We go back to what we said before about the need for regulation to be proportionate and targeted to risk. We advise that additional evidence of the detriment should be gathered before introducing this additional requirement.

Fulton MacGregor: Does anybody else have any views on that? Excellent. Thanks very much. That was good.

I also want to ask about the bill’s provisions on alternative business structures. Again, I am

looking for a broad discussion-based response to get your thoughts on the proposals to liberalise ABSs and what impact that might have on consumer practice.

Vicky Crichton: I have a general point on that. Sharon Horwitz mentioned the need for regulation to help to improve access and choice for consumers, so that a consumer can find the legal advice or representation that they are looking for, and in a number of different places, where that is appropriate. From the panel's perspective, in general terms, anything that improves choice and access is helpful.

Alternative business structures have been on the statute book in England and Wales for a long time but are not currently available for consumers in Scotland. ABSs have been operating in England and Wales for many years without issue, as far as we are aware. Making them work now as part of the bill would be welcome.

Fulton MacGregor: I have a follow-up question, for anybody actually, but Marsha Scott might want to come in on it. The bill also removes the requirement that ABSs provide services for "fee, gain or reward". Could that open up opportunities for law centres or charities such as yours to become ABSs? Have you thought about that?

Dr Scott: Earlier, I spoke about how much in favour we are of removing the restrictions on organisations, such as ours, that provide advocacy and advice. Per the recommendations that Martyn Evans made in his independent review of legal aid in Scotland, we welcome expanding the ability of law centres and other organisations to meet what is a rather extraordinarily large unmet need. That is very welcome.

Also, there is some language that allows the direct employment of solicitors, full-time and on a fixed salary. Having a solicitor on a fixed salary is a real advantage in our setting. It allows us to attract solicitors who are interested in providing public sector kinds of services and are less interested in a high profit margin. However, the environment that we work in is likely to need to be family-friendly for employees. Our model in Edinburgh, for instance, is a combination of paralegals and part-time solicitors, which accommodates the need for women solicitors, as well as expanding the flexibility of provision. We need to make sure that, whatever the final wording of the law is, it accommodates that flexibility.

Tracey Reilly: I agree with what has been said. We support the ABS proposal because we think that they are ultimately likely to improve access for consumers, especially in areas that may be less well served by private practice providers. It should, if the policy intent is carried through, increase the choice of providers and enhance the range of

services available and, more generally, improve levels of competition and innovation. I am not sure that we see a strong case for the retention of a 10 per cent ownership requirement by legal professionals of ABSs. Sharon Horwitz may have comments on that in a moment.

My final point is that a number of the bill's proposals will have an impact on access to justice. Those are the ABS and legal aid proposals and the human rights bill proposals that Marsha Scott referred to and that take an advocacy-based approach to accessing human rights. We still need a little bit of joined-up thinking about how that will work from the perspective of consumers or people who access those services, to make sure that everything is joined up effectively. I do not know whether Marsha Scott wants to comment on that.

Dr Scott: I was trying to figure out how to shoehorn in a comment that I have in my briefing. This is a great opportunity. Thank you.

We are quite concerned that there is a real lack of commitment to consultation with service users and survivors on the development of new services or new regulatory bodies or any of the, mostly welcome, innovations that are proposed in the bill. Such consultation is one way in which to provide that joined-up thinking. We were talking earlier about the patchwork of civil legal services available for women and children experiencing domestic abuse. The need can be for anything from negotiating a divorce, to a settlement on a new house, to child contact and custody arrangements—a whole variety of things. Those requirements reflect the real experiences of people who need services, rather than how the services are designed and delivered. That kind of input helps us to see the system as a whole and to join it up as best we can.

I have now shoehorned that in, but it is relevant to looking across and making sure that the actions in the bill further some of the positive arrangements that we are trying to make in other changes in the system, too.

Sharon Horwitz: We consider that ABSs can have positive impacts for consumers—everyone else has commented on their potential to stimulate competition and innovation. We have been making the point about the need to implement an ABS regime ever since we did our research report and we are concerned that ABSs have not yet been introduced.

Significant benefits can result from ABSs, such as access to external capital; the ability to achieve efficiencies by exploiting economies of scale; the ability to retain high-performing non-solicitor employees or attract outside talent; the involvement of non-legally-qualified practitioners in management who could facilitate entry of more

business-oriented firms; and the ability to deal with entry and exit, allowing partners in small firms who wish to retire opportunities to transfer ownership. For all those reasons, ABSs are important.

Indeed, in our research report, we found evidence that the lack of ABSs has impeded entry, growth and innovation, and has also affected the wider competitiveness of the Scottish legal services sector, with the result that Scottish firms may not be able to compete on a level playing field with England-based firms. For all those reasons, it is imperative that the ABS model develops.

We have views on the ownership threshold. We raised concerns in our research report about the 51 per cent ownership threshold. It is, clearly, an improvement, but the bill proposes to reduce it to 10 per cent. The ownership threshold is a barrier to participation in ABS schemes and might limit the introduction of ABSs. It will create a competitive disadvantage for Scottish law firms relative to their counterparts in England and Wales, where there is no minimum ownership threshold and we think that the risks associated with relaxation are extremely low. For those reasons, we query the value of any ownership threshold.

The Deputy Convener: Can I interrupt there? Is that what you mean about entity regulation potentially going too far and kicking in if people are practitioners but not owners? Is that what that bit of your written submission gets at?

11:15

Sharon Horwitz: You may be referring to our point about entity regulation, which was a mistaken understanding of the bill. This is a different concern. This is about requiring legal ownership, which is not necessary. We can come on to the entity point if you want.

The Deputy Convener: Okay. Sorry for taking you off your flow there. Please carry on.

Sharon Horwitz: Having an ownership requirement could limit the introduction of novel business models. It might end up limiting ABSs to simply having an additional non-solicitor partner added to a firm, keeping traditional firm structures and not getting new models. We recommend removing the ownership threshold completely.

We welcome the proposed removal of the fee, gain or reward requirement. It is important to allow third-sector organisations to directly employ legal professionals to undertake reserved activities. That is a good thing. Indeed, our research report identified various difficulties that had been encountered because of the lack of ABSs. For example, people had found workarounds: we found evidence that law centres and other social

enterprises were partnering with senior solicitors in order to provide legal services. That created an additional risk that would not arise if the solicitor was part of the enterprise and had greater control over the work that they carried out. We also had concerns about law centres losing access to client files if they were relying on external legal advice. We also noted some SLCC findings that social enterprises, many of which are currently registered in England and Wales, were interested in operating in Scotland but, because of the difficulties of doing so, had not entered. For all those reasons, that is a good provision.

Our final point, which we have made consistently, is that Scottish consumers would benefit from the removal of restrictions on advocates forming partnerships, whether with other advocates or in ABSs with legal and/or non-legal professionals, and on their being able to accept instructions directly from consumers should they choose to do so. That would create efficiencies and streamline processes and is, again, another aspect that we have previously recommended.

The Deputy Convener: Thank you. I want to pick up on two areas. My apologies for confusing the entity regulation with the ownership point. In your written statement, you say that section 39 could kick in even if solicitors are involved in legal business but are not actually owners and, therefore, the entity regulation perhaps goes too far. Could you unpick that a little bit for me?

Sharon Horwitz: Let me deal with the entity regulation and then I will come on to that particular point.

Our starting point is that legal services regulation imposes regulatory cost on providers and regulators. As those costs are ultimately passed to consumers, it is important that a regulatory framework is imposed based on an impact assessment that balances the benefits of regulation against the costs. We welcome the model that involves entity regulation and individual regulation, but it is important to strike the right balance. As a general rule, individual-based regulation is often necessary when high risks are identified that can be addressed only by ensuring that the individual is competent to provide the service and should be personally responsible. If there are not such high risks, entity-based regulation, where entities can set the necessary obligations on employees, can be more proportionate.

We welcome the introduction of entity regulation but we are concerned that the judgment about whether it should be entity regulation or individual regulation should be based on an assessment of market failure and where it is appropriate to introduce that.

The point that you may be referring to is that we had highlighted concerns about all licensed professionals being required to also be licensed through an entity. We were concerned that that would restrict the entities within which certain professional titles could be employed. It would mean, for example, that solicitors would be restricted in working in unlicensed providers, even when they were carrying out unreserved legal activities. We discussed with the Scottish Government our concern that that was what the bill intended and we understand that is not the case.

The Deputy Convener: Thank you for that clarification. Kevin Stewart, did you want to come in on this? I have one final question about complaints.

Kevin Stewart: My question is on a separate matter.

The Deputy Convener: Okay.

We want things in place so that people do not have to use the complaints system, but when they get to the point at which they have to use it, we want it to be robust and effective. How does the consumer panel view the bill's provisions to extend SLCC's powers to investigate complaints about unregulated legal services providers? What rigour will that bring to the complaints process?

Vicky Crichton: The panel certainly has raised concerns around the complexity of the existing complaints process, the time that it can take, how clear it is for consumers to access it and how the complaints process will take place. The panel welcomed the provisions in the bill to look at making the complaints process more streamlined.

Extending the complaints process to unregulated legal services could help us. We have touched on a number of other areas. It could help to encourage consumers to have more choice across the market, use the most appropriate provider and do that with the knowledge that there will be a basic level of consumer protection available, albeit that that would be different from existing regulated providers.

The panel wants to ensure that the proposal does not limit access, particularly to free advice, and place unnecessary additional burden on providers, particularly not-for-profit providers. However, at the level of allowing a complaint to be brought when someone has used a legal service that is currently unregulated, it would be welcome.

The other aspect that the panel is particularly concerned about is the one that you mentioned. We hope that people do not get to the point at which they need to use the complaints process, but we want it to work when they do.

When people raise complaints, they look for the issue to be resolved for themselves, but they often also want the issue understood so that it does not happen again in the future. The panel is absolutely supportive of the proposals in the bill for the whole regulatory system, drawing on that learning from complaints, to become much better at understanding where the risks exist and to build on those as part of continuous improvement to avoid the same issues arising in the future. That aspect of the bill is particularly welcome.

Kevin Stewart: I want to go back to a point that Dr Scott made about the lack of voices of lived experience in some of the work that has been carried out thus far. Would you like to comment on what we should do and what the Government should do to gather up the views of those voices of lived experience when it comes to setting regulations or when we are looking at flexibility and revisiting regulations at a later point? How do we best access those voices of lived experience, including the voices of many of the women for whom you have advocated over many years?

Dr Scott: It needs to be an "and" model, not an "or" model. How do we improve our existing systems and embed co-design elements in any new systems? We have a survivors reference group and Rape Crisis Scotland has a survivors reference group. I was struck by what was just said about people getting involved in complaints processes not because it will change the injustice of what happened to them but to improve the system for others. We absolutely hear that from survivors all the time and yet their expertise is so rarely embedded in the process of examining, inspecting, changing and improving the system.

The issue comes back to the original point about data. There is a notion that somehow numbers are objective, yet actually that is never the case. No data is objective; it is always collected with certain kinds of assumptions, and those need to be explicit and transparent. In Scotland, approximately one out of three to one out of four women, and probably one out of five children have experience of domestic abuse.

This is not a small task, but there is a readily available pool of information. When we talk about good data collection, for instance, we can say that it needs to be equalities informed. When you set up a system for data collection, it needs to be scrutinised by people with lived experience. They will tell you what you are not asking that you should be or what you are asking that is couched in ways that will limit the robustness of what you get.

That is all vague, but the issue circles back to looking at every system that we set up and trying to identify a best-case scenario and a co-design approach and, if you cannot do co-design, you

need accountability mechanisms that absolutely engage with survivors of domestic abuse and with consumers of all other services.

Kevin Stewart: A design such as Social Security Scotland's has made for a much better system.

Dr Scott: Absolutely.

The Deputy Convener: I thank all our witnesses for their contributions and for the written evidence that they provided in advance. We have covered an awful lot of ground, but if you think that you could provide more information on something, please send us further communication. We will be looking at the bill in the coming weeks, when we are not looking at the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. It will be an interesting and mixed few weeks for us. That concludes our formal business for today's meeting. [*Interruption.*] Marsha Scott has one last thing to say.

Dr Scott: Again, I am shoehorning, but the UNCRC reference was helpful. I had not included the invisibility of children and young people, who have a statutory right to legal services in Scotland in many circumstances. They hardly ever have access to that right, and they are hardly ever engaged in discussions about what it would look like if they did have access. Clearly, with the UNCRC, we are looking at how we can improve Scotland's provision of access to human rights for children and young people. Those questions are relevant to this bill. As we go forward, it will be important to ring fence some activity with children and young people in the design and consultation processes, and also have a specific specialist look at how these services do or do not affect children and young people. Kay Tisdale at the University of Edinburgh would be a great person to engage with on that stuff.

The Deputy Convener: Thanks for that. Sharon Horwitz wants to raise another point.

11:30

Sharon Horwitz: I completely agree with what Marsha Scott said about lived experience and data. We discovered a lack of research evidence and data when we did our report.

I want to pick up on something that Tracey Reilly said in response to the question about the checks and balances that are envisaged and the role that has been given to the CMA, Consumer Scotland and the Parliament. We talked about the evidence base, and I am concerned that the evidence base will not come from consumers. I suspect that Consumer Scotland is well set up for that. In the operation of the regulatory framework, the things that we are concerned about, such as

the tension between the representative bodies and regulatory bodies, will not come from consumers. We will get evidence from consumers about lack of confidence in the system, but there is also an issue about the ability to identify problems. We discovered that most of our examples came from the SLCC when we looked at conflicts of interest and the problems that arose in the current model.

To perform the role that is being established, you have to be a regulator and have that sort of relationship with the bodies. The evidence will not be readily available from consumers, for example.

The Deputy Convener: That is helpful. Do Tracey Reilly and Vicky Crichton want to make any last points. No? Okay, we will end there. Thank you all for your comments. That concludes our formal business and we will move into private to consider the last couple of items on the agenda. Thank you.

11:31

Meeting continued in private until 11:39.

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