OFFICIAL REPORT
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Equalities, Human Rights and Civil Justice Committee

Tuesday 21 November 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 21 November 2023

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
24th 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:

Bill Alexander (Association of Construction Attorneys)
Roddy Dunlop KC (Faculty of Advocates)
David Gordon (Law Society of Scotland)
Darren Murdoch (Scottish Law Agents Society)
Morag Ross KC (Faculty of Advocates)
Andrew Stevenson (Scottish Law Agents Society)
Rachel Wood (Law Society of Scotland)

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 21 November 2023

[The Convener opened the meeting at 09:45]

Regulation of Legal Services (Scotland) Bill: Stage 1

The Convener (Kaukab Stewart): Good morning, and welcome to the 24th meeting in 2023 of the Equalities, Human Rights and Civil Justice Committee in session 6. We have received no apologies. We are joined by members who are attending remotely.

Agenda item 1 is our fourth evidence session on the Regulation of Legal Services (Scotland) Bill. I refer members to papers 1 and 2. I welcome to the meeting Bill Alexander from the Association of Construction Attorneys; Roddy Dunlop KC, who is the dean of the Faculty of Advocates; Morag Ross KC, who is also from the Faculty of Advocates; Rachel Wood, who is the executive director of regulation from the Law Society of Scotland; David Gordon, who is the lay convener of the regulatory committee at the Law Society of Scotland; Darren Murdoch, who is the president of the Scottish Law Agents Society; and Andrew Stevenson, who is secretary of the Scottish Law Agents Society. There were lots of mouthfuls there, but we got through it. It is nice to see you all.

Before I ask you to make some brief opening remarks, I note that, as there are seven of you—we are delighted to have you here—and members have questions for you, I ask our witnesses to be succinct and to answer the questions that have been put. As there are two representatives from some bodies, perhaps only one of you—the most relevant person—should take the question.

I invite witnesses to make brief opening remarks, should they wish to do so. As I said, because we have two representatives from the Faculty of Advocates, the Law Society of Scotland and the Scottish Law Agents Society, I will leave it up to you to decide who offers the opening remarks. That being said, we start with Bill Alexander.

Bill Alexander (Association of Construction Attorneys): Good morning. Thank you for the opportunity to take part in the committee's consideration of the legal services reform bill. Although we were excluded from the Roberton review, we support all the proposals that were set out in the report.

By way of background, the Association of Construction Attorneys—formerly the Association of Commercial Attorneys—is the only body to have successfully applied for the right to practise in the Scottish courts under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. There have been no complaints against any of our members in more than 12 years.

We support much of the bill. However, we have concerns about sections 25 to 27 and the process for anyone making an application to practise in court. As far as we can ascertain, there appears to be little difference between those sections of the bill and sections 25 to 29 of the 1990 act. We believe that it is a token part of the bill to replace the existing primary legislation. In our opinion, the Scottish Government does not actually support more choice in the provision of legal services.

From our perspective, the application process in gaining our court rights was challenging and, at times, traumatic. We very much doubt that the experience would encourage anyone else to apply, unless there is an independent support structure and the recommendations of the Competition and Markets Authority on competition restrictions are not ignored.

In England, a number of organisations have applied successfully for the right to practise in court, unlike in Scotland. The question of whether that is simply because of the size of the market there or because of other factors might be considered.

In considering the bill, we should not lose sight of the fact that legal services need to be affordable. If any organisation has a dominant position in the marketplace, that will not encourage competition. However, we accept that our organisation is very small and our views on the bill must be seen in that context.

David Gordon (Law Society of Scotland): Thank you for the opportunity to give evidence. I convene the Law Society of Scotland's regulatory committee. I say up front that I am not and never have been a solicitor. I am one of more than 50 non-solicitors who serve on Law Society regulatory committees to set standards and take decisions in the public interest. I am joined by Rachel Wood, our executive director of regulation, who leads the staff team that delivers the society's core regulatory work.

The bill is the culmination of nearly a decade of work by the Law Society. It is important to remember that the legislation has come not because of scandal or significant market failure but because we went to the Government in 2015 to press for major reforms to update and modernise the current law, much of which is more than 40 years old.

The bill contains a great deal that we support and welcome, not least because we suggested it. However, as our submission details, there are important reforms missing from the bill and areas where the Government has not quite got the detail right. We hope that all of that will be addressed as the bill moves forward.

The key concerns for us and others are the sections that give the Scottish ministers sweeping new powers of control and intervention. Those powers have serious implications for the rule of law and the legal profession's independence.

We are pleased to note in the minister's recent letters that the Government has recognised that the bill needs to change. Until we see the proposed amendments, it is impossible to offer a definitive view on whether the new provisions will allay any or all of the concerns, but it is good that the Government is looking to move on the issues.

We look forward to giving evidence to the committee.

Roddy Dunlop KC (Faculty of Advocates): I am the dean of the Faculty of Advocates. With me is Morag Ross KC, who co-ordinated the faculty's response to the call for views at stage 1. As the committee will know, the faculty has been part of regulation of the bar—the public office of advocate—in Scotland since 1532. The faculty is grateful for the opportunity to assist the committee in considering the bill. Today and going forward, we look forward to working co-operatively with the committee on the bill.

The Roberton report, which was presented as long ago as October 2018, was far from uncontroversial, as Ms Roberton acknowledged. Many of the eminent lawyers who worked with her on the review could not support her report's conclusions, which were—accordingly—the conclusions of Ms Roberton alone. That led to a lengthy series of discussions; the faculty responded to the report twice in 2019, and many other bodies responded—the most notable was the senior judiciary's response in May 2019, which we may well discuss.

A formal consultation period followed, which ran for three months at the end of 2021. The faculty responded in detail again, as did many other bodies, including the senior judiciary.

On the back of that consultation, the bill that we are here to discuss was published. Many aspects thereof were welcomed in the profession and beyond. In many ways, the bill seems to strike the right balance between ensuring and improving the proper regulation of the legal profession on one hand and maintaining the profession's independence on the other.

Against that backdrop, I confess to having felt surprise and concern on finding that the first questions that the committee wishes to explore today centre on a potential new regulator of the legal profession. That proposal was discussed in inordinate detail in the various responses to which I have referred. It was opposed by all aspects of the legal profession, with the exception of one or two solicitors and the Association of Construction Attorneys, and it was compellingly rejected as unwarranted and unwise by the senior judiciary. Doubtless as a result, it finds no place in the draft bill. Accordingly, some of the questions that are to be posed today focus on a ship that was thought to have sailed long ago.

As we might come on to discuss, the creation of a new regulator cannot be effected by the amendment of the current bill. Rather, it would involve returning to the drawing board and repeating the exercise that has been on-going since 2018. That would remain, as has been repeatedly emphasised by the senior judiciary, unwarranted and unwise. It would require costings and regulatory impact assessments that have not been undertaken because they were not necessary. The faculty expresses the earnest hope that the improvements in the bill will not now be derailed by something that was rejected in the drafting of, and is thus not contained in, the bill that we are here to discuss.

The bill contains numerous provisions that are designed to improve the system, and those are welcome. However, as we will discuss, there are unwelcome surprises in sections 5, 19 and 20, and the faculty has already expressed our concerns to the Delegated Powers and Law Reform Committee.

It is in the interests of everyone that the legal profession is and is seen to be properly and independently regulated, but also that it is and is seen to be properly independent. The bill contains many improvements in that regard, and the faculty looks forward to working with the committee in order to allow those improvements to be implemented with minimal delay.

Darren Murdoch (Scottish Law Agents Society): Good morning. I am a solicitor and the president of the Scottish Law Agents Society. My colleague Andrew Stevenson is the secretary of the Scottish Law Agents Society.

The society has no regulatory function whatsoever. We were founded by royal charter in 1894, and we simply seek to support our members.

I welcome the opportunity to rectify existing regulatory issues, and I recognise that certain positive changes are proposed in the bill. However, I am of the opinion that certain sections

of the bill are contrary to the rule of law, which presents a risk to the principle of democracy. The most contentious sections of the bill relate to direct Scottish Government ministerial intervention to regulate the legal profession. That is a clear potential breach of the separation of powers. Although the proposed powers might never be used, their very existence is perhaps a risk to democracy.

It is remarkable how the regulatory objectives in the Legal Services (Scotland) Act 2010 have evolved. Section 1(a) of the 2010 act, on the regulatory objectives, states that the purpose of the act is to support

"the constitutional principle of the rule of law".

It would perhaps be more apt to narrate in section 1(a) of the current bill that the purpose of the bill is to diminish the constitutional principle of the rule of law. That is deeply concerning.

I support the bill in relation to the opportunity to improve the regulation of legal services. A recent "Profile of the Profession" study highlighted that nearly two in every three solicitors have experienced mental health problems in the past five years, and a previous "Profile of the Profession" study highlighted that a near majority of solicitors were contemplating leaving the profession within five years. I know from first-hand experience that regulation and lack of access to justice for solicitors in relation to the appeals process are causes of stress to solicitors.

In summary, I seek a commonsense approach to regulation that is fair to all, is cost effective and does not diminish the rule of law.

The Convener: Thank you. We will move to questions. We have quite a few areas to cover, so, as I indicated earlier, I encourage witnesses to be succinct in responding to the substance of each question. On that note, we will crack on.

Paul O'Kane (West Scotland) (Lab): Good morning. I will begin with issues relating to proposed regulation. Mr Dunlop commented on what the bill is not seeking to do, in relation to independent regulation, in the view of the majority of the panel, and I am keen to understand those views more.

In evidence sessions in previous weeks, we have heard support for independent regulation to some degree, although you contend that that is not within the scope of the bill. Might you be able to expand slightly on the argument for why you feel that it is not within the scope of the bill, and that—to use the expression that you used—that ship has sailed. I am keen to understand the thinking around that.

10:00

Roddy Dunlop: Certainly. I am aware of the need to obey the injunction to be succinct, but that question does not necessarily admit of a succinct answer. I am loth to go over old ground on the issue, so I refer the committee back to the lengthy papers that were submitted by the faculty, the Law Society and, in particular, the senior judiciary.

However, to get to the core of the matter, I start by recognising that, whenever the faculty responds on this issue, we are accused of self-pleading—"They would say that, wouldn't they?" That is why I lay such stress on responses from the senior judiciary, given that the core question is about what is needed to preserve and maintain the independence of a properly regulated legal profession. Who better to listen to than a judiciary that has for centuries been seen around the world as a paragon of independence?

Without wanting—or having the time—to discuss in detail all the various points, I stress the following. First, as was noted by the senior judiciary in 2019, the single independent regulator that was proposed by the Roberton report, which would be accountable to Audit Scotland and to the Scottish Parliament, would serve only to destroy the independence of the legal profession and, in turn, to impinge on the independence of the judiciary.

Secondly, it is important to bear in mind what is entailed in regulation of the legal profession. The faculty provides cradle-to-grave regulation of the public office of advocate. By delegation from the Court of Session, the faculty is responsible for deciding entrance requirements, training, examination, continuing professional development and disciplinary matters. It would require a Herculean effort to set up a new regulator to take over what is done by the faculty without any cost to the public or the public purse. The faculty covers all that. I find it very difficult indeed to see how the specialist knowledge, expertise and resources of the faculty, which have been there for centuries, could be replicated by a new regulator; however, I know that it would be very expensive to do so.

Thirdly, as I have touched on, we have been part of the regulation of the public office of advocate since at least 1532, without any concerns as to efficacy or independence. That is hardly surprising, given the safeguards that are in place.

Fourthly, and finally, we are not talking about those safeguards in the present scenario. We are not talking about self-regulation, as it is properly understood, because of the checks and balances that are in place. The Scottish Legal Complaints Commission has oversight in the form of its

handling of complaints. A complaints committee is four people, two of whom will be laypersons. A discipline tribunal is six persons: three practising advocates, two laypersons and an independent retired judge to chair the process.

Most crucially—this is a point that the Roberton report and its supporters have never truly grasped—unlike the case in many countries that have had to bring in independent regulation, the legal profession in Scotland is and has always been independently regulated. That comes from the role of the Lord President as chair of the College of Justice. That has been the case since the College of Justice Act 1532. He acts as the independent regulator of the profession; we can make no regulatory change without his approval or direction. Accordingly, the obvious response to cries for independent regulation is, "We have it already." Simply put, Scotland was ahead of the game in that regard.

Morag Ross KC (Faculty of Advocates): I will add a brief supplementary comment to specifically address Mr O'Kane's question in so far as it relates to the scope of the bill. The answer has to be no—it could not be within the scope of the bill to go backwards and introduce such a fundamentally different concept. You would have to take away all sorts of other material in the bill related to amendment of the Solicitors (Scotland) Act 1980. However, that would run contrary to the entire direction of the bill; it would be a different thing altogether. I understood your question—in addition to the principal questions—to be about the scope of the bill, but such scope is just not there.

Roddy Dunlop: I will add to that. How would the committee do that? Such regulation would involve, without knowing what would be necessary to do it or how much it would cost, grafting on to the bill something that had previously been deliberately and on a considered basis omitted from the bill. It would be impossible. If that is truly to be done, you would need to go back to square 1; you would need to go back to the drawing board and start the consultation process again so that you could have a proper understanding of what such regulation would entail, what it would cost and what it would mean for the profession.

Paul O'Kane: I am grateful for those contributions. It is helpful for the committee to have that on the public record as well as in your written statements. In relation to how the bill might change, it is useful to understand your view that the bill would have to be substantially rewritten in order to achieve some of what has been set out by other witnesses from whom we have heard.

I appreciate that the Association of Construction Attorneys takes a different view. How was that view arrived at, and what is your view of the discussion that we have just had?

Bill Alexander: We base our view on what has happened in England, where there are independent regulators and there does not seem to be any great outcry from the senior judiciary or the legal profession. On that basis, we think that independent regulation would work well here.

Paul O'Kane: It would be worth exploring the comparison with England, notwithstanding the point that was just made about the scope of the bill. If we are having an academic discussion, let us have the academic discussion.

Rachel Wood (Law Society of Scotland): There has been conversation about the comparison with England and Wales. It is important to start by saying that there are significant differences between what happens in England and Wales, the model that is proposed by Esther Roberton as option 1 and the proposed state intervention model that is currently set out in the bill.

I will explain. I should say by way of background that before I joined the Law Society, I worked in private practice in international firms, which are regulated by many regulators, including the main solicitors regulator in England and Wales, which is the Solicitors Regulation Authority. It is a separate regulatory arm of the Law Society of England and Wales, but is part, still, of the Law Society of England and Wales group.

Under the relevant legislation—which is, helpfully or unhelpfully, called the Legal Services Act 2007—in England and Wales, the power to regulate is delegated from the council of the Law Society of England and Wales to the SRA. That is a statutory requirement, but it holds that the power still sits with the Law Society of England and Wales. The SRA independently appoints members of its board, which is different from the situation in Scotland. The SRA is funded by the profession in England and Wales through practising-certificate fees and levies of various sorts.

The SRA, as is the case with every regulator in every sector—not just the legal sector—is staffed primarily by solicitors. Regulation of any sort tends to be a legal process—it involves a lot of law—so solicitors are necessarily involved in every regulator.

More of the SRA's decisions are made by its staff through delegated powers than is the case in Scotland, but it has adjudication panels that are similar to some of our regulatory committees. In relation to its adjudication panels, the requirement is that there must be at least one lay member, but the majority tend to be solicitors.

Is the SRA currently more independent than the Law Society of Scotland? Yes, it is, but when the bill is enacted, minus the ministerial intervention powers, they will be, in as much as you can compare them directly, pretty much the same.

On independent regulation, it depends what we mean by "independent", but if the question is whether the English model is causing any difficulties with the independence of the profession in England and Wales, the answer is no. As I have outlined, the situation there is remarkably similar to what is happening here now, and it will be more or less the same as what will occur once the bill is enacted.

Paul O'Kane: It is useful to have that view. Does anyone wish to add to that point before I ask another question?

Roddy Dunlop: Ms Wood has spoken about the position of the SRA. There is a similar position regarding the Bar Standards Board. In England there is not one regulator for the legal profession, unless you are thinking about the oversight role of the Legal Services Board. There are multiple regulators—the Bar Standards Board, the Chartered Institute of Legal Executives or CILEX, and the Solicitors Regulation Authority. It would be quite wrong to think that the Roberton model would simply ape what is happening in England. It would not.

The Convener: Are you ready to move on, Paul?

Paul O'Kane: Yes, if I can.

The Convener: Please do.

Paul O'Kane: I refer to your written submission, Mr Murdoch. It is concerning for the committee to hear your view on the threat to the independence of the judiciary. Could you expand on your view of the bill, perhaps by addressing the point about amendments to the bill and what might be required to deal with some of the problems?

Darren Murdoch: You asked for succinct answers.

Paul O'Kane: I am sorry: I appreciate that I am asking very wide-ranging questions.

Darren Murdoch: Yes—however, I can give you a succinct answer, in this particular instance. I believe that all sections of the bill relating to the Scottish ministers having power over the legal profession should be omitted. I simply do not believe that there is any place in a democratic society for that. I do not think that the provisions will help the profession in any way, and I do not think that they will help the public, either. I do not believe that those sections have any place whatever in a democratic society.

I have friends internationally who talk about Scotland and the Scottish legal system. If we could

"see oursels as others see us",

to quote a certain Mr Burns, how will we be viewed internationally if the Scottish Government has control over the legal profession? We are fortunate to have grown up in a society that has always had an independent legal profession. I accept that the proposed powers might never be used, but the fact that those powers exist might cause difficulty further down the line.

Paul O'Kane: I am grateful for that.

The Convener: Do any of the witnesses wish to expand on the arguments that we have heard about the conflict of interests in professional bodies being regulators?

David Gordon: We do not believe that a conflict of interests exists in having a professional-body approach to regulation of solicitors specifically. We believe that there is a coincidence of interests. The existing model—the dual role of the professional body, with robust regulation on one hand and representative functions on the other, exercised independently—is common across professions, and there are many examples of that. For accountants, architects, surveyors and my profession—actuaries—the council of the Law Society cannot, by law, interfere with regulatory functions.

Lay members make up at least 50 per cent of all the Law Society's regulatory committees and sub-committees. The solicitor members have strong personal and professional interest in protecting the status of solicitors, and in ensuring that education standards are high, that the right people are accredited as solicitors and that, if there is misconduct, there is appropriate sanction.

The Convener: Thank you for that, but the average citizen on the street will find it quite difficult to see the difference between a conflict of interests and a coincidence of interests. How would you reassure them?

10:15

David Gordon: I am a lay member, not a solicitor. Lay members make up half the membership of each of the regulatory committees and sub-committees. We bring to the party our experience of being not solicitors but the customers of solicitors, as well as our experience from our professional lives outside the solicitor profession. There is simply not a conflict.

The Convener: How would the Law Society choose between its joint professional and

regulatory interests when it comes to lobbying, for instance, or providing input to draft legislation?

Rachel Wood: The regulatory functions and the member support and representation functions are split in the Law Society—we keep a careful divide between them and make sure that they do not cross over. It is true that, on occasion, the regulatory side of the house, as it were, might have an opinion on a piece of proposed legislation, but that is rare and they are kept separate.

You asked about the perception of the consumers of legal services, which is a really good question. Some of what we are talking about is necessarily technical, but it is interesting that the Law Society has—usually every other year—carried out polling of the public, and the last few times that we have done that, we have found that the figure for trust and confidence in the solicitor profession is very high, and much higher than it is in other jurisdictions. That partly comes from the profession being well regulated. In Scotland, the figure runs at about 84 per cent—that comes from independent polling of the public that we undertake. The figure rises to over 90 per cent—I am sorry, but I cannot recall the exact number, at the moment—among people who have recently used a solicitor.

It is important to counter what I would refer to as the myth of self-regulation, which is where the notion of potential conflict comes from. At a previous evidence session, somebody said that the international trend is towards independent regulation, but that is simply not the case. The International Bar Association regularly carries out an analysis of legal regulation around the world. Obviously that is, as you can imagine, a daunting task, so the last time that it was comprehensively carried out was in 2016, but the situation has not changed significantly since that point.

The IBA found that 11 per cent of the world's jurisdictions have what could be classed as independent regulators and that 52 per cent are still regulated by a national bar association, or whatever it is called. There were other flavours and types of regulation in the mix, including state regulation. The perception of conflict sits with the misperception of self-regulation. I hope that we have spelled out why that is a misperception, but I am happy to talk about it further. Such conflict is not, in fact, the case in Scotland. Regulatory decisions are made entirely independent of the representative side of the house, which is key. They are made by lay members and solicitors, and the more serious ones are sent to the absolutely independent Scottish Solicitors Discipline Tribunal.

The Convener: Thank you.

Maggie Chapman (North East Scotland) (Green): Good morning to the panel. Thank you for joining us, and thank you for your contributions, both written and what you have said so far this morning.

I want to continue unpicking a little the issues around regulation, independent or otherwise, and the performance of the different regulators. If I can stay with Rachel Wood, that would be helpful. In relation to sections 19 and 20 of the bill, which we understand will change, although we do not know how yet, what is your view of how we will understand, regulate and assess the performance of the proposed different regulators?

Rachel Wood: I agree with what our colleagues from SLAS have said today: we do not think that there is any place in the bill for the provisions that are in sections 19 and 20.

However, if you are asking about the broader question of oversight, there is already extensive oversight of the solicitors' profession and the Law Society of Scotland. The SLCC has oversight powers, particularly but not solely in relation to complaints. It has limited oversight, for example, on our master policy and on our client protection fund or guarantee fund as it is sometimes called.

We also have oversight from a number of other bodies—let me see whether I can remember them all. The Financial Conduct Authority provides oversight on incidental financial business, where we are delegated to authorise some of that for our solicitor members. HM Treasury and the Office for Professional Body Anti-Money Laundering Supervision in particular heavily oversee our regulation of anti-money laundering. The Office of the Immigration Services Commissioner oversees and regulates our regulation of immigration services, which is very important as so many of the people who need to use those services are particularly vulnerable.

There is quite a lot of oversight already. We accept that there should be oversight, but we do not accept that there should be oversight by the state.

We also understand that increased oversight powers will be put in place with the new commission. We are comfortable with some but not all of those powers. We have concerns about some of the powers that the commission will be given, and we have concerns about a lack of checks and balances.

As I said, there is hefty oversight—

Maggie Chapman: Sorry to interrupt. Will you give us a little bit more detail on your concerns about the oversight powers of the commission?

Rachel Wood: Yes, certainly. The commission will be renamed and given far more power than it

has currently. I suppose that we have two main concerns about what is in the bill in relation to the commission. We have other concerns, such as its name, but we do not need to worry about that detail.

One of our main concerns is that two sections in the bill—the combination of sections 69 and 71—would allow the commission to bring in practice rules for the profession by the back door. Section 69 says that the commission has the power to set certain minimum standards directly for the profession, and section 71 includes a provision that requires practitioners to comply with those standards. There are no checks and balances on that; there is no requirement for approval by the Lord President.

I think that everybody has accepted that, although those are framed as standards, they are, in effect, rules. If you say to the profession, "You must do these things. There will be consequences if you don't", you are talking about practice rules. The commission can simply bring those into force and the profession would have to follow them. There are no checks and balances on that.

More widely, I mentioned that the SLCC has direction powers. Its powers over the Law Society will increase. At the moment, its direction powers are limited. In the main, it can make recommendations, particularly through the complaints handling mechanism. In practice, that is a very collaborative process. The SLCC investigates and writes a report, then there is conversation between it and some of my colleagues about that, and we get a chance to have our say. At the end of that, the SLCC makes a recommendation, which we will almost always follow. The bill will change that to a direction—it will eliminate recommendations and say that there are directions. Again, our concern is that checks and balances are missing.

With the increased power to direct rather than recommend, there would be no requirement for the commission to consult on its recommendations or to give reasons for them, which is key, as those requirements exist in the current legislation. To us, that omission seems to fly in the face of fair process, as the commission would be able to give directions without providing reasons. There is no mechanism for us to challenge any of the commission's directions and the bill provides it with unfettered oversight power to direct us. Occasionally, we do not follow its recommendations because, in our opinion, it does not always get things right. We accept that there should be oversight power—there is a lot of that already, which will continue, and the SLCC will have more power. However, we think that important checks and balances need to be in place.

At stage 2, we will be recommending that the commission retains the power to recommend with reasons and that we would have a statutory obligation to respond to it and provide good reasons if we are not going to follow its recommendations. We will recommend that the SLCC has a mechanism to take any matters further, possibly to the Lord President, if it feels that we are wrong, which may be a more balanced approach. However, as it stands, there is a lot of oversight and there is a lot more to come that has no checks and balances worked into it.

Maggie Chapman: Could you give us a little more detail on the society's view of the proposals for the two different categories of regulators to have different regulatory regimes? We heard different views about the complexity and consumers' understanding of that, which touches on Kaukab Stewart's earlier point. What is the society's view of how the different regulatory regimes will work, or not?

Rachel Wood: Our view is simpler than that: we do not understand the reasons and justifications that the Government has given. I understand what it has said, which is that it is due to numbers. We regulate more people than the ACA or the Faculty of Advocates. It has also said that it is because solicitors have direct face-to-face contact with members of the public who are seeking to use legal services. If it is simply because it is a numbers game, we do not think that that is a good justification. To some extent, we accept both of those things, but the work that is carried out by the Faculty of Advocates and the ACA is extremely important. Often, those organisations deal with high-value civil litigation cases and, sometimes, they deal with some of the most vulnerable people in society in important cases in the criminal sphere. It is not just a numbers game. Both the ACA and the faculty have direct contact with the public, although the faculty has less contact. There is a notion that solicitors are always in between the faculty, the advocate and the client, but that is no longer the case. We simply do not understand the reasons that the Government has given.

Maggie Chapman: Linked to that, what are your views on the position that category 1 regulations should not be subject to freedom of information requests and other such interrogations?

Rachel Wood: FOI requests are an interesting topic. We welcome the provisions in the bill that will give greater transparency. Currently, we are constrained in that we cannot publish anything other than a couple of meaningless lines on what are called our "unsatisfactory professional conduct decisions", which the society makes. There is also other information that we are unable to publish. Obviously, there will always be some restrictions

because of general data protection regulations and human rights legislation.

In addition, a key provision in section 52 of the Legal Profession and Legal Aid (Scotland) Act 2007 makes it a criminal offence for us to discuss any conduct complaint outside of the society. All of that will still be in place, but the costs of FOI would be significant in spite of the statutory limitations on its use. There needs to be a balance between that and what complying with FOI could deliver for people who are looking for more information, because there would be very little that we could say under that that we would not already be able to say through the increased transparency, publishing powers and reporting obligations that we will have under the bill. It would be cumbersome and disproportionate to operate FOI.

10:30

I will also flag up that, if the Law Society were required to be subject to FOI, we would be the only legal regulator in the United Kingdom to be subject to that. There are good reasons for that: it is because of the limitations on what legal regulators can say and because of the disproportionate cost that goes with that.

Bill Alexander: I agree with the Law Society's position. The ACA performs a function that is similar to that of solicitors; we engage directly with the public and instruct counsel. The decision about what is a category 1 or category 2 regulator seems to me to be simply a numbers game.

I have one further point. If we were asked to become a category 1 regulator, we would struggle to do that because there are so few of us.

Maggie Chapman: That is really helpful. Would either Morag Ross or Roddy Dunlop like to add anything to what has already been said about category 1 and 2 regulators and the different regulatory frameworks and regimes?

Roddy Dunlop: As you will have seen in our written response, the faculty is content to be allocated as a category 2 regulator. I accept that it is not purely a numbers game, but numbers are part of it. What is more important is the limitations on what counsel can do. One really crucial example is that we do not handle client money, so a lot of the requirements that would be imposed on category 1 regulators simply would not be apposite for the faculty.

In so far as there is a difference between us and the Law Society, it is not that I think there is any suggestion that we should be elevated to being a category 1 regulator. Instead, what is being said is that too much is being expected of category 1 regulators. I do not have a view on that: it is for the Law Society to make its own case about that. We think that the right balance has been struck regarding the requirements imposed upon the faculty as a category 2 regulator. In whatever way one wants to describe those requirements, whether by way of categories or otherwise, we are content with what is proposed in the bill.

Maggie Chapman: I have one final question. Bill Alexander, you spoke in your opening remarks about the problematic experience of going through the application to practise. My question is not about regulation, but can you say a little more about that and about what you would like to see in sections 25 to 27 of the bill that is not already there? That is not an area that has been unpicked for us in previous evidence sessions.

Bill Alexander: The difficulty that we found is that you are entering into a process about which you have very little knowledge, because all of it is geared to solicitors being essential to how the court system works.

In England, if a new body wants to apply for court rights, that body gets advice about how to go through the process and the rights that it can ask for. When we were doing that, we found that there was no support whatsoever. At some points, we were debating with the Lord President's office, which argued against some aspects of what we were looking for, but the Lord President was also the ultimate decision maker. We never got an opportunity to speak directly to the Lord President to make our case, because everything went through his office, which we found frustrating. There were occasions when we asked for something and it was rejected without any explanation being given, but then, a couple of years later, what we had asked for was granted, again with no explanation. We would certainly like to see a process in which explanations are given as to why something has not been agreed by the Lord President. In addition, if recommendations that the Competition and Markets Authority has made about restrictive practices are rejected, reasons for that should be given, but that has not been the case thus far.

Maggie Chapman: Thank you, Bill—that is helpful. I will leave it there, convener.

The Convener: I bring in Annie Wells.

Annie Wells (Glasgow) (Con): Good morning, panel. First, I will touch on entity regulation. In its submission, the Law Society said that it would

"provide suggested amendments for Stage 2".

Do you want to expand on that?

Rachel Wood: Yes. First, we absolutely welcome entity regulation—we have been asking for it for a long time. For clarification, I note, because the two are sometimes conflated, that entity regulation is similar to, but different from, the

regulation of licensed legal service providers, or ABS—alternative business structures—as they are called under the Legal Services (Scotland) Act 2010.

Entity regulation would allow us to wrap our arms around the whole business. That is important for consumer protection in particular, because the consumer's contract tends to be with a law firm—sole practitioners are an exception—and yet the decisions that are made in the delivery of that service are often made by multiple individuals, some of whom will not even be solicitors. Entity regulation would also allow us to regulate paralegals, for example, which we currently cannot do, so it is a really good thing.

However, there are challenges that we see in the bill with regard to entity regulation, and we have some concerns. Much of the bill has duplicated, or lifted and shifted, parts of the 2010 act that do not relate to the current legal profession, so we have been working closely with the Scottish Government on how we might change some of that. Our main concern is that the bill refers to "special rule" exemptions, but we think of them as waiver procedures. That is something new, and it is not workable for us at all, so we have concerns about that.

Under the existing legislation, we already have the power to issue waivers of practice rules, with some exceptions. We do that very rarely; it tends to relate to technical niche points about conflicts of interest, for example. There might be a potential conflict where one client is a house builder and developer, and the other is a family member who wants to buy a house in that development, but everybody is quite happy that the same solicitor acts for them.

In addition, we waive rules on admission. For example, if somebody has had a longer period of absence than the rules allow for, for health reasons or family or childcare reasons, we might waive those requirements.

We have limited waiver powers, and those powers would allow us, if the need arose in Scotland—which it has not yet done—to create what are known as regulatory sandboxes. Licensed providers, or ABS in particular, may want to do something quite different and innovative that none of us can currently foresee, and those areas would allow that to be done in a supervised way.

We do not currently have powers to waive any rules in the ABS scheme under the 2010 act. It is important that we have such powers, because that is where innovation is more likely to come from. We had asked Government for those powers; instead, it has brought in the complex waiver provisions in the bill, which will be very time consuming and will require a huge amount of consultation.

Waivers normally need to be done quickly—they are often transaction based. In addition, there are requirements on publishing waiver decisions, which we would almost never be able to do because of the commercial and client confidentiality that is involved. That is just one example of where entity regulation has gone slightly awry in some respects. As I said, we are working constructively with the Scottish Government to work through some of that.

The other key point relates to what are known as authorised legal business rules. At present, we bring in rules through the regulatory committee. That is another key to our independence—our members do not make the rules; it is only the regulatory committee that can make them, with the approval and consent of the Lord President. Ultimately, it is the Lord President who has that power. The entity regulation requirements in relation to ALB rules would require mandatory consultation and would give other people, including ministers, powers over those rules, which we do not think is a good thing.

Annie Wells: Over the past few weeks, I have asked various witnesses about the provisions in the bill in relation to making it an offence to use the title of "lawyer" with intent to deceive. What are your views on Professor Mayson's argument that title regulation will not benefit consumers because various people with legal qualifications can legitimately describe themselves as lawyers and provide legal services without being a solicitor or advocate? Roddy Dunlop, do you have a view on that?

Roddy Dunlop: I have been involved in a few cases over the years in which people have contravened the existing provisions in the 1980 act by pretending to be a solicitor. The Law Society has had to seek an interim interdict against their doing that, and my involvement has been as counsel for the Law Society. Therefore, you can tell that there is a problem that needs to be addressed. The problem has become more acute because there are providers out there, some of whom were solicitors who have been struck off and who present themselves to the public as lawyers without explaining that fact, which is something that you would have thought a consumer might want to know before handing over any cash to that particular person.

Therefore, that issue needs to be addressed, and the faculty supports the way that the bill would do that. We were looking for something that went further to protect things such as the title of "advocate", but we can understand the difficulty that that imports, because of the existence of the concept of a mental health advocate, for example.

There are various provisions for advocates with a small “a”, so to speak, north and south of the border. We can understand why that is so. The way to handle the issue is by holding yourself out as a practising member of the faculty, which I think is an adequate way of dealing with it.

The protection in question is a necessary one. The bill seems to strike the right line in that regard, and I support it.

David Gordon: I support those comments and add that, by working with an unregulated lawyer, the consumer only loses protection. An unregulated lawyer would not have the educational qualifications that a solicitor would have or the continuing professional development that a solicitor would need to follow, and they would not be protected by the indemnity insurance that a solicitor would have. In addition, the consumer could not be sure that they had not had complaints made against them.

Darren Murdoch: I have come across a number of examples of individuals holding themselves out as solicitors who were never on the solicitors roll. I reported one instance to my local faculty of procurators, which was reported to the Law Society. No sooner had it been reported than his Facebook page was using the word “lawyer”.

At a client meeting, a client asked me whether a solicitor is the same as a lawyer. I sat back in my chair and thought that I understood why there is confusion out there. The term is misused from time to time. I have come across powers of attorney designed not by a solicitor but by someone holding themselves out as a lawyer, whose drafting allowed the attorney to transfer heritable property “whether situated” as opposed to “wherever situated”. I have seen wills that were poorly drafted by pretend lawyers and pretend solicitors. I agree with the Law Society and with Mr Dunlop that we really need to protect the public.

When someone goes to a solicitor, they know that there is that level of insurance and competence and that the solicitor who is sitting in front of them has years of experience. When someone goes to another firm of “lawyers”, they are under a total misconception.

10:45

Rachel Wood: I understand Professor Mayson’s position to be one of support for regulating the unregulated market in a proportionate way. I think that his comment was about whether regulating the title “lawyer” gets us there. My view is that it is a good start. Regulating the whole unregulated market is very difficult to do proportionately, while balancing the need for access to good-enough services. However, in the main, there is a public protection problem with people calling themselves “lawyer”, and that is what we are trying to do with the bill.

Bill Alexander: I think that we all agree on this. My view is that there is a public perception that a lawyer will be regulated. For that reason alone, the title should be protected.

The Convener: Fulton MacGregor is attending online.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Thank you, convener, and good morning to the panel members. Thank you for your evidence so far.

Following on from Annie Wells’s line of questioning, I want to come back to something that Roddy Dunlop started to address, which is the faculty’s position that protection should also be extended to the title of “advocate”. Roddy, I want to give you a wee opportunity, if you want it, to expand a bit further on that. You have already said that you can see some issues with that position, but I want to know about the initial thinking around it and whether there are any solutions to the issues that you started to address in a previous answer.

Roddy Dunlop: The original thinking comes back to our response to the Roberton report itself, in which the faculty contended that there should be protection given to the title of “advocate”, which, in Scotland, is expressly a public office that is not seen elsewhere. However, in the course of the consultation process in that regard, it was pointed out that there would be difficulties, in that we do not want to criminalise people who justifiably say that they are an advocate for something or to criminalise people who, south of the border, are known as a mental health advocate or anything of that nature.

I think that it is for that reason that the bill strikes the line that it does, which is that it will make it an offence to hold oneself out as a member of the Faculty of Advocates if one is not. Now, that means that, if you wander around with a business card saying “Roddy Dunlop, advocate” and you are not “Roddy Dunlop, advocate”, you will probably have a problem, but it does not fall foul of criminalising those who ought not to be criminalised. It is for that reason that I think, on reflection, that the bill has struck the right line, and I am not advocating—with apologies for the pun—a return to the position that the faculty put forward in its original response.

Fulton MacGregor: Thanks for that—it is helpful to get that on the record.

My second question, which I will open up to the whole panel, is a request for thoughts on the rules on alternative business structures, including a

request for SLAS to expand on concerns in relation to the rules on the suitability of outside investors.

The Convener: Thanks, Fulton. We will perhaps not open the question to all seven members of the panel. Is there anybody on the panel who would particularly like to come in on that? Rachel Wood wants to speak. Is there anyone else? Okay, go for it, Rachel.

Rachel Wood: Oh, sorry—I thought that the question was directed first at SLAS. However, I will be happy to pick up on it, given that we are pulling that together.

The Convener: That is fine; I will go over to SLAS.

Andrew Stevenson (Scottish Law Agents Society): We have a particular concern about section 80 of the bill, which, although it is under the heading of "Miscellaneous", is quite an important provision as regards ABS.

Section 80 would amend section 49 of the Legal Services (Scotland) Act 2010 by reducing from 51 to 10 per cent the minimum stake for lawyer ownership. We have a real concern about that. Under the 2010 act, anyone who owns less than 10 per cent of an ABS is not liable to undergo a suitability test. The provisions in the bill could mean—we give this example in our written submission—that there is a situation in which an ABS has 11 owners, with a lawyer owning 10 per cent and 10 non-lawyers each owning 9 per cent; together, the non-lawyers would own 90 per cent and they would not be liable to undergo any suitability test.

We do not understand why that provision is in the bill, because it alters considerably the responsibility that we have to ensure that the owners of legal businesses are suitable and proper persons to do that. We have a real concern about that particular provision.

The Convener: Thank you for that. Rachel, did you want to come in on the back of that?

Rachel Wood: Yes, please. First, it is important to clarify that neither the existing legislation nor what is proposed is about solicitor or non-solicitor ownership. In fact, section 49 of the 2010 act and the other relevant sections talk about a split between ownership by certain regulated professionals. That includes solicitors and around 10 other categories of professional that are listed in the 2010 act, such as actuaries, accountants, surveyors and some others. The distinction is between that list and people who do not fall within the list of regulated professionals.

The reason for that provision in the first place was that regulated professionals are regulated—they will have already gone through some fitness-to-practice mechanism and approval before gaining that title. That is important.

With regard to the percentage, the 51 per cent threshold was very much of its time. It was very contentious when it was brought in. At the time that it was being discussed, Scotland was one of the first countries in the world to try to put it in place. Other countries were talking about it but, at that point, nobody had done it. ABS did not start in England and Wales until March 2012—the legislation was being worked through at around the same time as it was in Scotland, but it did not actually start until then. The US and Australian states that do it now had not done it at that point.

It was the Law Society that asked for a reduction in the 51 per cent stake. We did not suggest a percentage—we are not quite sure why 10 per cent was chosen. We would say that if the threshold is going to be 10 per cent, why have one at all? We are now 10 to 12 years on from the introduction of ABS and it is working very happily and very well. There is a lot of data from around the world to show that there are no issues with ABS and that, in fact, it increases access to justice and to legal services, and helps the existing profession to innovate.

The 51 per cent was a barrier to people becoming an ABS. The 10 per cent could still be an issue—if we were to move to allowing licensed legal services businesses to list on the stock exchange, as has been done successfully in Australia and in England and Wales, we could not have any percentage requirement, because the requirements of listing and changing ownership just would not be compatible with that.

Our position is that we are really keen to move forward with that, having taken on board the experience of it being very successful in other jurisdictions, and we welcome the reduction in the restriction on ownership.

The Convener: Are you content with that, Fulton? I got a thumbs-up there—that is great.

I will explore the issue of complaints. In previous witness sessions, we have heard a lot on that theme. The Law Society has said that the current complaints system

"is too slow, too rigid, too complex and increasingly expensive to operate."

I go to either Rachel Wood or David Gordon. What are your suggestions to make it less expensive and more efficient? Does the bill cover that?

Rachel Wood: Again, I will take that.

The bill helps, for sure. We welcome the changes that it brings in with regard to making the system faster and more streamlined, and less

complex in terms of eligibility and the gate keeping by the SLCC.

We welcome things such as the ability for the Law Society to raise and begin investigating a complaint directly. At present, as part of what is often referred to as the maze of the complaints system, we can, if we see something, raise a complaint in our name—anybody can, but we still have to send it to the SLCC for eligibility, and it then sends it back to us. That can be a very long process.

There are a number of things in the bill that are very good, and some other things that arise from a long piece of collaboration between the Scottish Government, the Faculty of Advocates, the SLCC and the Law Society on what would have been a piece of secondary legislation, but which has now been wrapped up in the bill.

We also welcome the reintroduction of hybrid complaints. That will speed things up and make things less expensive, and take us back to the position that we were in before a court case on that aspect.

Unfortunately, the bill did not include the additional powers that we had asked for, which would allow us to have levers on conduct complaints in order to move things along more swiftly—

The Convener: What kind of levers do you mean?

Rachel Wood: There are two in particular that we are discussing with the Scottish Government. First, we would like a power for what is known as consensual disposal. I can explain a bit more about that. Secondly, we would like a power to cease or discontinue investigations. At present, around 70 per cent of our complaints result in no action. According to the current legislation, we have to take those all the way through every small, but lengthy, step, and yet very few actually result in action.

Powers on consensual disposal and discontinuing investigations would allow us to flush things out where it is appropriate to do so, or to impose more quickly a moderate, appropriate sanction, rather than having to go all the way to the end. I am happy to explain to the committee more about what those things mean.

The Convener: Thank you. I turn to the Faculty of Advocates, which also has concerns about the complaints system and the role of the SLCC. I give you a wee opportunity to talk about complaints and the SLCC's role in that regard.

Roddy Dunlop: We are largely supportive of the changes that have been proposed in the bill. Our one area of concern centres on the proposed removal of the right of appeal. I have seen the committee's previous evidence sessions in which that has been discussed. Some people have said that that is a good thing, but I beg leave to differ.

On the suggestion that the right of appeal as it currently stands be replaced with a right of review by the SLCC itself, it is highly questionable whether that would be an adequate remedy. In any event, the result would be challengeable by way of judicial review. I have heard previous contributors suggest that that is a good thing, but I doubt that.

At present, if the SLCC makes a wrong decision—I am afraid that there have been several decisions that have been ruled unlawful by the inner house of the Court of Session—there is an ability to go direct to the inner house for a final decision, with no onward appeal. If one had to go to review and then to judicial review in the outer house, and then to an appeal in the inner house, it would add considerably to the delays and expense involved in all that. I therefore query whether that is right. It seems to me that there needs to be some sort of automatic right to go to court, rather than going via judicial review.

The other aspect that has been touched on is hybrid complaints. I put my hands up: I was the counsel in the two cases that exposed the problem with regard to hybrid complaints, so I am very familiar with them. The Faculty of Advocates does not have a difficulty with the statutory reintroduction, as it were, of the notion of hybrid complaints. The main point that arises from that system is that it potentially involves the same set of facts leading to parallel proceedings: one before the SLCC for services, and one before the disciplinary body for conduct. That is not necessarily a good thing, and we have suggested that it can easily be resolved by the faculty dealing with all complaints, whether on services or conduct, as was the case satisfactorily before services complaints were arrogated to the SLCC.

As with the question of an independent regulator, the issue is not covered in the bill, and it is perhaps too late to reopen the matter. What I have suggested would be an easy solution to resolving the delays inherent in the present system, but if the matter is not open, it seems to me that the changes made by the bill are to be welcomed as being designed to minimise the delays that can be found in the system.

11:00

Morag Ross: Can I pick up a point, convener?

The Convener: Is it on the back of Roddy Dunlop's comments?

Morag Ross: I just wanted to supplement his observations.

The Convener: Okay.

Morag Ross: I wanted to comment further on the benefit of having the power to initiate complaints lying within the regulator itself. I know that that has already been discussed and that the committee has already had information on it, and it seems to be a sensible tidying-up approach. Of course, it would be possible to say more about other experiences of efficiency—or its lack—complexity and so forth, but I would just say that we share a number of the responses that the Law Society has made in addressing those questions. I wanted to mention that particular aspect, as I am aware that the committee has taken evidence on it before.

The Convener: Thank you. I will bring in Darren Murdoch.

Darren Murdoch: Going back to the earlier discussion on public perceptions, I understand that, under section 58 of the bill, the SLCC will have an internal review committee. My concern is that the public will perceive that as the SLCC marking its own homework. At the start of the meeting, I raised a concern that I was looking for the bill to be fair but also cost effective, and I referred to the position of solicitors and the stresses that we are under. It is only fair and reasonable that we have a complaint route to the SLCC—and if it has an internal complaints commission, that is fair enough—but the final route for an appeal should be to the sheriff court. Appealing to the inner house of the Court of Session is cost prohibitive for solicitors. My concern is that, if a solicitor gets a finding against them, as a result of which they have to pay the sum of £4,000, they will have to spend multiple times that to appear in the inner house of the Court of Session. I believe that, in so far as we hold the sheriff court as being competent for other business, it should be competent to hear an appeal, too.

The Convener: I am glad that you have brought that issue up again. We have heard representations—indeed, I have had members of the public and constituents speak to me about this—on public trust and faith in a system in which professional bodies investigate their own members' conduct. It is hard enough for an average citizen to navigate the legal profession as it is, let alone make a complaint against one of its members, and when they do make a complaint, they find that the same professional body is investigating it. I am glad that the issue has been raised again.

I believe that my colleague Karen Adam would like to come in on the theme of complaints.

Karen Adam (Banffshire and Buchan Coast) (SNP): I want to drill down a bit more into that, if I may. My question is along the lines of the supplementary that just popped up, but I want to open it up to more of the panel.

What are the panel's views on the powers being granted to the SLCC to initiate a complaint in its own name when it becomes aware of a public interest issue and on the powers for professional organisations to investigate complaints on their own initiative, where those arise from their regulatory monitoring? I am happy to be guided on who to ask first, convener.

Roddy Dunlop: I am happy to take that first. We are supportive of the introduction of the SLCC's ability to bring forth a complaint, where that is deemed necessary in the public interest. As the committee will doubtless be aware, it stems from a decision in which exactly that happened, and the solicitor under investigation sought judicial review on the basis that the SLCC could not be both a complainer and the adjudicating body, because that would effectively offend the principles of natural justice. The complaint was upheld.

Natural justice concerns need to be taken on board, and there would need to be a proper demarcation in the SLCC so that people who were involved in initiating a complaint were not involved in any way in the adjudication of it or even just in its passing the sift. However, as long as we understand those concerns and provisions are made to address them, it is far better that that situation should be introduced than to have a situation whereby there is a problem and no one is doing anything about it or can do anything about it. That would be quite unwelcome and regrettable.

The Convener: Are you happy with that response, Karen?

Karen Adam: Yes, I am. Thank you.

The Convener: Rachel Wood has indicated that she would like to come in quickly, and then I will move on to Meghan Gallacher.

Rachel Wood: We also agree with and welcome both those powers, for the reasons that the dean has laid out. The SLCC often may have first sight of a problem in a firm. If repeated service complaints are coming through against a solicitor, we may not be aware of that, so it is important that the SLCC can say that there is a bigger issue. Likewise, we receive intelligence and become aware of things through some of our proactive regulation, such as inspection. There was a provision previously in statute that allowed us to raise such issues, but it dropped out in 2010. I do not want to put words in the Scottish Government's mouth, but we think that that was accidental, and it means that we have to throw such issues to the SLCC for it to throw them back to us.

On Roddy Dunlop's point, the power is a really important public protection. Within the Law Society, there are very distinct regulatory sub-committees that would raise the complaint to begin with and then deal with the outcome of the investigation at the other end. Of course, the most serious cases go to the tribunal.

Karen Adam: What are the panel's thoughts on the proposal to allow the SLCC to investigate complaints about unregulated legal service providers?

Rachel Wood: I echo what we said earlier about regulation of the title "lawyer" being a start. It is a start, and it will be interesting to see how that pans out in practice, because in practice it might be difficult to identify such providers. There will be a voluntary register of those who agree to be regulated by the SLCC, but we are not sure that people will sign up for that. It is a start, and it will be interesting to see what happens.

Karen Adam: Thank you.

The Convener: Is there anything else that members would like to cover? I will bring in Paul O'Kane, who might want to ask about the definition of "legal services" in section 6 being rather narrow. Have we covered that?

Paul O'Kane: The Law Society had quite a bit to say about section 6 being too narrow—for example, it does not cover estate agency work and incidental financial business, which the public would recognise as being long established in the sector more broadly. Why did you arrive at the feeling that the section is narrow, and how might the bill be amended to widen the scope?

Rachel Wood: You will be pleased to hear that my answer to that will be fairly short. The issue arose because the section was lifted from the 2010 act, and our understanding is that, under the 2010 act, it would not be possible for us to regulate estate agency work or, in particular, incidental financial business of licensed legal service providers. That is not to say that they could not do those things, but they would need to be regulated by somebody else, such as the Financial Conduct Authority, as well as us. That is based on a lot of discussion and legal opinions, at the time.

That was our first concern when we saw the provisions. We are reflecting on the matter further in a lot of detail, and we are at a point where I cannot really comment one way or the other, other than to say that we are still working through whether, in circumstances in which the provisions in the bill link to the 1980 act, there is an issue. We should have our views finalised fairly soon. I know that the Scottish Government is waiting for us to let it know what we think and how we might fix the issue, if we need to.

It is important that we are able to regulate the activities concerned, particularly for those in the existing profession who already do them. It would be a very poor outcome for the public and for the profession if it was suddenly not able to provide the services that are under our regulation. As I said, we are considering the matter further and should have a view soon.

Paul O'Kane: That is very helpful. The committee would be keen to see that.

Meghan Gallacher (Central Scotland) (Con): I wish to return to the complaints process and the complainer's fee. We do not have that in Scotland, but it exists in other places, including South Australia, where I believe there is a complainer's fee equivalent to £60, which is returned to the complainant should their complaint be successful. Given the pressure on the complaints system, and referencing the delays that were mentioned earlier, has anyone on the panel thought whether it would, in that regard, be better for the legal profession were we to proceed with the bill?

I am happy to throw that out to whoever would like to answer.

Roddy Dunlop: We do not think that it would be necessary or desirable to have such a fee. For some people, it would be a significant barrier to their making a complaint. Even £60 might deter somebody from making a complaint. We would not seek to impose such a barrier, and I am not for the introduction of such a measure.

Morag Ross: Indeed. There is no dissent at all—that must be the position—but it is perhaps important to add a little bit of context. It appears that in the bill there is perhaps a move away from recognising the importance of the ability to sift against cases that are

"frivolous, vexatious or totally without merit".

It seems to me that a financial barrier is the wrong way to address that issue—if, indeed, that is the thinking behind the proposal. It is important to realise, however, that there are such cases, and there should be an opportunity to sift those out at a very early stage. It is in everybody's interests that that happens.

David Gordon: The Law Society agrees with the faculty on that: we do not think that there should be a fee, in that regard.

Andrew Stevenson: I do not want to sow the seeds of dissent, but we disagree with the views that have been expressed by the other panel members: we are strongly in favour of the proposal. We do not think that it is a barrier to justice. Indeed, £60 is less than someone would pay to sue a solicitor under simple procedure in the sheriff court, where the fee is £110. If someone chooses to sue a solicitor for £3,000,

they must pay £110 to the sheriff clerk. Our suggestion is a fee of £60, which is roughly 110 Australian dollars, which is the amount that has to be paid in order to complain about a solicitor in South Australia. The commissioner there reported in 2022 that

"a not insignificant amount of resources of my Office are applied to dealing with what are ultimately unproved or unmeritorious allegations about legal practitioners".

The commissioner was also of the view that the fee in South Australia was almost certainly deterring frivolous complaints. That freed up resources, time and energy for dealing with more meritorious claims.

We spoke earlier about trying to make the process faster and more efficient. Our view is that a fee such as the one that is proposed would not be a significant barrier to a great many clients. If someone is buying a house, for example, £60 is nothing in comparison with what they will pay in registration fees, stamp duty and such like. We feel that that is a reasonable requirement, so that the entire cost of the exercise is not borne by the solicitors, and the complainer is required, essentially, to put their money where their mouth is. In our view, that will free up the SLCC's resources to deal with meritorious actions at the expense of frivolous actions, of which there are a few. We feel that it is a reasonable measure.

11:15

Bill Alexander: We agree with the Faculty of Advocates and the Law Society on that point.

Meghan Gallacher: At the risk of starting a new debate, I will leave it there, convener. Thank you very much, everyone.

The Convener: I suppose that £60 is quite a lot of money to a lot of people. If we are trying to ensure that the law, in every aspect, is accessible to as many people as possible, there will be many people who would think that £60 is quite a lot of money.

I understand what Andrew Stevenson said about reducing vexatious complaints, and that has worked. I am considering the balance of risk. Will a £60 charge put off people who need to access the law? Is that risk worth taking? There is a balance to be struck.

You can come back on that one if you wish.

Andrew Stevenson: It is much cheaper than suing a lawyer.

Darren Murdoch: At present, the SLCC is wholly funded by solicitors. There is no "polluter pays" ethos in the current system, so there is nothing to prevent the serial complainer.

In fairness, I note that other complainers might be somewhat delayed by the serial complainer. If we can weed out those serial complainers and their spurious and vexatious complaints, that will be to the betterment of the complaints system. I would be in favour of a nominal fee of £60, plus interest if a complaint is successful. As long as there was some fee, even it was only £30, I would be in favour of introducing such a fee to weed out—one would hope—some of the frivolous or vexatious complaints.

The Convener: I suppose that there is also the cost of setting up a system to process that. I imagine that, even with a nominal fee of £30, the creation of such a system would cost quite a lot of money.

Rachel—you indicated that you might wish to come in. Please do.

Rachel Wood: The Law Society is opposed, in principle, to charging people for bringing complaints. I do not think that it would necessarily stop complaints that are currently termed

"frivolous, vexatious or totally without merit".

To pick up on the point about those complaints clogging up the system, I note that it is important—as Morag Ross said—that there is, as we think there should still be, a statutory mechanism. We recognise that the term

"frivolous, vexatious or totally without merit"

is difficult for an individual who is not a solicitor to understand; in some cases, it might even be offensive. We had long conversations previously with the SLCC and the Scottish Government about coming up with a better form of words. Those terms are legal terms of art, and there is case law around them, but we could overcome that and come up with something that would be more acceptable for complainers of all shapes, sizes and colours.

We certainly understand the stress that that term can cause, but we think that it is a very important provision. We know that the bill allows the SLCC to make rules about that. We think that there should be a statutory provision for some sort of mechanism for sifting out those complaints that are—for lack of a better phrase currently—"vexatious" or "frivolous", or which involve 10 complaints on the same subject.

In addition, we are in favour of the levers to which I referred with regard to conduct complaints, in order to help to relieve the system of certain matters when the time would be better spent elsewhere. However, we do not agree with charging for complaints.

The Convener: Thank you for that. We are coming to the end of our session, so I want to

ensure that we have covered everything. There is one area that we appear not to have touched on.

In the first instance, I ask the Law Society to expand on its argument that the rules in section 81 of the bill, which allow charities to employ solicitors to carry out reserved legal services, are not desirable and should be replaced by allowing third sector organisations to establish themselves as licensed legal service providers and to operate as alternative business structures. It would be good to get some views on that.

Rachel Wood: I will take that. I have not prepared for the question, so bear with me. I do not think that that is what we meant, if it is what we said in our submission. Our position is simply that allowing law centres, citizens advice bodies, charities and the third sector to be able to deliver legal services is a good thing but there should be some regulation of it.

As the bill stands, there would be, again, no public protection. The balance in achieving that protection is difficult, because some of the costs involved in being regulated can be significant. We need to strike a balance between the third sector's resources and the need for legal services to be delivered to the public. However, an open door that would allow third sector organisations to go ahead and provide legal services without any checks and balances or protections for the public gives us some concern.

We welcome third sector organisations and charities being able to become licensed legal services providers. We suspect that that is where they would end up falling anyway because of their ownership structures. They would then be regulated. In fact, we asked for that. We do not understand why the 2010 act stopped them from doing that in the first place, so we are keen to allow that additional access to legal services for members of the public. We simply have some concerns about there being no public protections built into section 81.

We also have some concerns about trying to create a statutory definition of "legal privilege", but that is a different matter.

The Convener: Thank you very much for that. That is brilliant.

We have come to the end of questions, but we have a few minutes in hand, so I want to ensure that everybody on the panel has had an opportunity to say what they wanted to say. If there is a burning topic that any of the witnesses has not managed to bring up through our questioning, and they would like the opportunity to speak on it, this is their moment.

Roddy Dunlop: I was not able to contribute on conflict of interests, which has come up more than once.

I genuinely see no true conflict of interests, nor any risk of the perception of one, once one properly understands the regulatory process. Anyone who has ever experienced regulation by one's peers will know that, when one falls short of what is expected, there are no harsher critics than one's peers.

Moreover, as I have been at pains to stress, the system that endures in Scotland is not one of self-regulation, as it is properly understood. There is no aspect of the disciplinary regime for the faculty nor, I should add, of the one that is applicable to solicitors, in which the faculty or the Law Society is able to exert control or direction, because the disciplinary bodies act independently and none of them has a majority of practising members, whether faculty or solicitors. Rather, the simple truth is that proper and robust regulation is essential to the future of the legal profession. If we cannot show proper and robust independent regulation of the legal profession, the public will lose trust in it.

That being so, there is no conflict between the interests of the faculty and the interests of the public. They are completely aligned. Independent robust regulation without fear or favour is absolutely what we are all about. In that regard, I do not discern any difference or conflict between the interests of the public, on one hand, and those of the profession, on the other.

The Convener: Thank you. We have heard you. That concludes our formal business and I thank all the witnesses for attending. We will consider the remaining items on our agenda in private.

11:24

Meeting continued in private until 11:33.

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