

JUSTICE 2 COMMITTEE

Tuesday 3 October 2006

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2006.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Tuesday 3 October 2006

	Col.
ITEMS IN PRIVATE	2811
LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL: STAGE 2	2812
SUBORDINATE LEGISLATION	2844
Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland)	
Amendment Order 2006 (SSI 2006/466).....	2844

JUSTICE 2 COMMITTEE

† 25th Meeting 2006, Session 2

CONVENER

*Mr David Davidson (North East Scotland) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)

*Colin Fox (Lothians) (SSP)

*Maureen Macmillan (Highlands and Islands) (Lab)

*Mr Stewart Maxwell (West of Scotland) (SNP)

*Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE SUBSTITUTES

Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

Carolyn Leckie (Central Scotland) (SSP)

Mr Kenny MacAskill (Lothians) (SNP)

Margaret Mitchell (Central Scotland) (Con)

Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Bill Aitken (Glasgow) (Con)

Hugh Henry (Deputy Minister for Justice)

Mr John Swinney (North Tayside) (SNP)

CLERKS TO THE COMMITTEE

Tracey Hawe

Alison Walker

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 4

† 24th Meeting 2006, Session 2—Joint meeting with Justice 1 Committee held in private

Scottish Parliament

Justice 2 Committee

Tuesday 3 October 2006

[THE CONVENER *opened the meeting at 14:03*]

Items in Private

The Convener (Mr David Davidson): Good afternoon ladies and gentlemen and welcome to the 25th meeting in 2006 of the Justice 2 Committee. Would anybody who has a mobile phone, pager or BlackBerry kindly switch it off? The minister has already done so—I give him credit for that.

I welcome to the meeting Bill Aitken and John Swinney. We have received no apologies for absence. Jackie Baillie has had to slip out of the meeting, but she will return in a minute.

Under agenda item 1, the committee is asked to agree to take in private item 4, under which it will consider its approach to the Custodial Sentences and Weapons (Scotland) Bill, and item 5, under which it will consider a draft stage 1 report on the Christmas Day and New Year's Day Trading (Scotland) Bill. Do members agree to take those items in private?

Members *indicated agreement.*

Legal Profession and Legal Aid (Scotland) Bill: Stage 2

14:04

The Convener: Item 2 is the second day of stage 2 consideration of the Legal Profession and Legal Aid (Scotland) Bill. I welcome the Deputy Minister for Justice and his advisers.

Members should have to hand the bill as introduced, the marshalled list of amendments and the groupings of amendments. We will try to reach section 34 today; if we get that far, we will not go any further, as there will be another session on the bill at our next meeting.

Section 18—Annual general levy

The Convener: Amendment 231, in the name of Hugh Henry, is grouped with amendments 267, 269, 225, 241 to 244, 226, 270, 271, 247, 248, 272 to 274 and 227 to 230. I draw to members' attention the pre-emption information on the groupings document. In addition, amendment 269 is pre-empted by amendment 268, which is in the next group.

The Deputy Minister for Justice (Hugh Henry): Amendments 231 and 247 clarify the position on the annual general levy that is set out in the bill. The Executive's policy is that the annual general levy should be the same amount for every legal practitioner who is liable to pay it. The effect of amendments 231 and 247 will be to permit the Scottish legal complaints commission to allow for circumstances in its rules in which a portion of the annual general levy might be waived—for example, a waiver might be appropriate when a practitioner begins or ceases to practise in the course of the financial year. The bill contains the safeguard of requiring the commission to consult interested parties on the content of the rules that it proposes to make.

Amendments 241 to 244 will adjust the circumstances in which the complaints levy is payable. Amendment 241 is a technical amendment. The bill as introduced provides for a process of formal determination of a complaint and for an appeal against that determination. That process will be replaced by the process that the committee agreed last week, which involves the offer of an informal settlement. If the informal settlement is accepted by both parties, it will become binding; if it is not accepted by one or other party, the complaint will be formally determined by a determination committee of the commission.

Amendment 242 will require the complaints levy to be paid when a settlement that is proposed by

the commission is accepted. We have listened to the concerns that the profession has expressed about the perceived inequity of having to pay the complaints levy when a complaint is not upheld and have decided on balance that the levy should be paid only when a complaint is upheld. Therefore, amendment 243 requires the complaints levy to be paid when the commission makes a determination that upholds a complaint.

The complaints levy will thus apply in three circumstances: where mediation has been accepted; where an informal settlement has been accepted; and where a complaint has been upheld on formal determination. It is right that the levy should be payable in principle in the first two situations because a settlement that is accepted by both parties will almost always involve some admission of fault on the part of the practitioner. However, it is important that the commission should be able to determine different amounts for the complaints levy in different circumstances, including where time has been saved because the parties have been able to reach an agreement. I have said before that an amount of nil should be included to be used when the commission decides that that is appropriate. The effect of amendments 244 and 248 will be to make it clear that the complaints levy can be assessed as nil.

Amendments 267 and 269 to 274 form an interesting package. I see why having a simpler levy structure might appear to be attractive, but there are good reasons for having a complaints levy. It is designed to ensure that those who generate successful complaints contribute to the costs that the commission will incur as a result of having to deal with them and it will provide a built-in incentive to improve service standards and resolve more disputes at source. We no longer propose to charge the levy when the complaint is dismissed, so it cannot be a burden on practitioners who have done nothing wrong.

However, we have always recognised that it would be unfair to fund the whole machinery through complaints levies. Some types of work are more risky than others. Because the commission's work in raising standards will benefit the profession collectively, it is right that all members should contribute through the annual general levy. That would keep down the costs that small rural firms and firms that depend on legal aid income incur, which would help to preserve access to justice throughout Scotland.

My argument is that the two-levy structure creates transparency. It clearly distinguishes the two elements of individual accountability and collective contribution from each other. Section 20(5) requires the commission to consult on the amount of both levies each year, so practitioners will be able to see how far the collective levy

subsidises less careful colleagues and make representations to the commission about that. Such meaningful consultation will ensure that the commission knows exactly what the profession's views on the problem are and that it should be able to take into account any groundswell of opinion that suggests that careless members should bear an increased share of the burden. As we have argued before, such decisions will ultimately be for the commission after it has considered all the relevant factors.

In essence, we are trying to say that the general levy spreads the burden equally and protects smaller firms—particularly in rural areas—and those who do legal aid work. However, it is equally right that those who fall below the expected standards should make some additional contribution to the overall costs and that those who are never complained against should not have to pick up the burden against those who fail to maintain high standards.

If everything was swallowed up in a single levy, the profession could lose its role in helping the commission to strike the right balance over time. In fact, amendments 267 and 269 to 274 contain no guarantee that any element of individual accountability would be built into the system, because the commission would not be obliged to do that, and I would be wary of having nothing in the bill to require a practitioner's record of upheld complaints to be taken into account. That would send out a wrong and potentially confusing signal to practitioners and suggest to them that they do not need to bother, because failing to maintain high standards would cost them no more, other than whatever the commission determined in the way of liabilities.

I am concerned about how the package of amendments would affect Executive amendment 236, which will require the professional organisations to take responsibility for paying the annual general levies that are due by those they regulate and to collect them from individual practitioners. It could be a step too far to apply that approach to any element that is based on the complaints record, which would make the professional organisations responsible for practitioners' individual service failures. I hope that Jeremy Purvis will reflect on what I have said and not move amendments 267 and 269 to 274.

Amendments 225 to 230 propose that the costs of handling complaints against the legal profession be transferred from the profession to the taxpayer. That would be a striking change from the current position whereby the profession meets those costs. It is not at all clear to me why the taxpayer should be expected to foot the bill for complaints that arise from the legal profession's daily business.

Amendments 225 to 230 seem to be based on unfounded concerns that an independent complaints handling body would be significantly more expensive than what currently exists. I do not believe that to be the case, and the bill provides for controls over the commission's expenditure. Those include annual consultation with the professional bodies and their members on the commission's budget for the coming financial year. Moreover, the Scottish Executive will be able to control the number of staff who are employed by the commission and their terms and conditions. The anxieties about costs are unjustified, but a more fundamental point is that the principle that the taxpayer should meet the cost of complaints that are generated by the profession is unacceptable. The public sector will contribute a fair share of the cost through the annual general levies that are payable for lawyers employed in that sector.

I note the suggested compromise that the Scottish ministers should at least pay to the commission each year a contribution representing the level of annual funding that we provide for the office of the Scottish legal services ombudsman. Contributing such a relatively small sum to the commission throughout its existence would create an anomaly, and I am content that the overriding principle should be that it is for the profession to meet the costs of handling its own complaints.

I move amendment 231.

14:15

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): I shall speak to amendment 267 and the other amendments in my name, which were lodged in response to one of the most persuasive elements of the evidence that we heard—evidence from small solicitors on the setting of a complaints levy as proposed in the bill.

I acknowledge the comments of the Deputy Minister for Justice, but even taking into account the polluter-pays approach, which the Executive has been consistent in proposing and which the committee has agreed to, and the Executive amendments that could allow the commission to set the levy to zero in certain circumstances, I have concerns about the operation of the levy and the provisions in the bill.

The Executive has indicated from the beginning that a proportion of the commission's budget will be funded through the complaints levy, and I do not detect that the situation has changed. The financial memorandum suggests a 50:50 split; if that proportion is followed, and if we assume that the same number of complaints that is upheld by the Law Society—roughly 50 per cent—will be upheld by the commission, we could be looking at

a complaints levy, when it is charged, of between £600 and £1,000. That raises the question whether a solicitor would consider it to be in their interests in effect to pay off a complainer rather than to go through the process of being found guilty by the commission.

That could also apply to mediation. One of my greatest concerns is that, if both parties accept during mediation, a solicitor could be looking at a potential charge of up to £1,000. That would be a considerable disincentive both to going to mediation in the first place and to reaching resolution during the process. The minister said that part of the bill's intention is to resolve complaints at source, but solicitors may consider it to be in their financial interests to go to a full commission process, which would not be in any of our interests.

There is a third element of concern. If a solicitor is found guilty by the commission on a minor aspect of inadequate professional service but the commission thinks that no compensation should be awarded, the levy could be a de facto fine of up to £1,000.

The wider aspect is that the complaints levy would be set only on historical information. The commission has a duty to set its budget for the following financial year, and if part of the intention in charging the levy is to fund a core aspect of the commission, the preceding year's number of upheld complaints will be used to set the levy. Are we saying that there will be a de facto fine with the proposal, and are we building into the commission cash-flow problems? The commission will be able to forecast its revenue only from the complaints levy.

I agree with the deputy minister's comment at stage 1 that it is up to the commission to decide, which is why my amendment 272 would leave a degree of flexibility for the commission to change the circumstances in which a levy would be applied. If the Executive and the committee felt strongly that it was necessary to include the polluter-pays principle, an amendment at stage 3 could state that the commission has to reflect the polluter-pays principle in its charging. That would not be the overt link of the complaints levy funding the commission, nor would it build in some of the areas of concern.

I intend to move my amendments, although I will not do so if the minister responds positively. However, I still have considerable concerns about the operation of the commission.

Bill Aitken (Glasgow) (Con): I listened carefully to what the minister said and to Mr Purvis's comments on his amendments. On balance, I am persuaded that the minister has moved far enough for me to not move my amendments 225 to 227,

229 and 230, but issues still arise with regard to amendment 228.

This committee and the Finance Committee have criticised the funding arrangements for the new body. The lack of detailed cost information in the policy and financial memoranda concerns the legal profession and, in fairness, the Justice 2 Committee, which emphasised that concern in the appropriate committee report. The finance of such an organisation—which is, in effect, a quango—must be seen to be independent and fair, or its credibility will be diminished.

In this instance—the occasion is possibly unique for me—I do not think that it would be inappropriate for the taxpayer to fund the new body. The bill provides that the SLCC will be funded by two types of levy on the legal profession. The amount and balance of the levies will be decided by the SLCC, albeit after consultation. The Justice 2 Committee was quite clear in its report that a much more robust approach should be taken to financial accountability and that, by those means, the body's independence would be guaranteed. At the moment, quite frankly, it is not.

Hugh Henry: Bill Aitken said that this is perhaps a unique occasion in that, in his opinion, it would not be inappropriate for the taxpayer to fund the new body. I find that somewhat amusing, given everything that the Tories have said about public subsidies and lower taxation. It seems that, when it comes to the legal profession, some of whose members might well have links to people in the Conservative party, it is suddenly right for taxpayers to provide the funding. Apart from the fact that that is inconsistent, I suggest to Bill Aitken that, if he wishes to depart from his normal principles and find a unique situation for the use of public funding, he might reflect that there could be circumstances in which that would be better applied than in this bill.

I understand what Jeremy Purvis says about the complaints levy and the financial memorandum. However, the 50:50 split to which he refers is purely illustrative. It will be for the commission to decide what the proportion should be. Of course, that will be done after consultation and all the circumstances will be taken into account. The bill, as amended, will permit the commission to give a discount on the complaints levy or to waive it when it thinks that that is appropriate.

Mediation should be done on a number of levels. The most effective mediation is that which is done in the first instance at the level of the firm when someone has a grievance. I hope that discussion, dialogue and resolution could take place without the case having to go to the commission. When a case goes to the commission, it will be in a different scenario and there will be potential not

only for an award but, as Jeremy Purvis said, for a complaints levy to be made.

It would be perverse to say that we do not want a complaints levy to apply because it might be so high that it would become a fine. If we believed that there would be substantial costs of that nature in an individual case—although we do not yet know what the costs will be—why would we then want to load all of that on to firms across Scotland, including small firms and those in rural areas, that had done nothing wrong and had behaved in an exemplary manner? Such firms would have to take up the burden of paying an added contribution for those firms that did not meet the high standards that they themselves had demonstrated. Simply to load everything on to practitioners across Scotland in a general way would be an unfair burden.

I hope that the amendments that we have lodged and the assurances that we have given show not only that the commission will have the ability to introduce flexibility and will be required to consult, but that we have reflected on the committee's concerns about the levy applying in all circumstances. I hope that those measures will address the concerns.

Amendment 231 agreed to.

Amendment 267 not moved.

The Convener: Amendment 268, in the name of Bill Aitken, is grouped with amendments 232 to 240, 245, 246, 254 and 256. I draw the committee's attention to the pre-emption information; amendment 268 in this group pre-empts amendment 269 in the previous group, as well as the amendments in this group that are mentioned on the groupings document.

Bill Aitken: Amendment 268 would delete the obligation on the professional organisations to collect and remit the general levy. Under the bill, the Law Society of Scotland is being used as a tax collector for the Scottish Executive. I hardly think that that is calculated to improve relationships, nor do I think that it makes clear the degree of independence that has been mentioned time and again in the arguments that have been advanced. Perhaps there is an opportunity for the commission to establish some sort of relationship with individual practitioners who are contributing to the levy.

I move amendment 268.

Hugh Henry: I disagree fundamentally with Bill Aitken and I oppose amendment 268, which would result in the duplication of administrative effort and an increase in costs. Far from being a contribution to efficient government, not only would what Bill Aitken proposes be inefficient, but it would create a burden for the very people whom he professes to want to protect.

Amendment 268 would in effect require the commission to set up its own administrative arrangements to collect the annual general levy from practitioners. That would be an inefficient way to collect revenue. The professional bodies already have well-developed administrative arrangements to collect annual fees or charges from their members. To require the commission to set up its own arrangements to collect the annual general levy would result in the duplication of effort that I mentioned. It would raise the commission's running costs, and the profession would ultimately have to bear the extra costs.

We have heard a lot, in the committee and elsewhere, about people's concerns that the burden would fall on small firms and on practitioners in rural areas. The proposal in amendment 268 is an example of an additional burden that could have a significant impact on those whom members seek to protect. I hope that Bill Aitken will reflect on the matter and agree that the amendment is not appropriate.

14:30

At present, the bill requires the professional bodies to pay the commission each financial year a sum representing the total amount of annual general levy that they collect from their members. That would leave the commission to pursue any individual practitioners who do not pay up. We think that that could be time consuming for the commission, that it could increase running costs and that there could be a risk of any significant level of non-payment destabilising the commission financially. Amendments 232 to 236 will adjust the bill's provisions to address that concern.

Amendments 232 to 235 are technical amendments. Amendment 236 proposes a small but significant change. The amendment places responsibility on the professional organisations to pay the commission each year the full amount of annual levy that is due from their members. That will require the professional organisations to pursue individual practitioners who do not pay when the levy is due. Amendment 236 will avoid the need for the commission to set up its own arrangements to recover unpaid annual levies, which could tie up resources and make the commission more expensive to the profession.

Amendments 237, 238 and 239, which are consequential on the change, will allow the commission to recover from the professional organisations as a civil debt any sum that is due by them to the commission, plus interest at such rate as ministers may prescribe.

Amendment 240 is intended to protect the interests of the professional bodies. It will allow them not only to recover from individual

practitioners as a civil debt any amount of annual general levy that is unpaid by them, together with interest, but to bring a conduct complaint against any practitioner for late payment or non-payment. Those powers should ensure that failure to pay the annual levy is not seen as being in a practitioner's best interests and that it will not happen to any significant extent in practice.

Amendments 245 and 246 will deal with recovery of the complaints levy and provide for the commission to charge interest at a rate that is prescribed by ministers. They will also permit late payment or non-payment to be made the subject of a conduct complaint.

Amendment 254 will permit the commission to make rules about the mechanics of charging interest on any outstanding amount of annual general levy or complaints levy that is due by a professional organisation or practitioner respectively.

Amendment 256 will confer on the commission a number of rule-making powers to establish the machinery for setting, collection and recovery of levies. Those include specification of the circumstances in which a portion of the annual general levy may be waived and of the circumstances in which the complaints levy may be waived. We debated the powers to waive in group 1.

The Convener: The minister appears to suggest that, should there be default for any reason, the professional bodies, rather than the organisation that is trying ultimately to collect the money, will cover the cost. Does he agree that, if the administrative systems that are used currently by the Law Society of Scotland were slimmed down, there would be a saving to the profession on basic practice fees, which would clarify where the costs were coming from? In other words, there would be clarity as far as the commission is concerned.

Bill Aitken: I am not persuaded by the minister's arguments. Although I am not fully aware of the number of practitioners that exist in Scotland, it cannot be very high. It would be a simple matter to invoice each one individually. Normal civil diligence procedures would apply in the event of any degree of non-payment. The fact of the matter is that the Executive is seeking to use a professional body to collect an imposition that it has applied. That is unfair, unjust and utterly inappropriate. Accordingly, I will press amendment 268.

The Convener: The question is, that amendment 268 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
 Butler, Bill (Glasgow Anniesland) (Lab)
 Fox, Colin (Lothians) (SSP)
 Macmillan, Maureen (Highlands and Islands) (Lab)
 Maxwell, Mr Stewart (West of Scotland) (SNP)
 Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 268 disagreed to.

Amendment 232 moved—[Hugh Henry].

The Convener: The question is, that amendment 232 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
 Butler, Bill (Glasgow Anniesland) (Lab)
 Fox, Colin (Lothians) (SSP)
 Macmillan, Maureen (Highlands and Islands) (Lab)
 Maxwell, Mr Stewart (West of Scotland) (SNP)
 Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

AGAINST

Davidson, Mr David (North East Scotland) (Con)

The Convener: The result of the division is: For 6, Against 1, Abstentions 0.

Amendment 232 agreed to.

Amendment 233 moved—[Hugh Henry].

The Convener: The question is, that amendment 233 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
 Butler, Bill (Glasgow Anniesland) (Lab)
 Fox, Colin (Lothians) (SSP)
 Macmillan, Maureen (Highlands and Islands) (Lab)
 Maxwell, Mr Stewart (West of Scotland) (SNP)
 Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

AGAINST

Davidson, Mr David (North East Scotland) (Con)

The Convener: The result of the division is: For 6, Against 1, Abstentions 0.

Amendment 233 agreed to.

Amendments 234 moved—[Hugh Henry].

The Convener: The question is, that amendment 234 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
 Butler, Bill (Glasgow Anniesland) (Lab)
 Fox, Colin (Lothians) (SSP)
 Macmillan, Maureen (Highlands and Islands) (Lab)
 Maxwell, Mr Stewart (West of Scotland) (SNP)
 Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

AGAINST

Davidson, Mr David (North East Scotland) (Con)

The Convener: The result of the division is: For 6, Against 1, Abstentions 0.

Amendment 234 agreed to.

Amendment 269 not moved.

Amendment 235 moved—[Hugh Henry]—and agreed to.

Amendment 236 moved—[Hugh Henry].

The Convener: The question is, that amendment 236 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
 Butler, Bill (Glasgow Anniesland) (Lab)
 Fox, Colin (Lothians) (SSP)
 Macmillan, Maureen (Highlands and Islands) (Lab)
 Maxwell, Mr Stewart (West of Scotland) (SNP)
 Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

AGAINST

Davidson, Mr David (North East Scotland) (Con)

The Convener: The result of the division is: For 6, Against 1, Abstentions 0.

Amendment 236 agreed to.

Amendments 237 to 240 moved—[Hugh Henry]—and agreed to.

Amendment 225 not moved.

Section 18, as amended, agreed to.

Section 19—Complaints levy

Amendments 241, 97 and 242 to 246 moved—[Hugh Henry]—and agreed to.

Amendment 226 not moved.

Section 19, as amended, agreed to.

Section 20—Amount of levies and consultation

Amendments 270 and 271 not moved.

Amendments 247 and 248 moved—[Hugh Henry]—and agreed to.

Amendments 272 and 273 not moved.

The Convener: Amendment 249, in the name of the minister, is grouped with amendments 289 and 290.

Hugh Henry: Amendment 249 will simply require the professional bodies to give the commission an estimate of the number of members whom they anticipate will be liable to pay the annual general levy in the following financial year. The commission will need that information to calculate the level of annual general levy that it will propose in its draft budget.

The commission must consult the professional organisations and their members on its proposed budget in January each year. After taking account of the views expressed in response to the consultation, the commission will set its budget for the following financial year. Estimates will therefore be essential if the commission is to be able to determine the appropriate level for the annual general levy.

Amendment 289, in the name of Jeremy Purvis, appears to try to ensure the transparency of the commission's annual budgetary consultation. I support that intention. However, the effect of the amendment is not clear. The words "results of the consultation" could mean the actual responses to the consultation, a summary of those responses or some aspect of the outcome of the consultation. The wording should make clear what the commission is required to publish. I am happy to accept the principle behind amendment 289, but it would be best to reflect on the necessary form of words with a view to returning to the issue at stage 3. I am happy to discuss the matter with Jeremy Purvis.

Amendment 290 is a self-explanatory and sensible small amendment, which I am happy to accept.

I move amendment 249.

Jeremy Purvis: I could not state the case better than the minister has done. Amendments 289 and 290 are straightforward and reflect concerns about the level of scrutiny of the commission in setting its budget. I take on board the minister's comments about amendment 289. I am pleased that he accepts amendment 290, which will give a degree of assurance that before the end of each financial year the commission's finalised budget document for the following financial year will be made public.

Mr John Swinney (North Tayside) (SNP): I welcome the minister's comments. The amendments in Jeremy Purvis's name reflect the Finance Committee's concerns about the possibility that the commission might grow arms and legs and become a greater cost on the profession than is necessary. Given that the Parliament is wrestling with wider issues to do with the commissioner and ombudsman sector—the Finance Committee has been leading the debate—the precautionary tone of amendments 289 and 290 and the need for vigorous public

scrutiny of the commission's budget sit comfortably with the mood of the Parliament. The minister's broad acceptance of the principle behind amendments 289 and 290 is welcome.

The Convener: Will you wind up, minister?

Hugh Henry: I do not need to say more, other than to repeat that I am happy to have further discussions with Jeremy Purvis on amendment 289 and I accept amendment 290.

14:45

Amendment 249 agreed to.

Amendments 274 and 289 not moved.

Amendment 290 moved—[Jeremy Purvis]—and agreed to.

Amendment 227 not moved.

Section 20, as amended, agreed to.

After section 20

Amendment 228 moved—[Bill Aitken].

The Convener: The question is, that amendment 228 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 228 disagreed to.

Sections 21 and 22 agreed to.

Section 23—Duty of Commission to make rules as to practice and procedure

The Convener: Amendment 275, in the name of Bill Aitken, is in a group on its own.

Bill Aitken: Amendment 275 is straightforward. At the moment, as the governing body for solicitors, the Law Society of Scotland requires to have its rules approved by the Lord President of the Court of Session. Amendment 275 seeks to introduce a similar provision in respect of the new commission. It is not unreasonable to express again the same caveat on the need for independence that was expressed in the past. The input of the Lord President to any rules that the

SLCC seeks to implement would be sensible and would provide some reassurance to the legal profession.

I move amendment 275.

Hugh Henry: Bill Aitken's comments reflect his continuing confusion on the exact purpose of the new body. I do not believe that the Lord President should have a role in approving the rules of a consumer complaints-handling body. We are talking about a body that is not an appendage to but separate from the legal profession. The commission is being established to rule on complaints that emanate from the legal profession.

The range of expertise that the holder of the post of Lord President requires to have relates primarily to the law and the legal profession. For example, given that the subject matter of the rules that the Law Society of Scotland makes under the Solicitors (Scotland) Act 1980 falls directly within his remit, it is entirely appropriate that the Lord President should approve them. However, the remit and experience of the Lord President does not extend to consumer issues.

The bill requires the commission to consult the Scottish ministers, relevant professional organisations and groups that represent consumer interests on its proposed rules. As an independent body with a wide range of relevant experience, it is important that the commission should be able to make its own rules in the light of the outcome of consultation. It should also be able to implement them without vetting by an outside interest, whoever or whatever that may be. I hope that Bill Aitken understands the importance of a consumer complaints body being seen to have that separation of interests. Amendment 275 would deny such a separation.

Bill Aitken: I find it surprising—and, to some extent, quite amusing—that the minister feels that the Lord President of the Court of Session is not in a position to bring a degree of expertise on consumer matters. If a civil action went to court, any appeal on a matter of consumer law might have to be determined by the Lord President of the Court of Session sitting in the first division with two of his colleagues. To suggest that a degree of expertise would not be required in that respect is a shallow proposal.

Basically, we come back once again to the question of independence. The Lord President's input would be valuable in suggesting that the commission is independent. The minister is quite correct to say that the commission will be a consumer body, but it will have considerable powers. The fact is that any body with such powers must be seen to be detached and independent from the Executive. The purpose of

amendment 275 is to underline that, therefore I suggest that the committee should agree to it.

The Convener: The question is, that amendment 275 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 275 disagreed to.

Section 23 agreed to.

Schedule 3

RULES AS TO COMMISSION'S PRACTICE AND PROCEDURE

The Convener: Amendment 250, in the name of the minister, is grouped with amendments 251 to 253, 260, 262, 291 and 264. I draw members' attention to the information on pre-emption in the groupings paper.

Hugh Henry: Amendment 250 will ensure that the complainer cannot obstruct the release to the commission of information and documents that are necessary to investigate a complaint fairly. For that purpose, the amendment provides that the commission must make rules that require it not to investigate a service complaint unless the complainer has waived any right of confidentiality in respect of the subject matter of the complaint. Amendment 250 will also ensure that the commission's rules will require the complainer to waive the right of confidentiality before the commission can remit a conduct complaint to a professional body or investigate a complaint about the way in which a professional body has handled a conduct complaint.

Amendment 260 also deals with confidentiality, but it relates to situations in which the commission requires a professional organisation to provide it with information or documents. Such information or documents may be needed by the commission either to investigate a handling complaint or to meet its responsibility to monitor practice in relation to conduct complaints. Section 27 requires the commission to identify any trends in relation to either the way practitioners handle matters that result in conduct complaints or the way in which the professional bodies deal with such complaints. It would not be appropriate to give the commission

the right to override legal professional privilege when gathering evidence from the professional organisations, therefore amendment 260 will delete the wording that would have allowed it to do so.

Amendments 251, 252 and 253 are minor drafting amendments that will remove unclear references to “the Part” in schedule 3 and replace them with clear references to “Part 1”.

Amendment 262 will prohibit the commission from disclosing information that it receives in connection with a complaint other than in the discharge of its functions or in accordance with any legal requirement. Amendment 264 contains a similar provision for the professional bodies in respect of their investigation of conduct complaints. The amendments are designed to keep disclosure of information to a minimum and to allow disclosure only when permitted by statute, such as when the commission is exercising its functions under the bill. In addition, there will be no protection from liability in damages if a disclosure is made in bad faith.

There are two main differences between amendment 291, in the name of Bill Aitken, and Executive amendments 262 and 264. First, amendment 291 would apply only to the commission, and not to those acting on behalf of the professional organisations in investigating conduct complaints. Secondly, it would provide for the creation of a criminal offence. It is not reasonable to create a criminal offence that would apply only to the commission and not to the professional organisations in similar circumstances. For that reason, I do not support amendment 291. However, I will give serious consideration to the addition at stage 3 of a criminal sanction to the provisions in both Executive amendments. I will leave Bill Aitken to reflect on that.

I move amendment 250.

Bill Aitken: There is no great difference between us in this group of amendments. Having listened carefully to what the minister said, I totally agree that the commission should in no way be obstructed by the legal profession in any of its investigations or inquiries. That is a given. At the same time, it would be decidedly unfortunate if the converse situation were to arise, such that someone in the commission, whether for pecuniary gain or for some other reason, were to release to the press details of some business between the commission and a practitioner. That would be a fairly serious matter that should, at the end of the day, be open to sanction.

Having listened to what the minister has said, I am prepared to await the amendment that will come at stage 3. At that stage, I will revisit the

argument. For the moment, I am not disposed to move amendment 291.

Amendment 250 agreed to.

Amendments 251 and 98 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 190, in the name of Bill Aitken, is the only amendment in the group. If amendment 190 is agreed to, I cannot call amendment 252.

Bill Aitken: This is one of those amendments about which I feel gamekeeper turned poacher, as opposed to the reverse. I have had some harsh words to say, under various headings, about the application of the European convention on human rights to Scots law. The fact is, however, that we have it, we are stuck with it and we have to abide by it.

It is not appropriate for the SLCC to hide behind the wording as it has been drafted. The commission must have regard to the ECHR—it is not open to choice. I personally, and my party, did not sign up for the ECHR's operation here, but we are bound to adhere by it. As the bill is drafted, however, we are not abiding by it.

I move amendment 190.

The Convener: I remind the committee that we have received letters from professional bodies raising much the same issue.

Hugh Henry: It is right that all the processes of the commission should be bound by the European convention on human rights. In the context of the commission's power to make rules regarding hearings, we would prefer to remind the commission of the relevance of the convention to its decisions on whether to hold hearings on a complaint and on whether such hearings should be held in public or private. That is entirely appropriate. Our proposals are best in the circumstances. I do not support amendment 190.

Bill Aitken: I need not add to what I have already said. The issue is clear. I am totally convinced that the Executive is wrong in this respect and, unfortunately, it might well be proved to be wrong at some later stage, which will cost the people of Scotland quite a lot of money.

The Convener: The question is, that amendment 190 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)
 Macmillan, Maureen (Highlands and Islands) (Lab)
 Maxwell, Mr Stewart (West of Scotland) (SNP)
 Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 190 disagreed to.

Amendments 252, 99, 100 and 253 moved—[Hugh Henry]—and agreed to.

15:00

The Convener: I call amendment 101, in the name of the minister, which we debated last week with amendment 10. If it is agreed to, I cannot call amendment 191, because of pre-emption.

Amendments 101 to 108 and 254 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 255, in the name of the minister, is grouped with amendment 261.

Hugh Henry: Amendments 255 and 261 are designed to prevent unnecessary double investigation of the same factual issues by both the commission—which will be a regulatory body as well as having the role of examining wider issues—and the professional organisations.

Amendment 255 enables the commission to use its rule-making powers to specify circumstances in which it may rely on its own previous findings of fact or on those of a professional body. The consent of the professional body is required for that because of the possibility that its finding of fact might be misunderstood or might have been made in a different context. If, for example, a particular finding was not critical to an issue that the professional body required to decide upon at the time, it might not have been the subject of a thorough investigation.

The professional bodies whose findings the commission may take into account are the council of the Law Society of Scotland, the Faculty of Advocates, any organisation that has acquired new rights of audience and rights to conduct litigation on behalf of its members and the Scottish Solicitors Discipline Tribunal. Ministers are given the power to add other disciplinary bodies by order, which will permit any future changes in the regulatory structure to be taken into account.

Amendment 261 places both the commission and the professional organisations under a duty to liaise with one another to avoid unnecessary duplication of effort. The duty will be particularly relevant to hybrid complaints and should encourage the development of protocols regarding their treatment.

I move amendment 255.

Jeremy Purvis: I appreciate that the amendments remove the potential for duplication and a rehearing, effectively, but if there is a finding of fact that indicates guilt in a previous complaint, will there not be a concern that someone who complains to the commission might rely on that previous finding of guilt in a different situation for a different offence, and not on inadequate professional services? In such circumstances, it would be correct for there to be a new finding, so the commission would not be bound by the previous finding. That is just an area of concern. I am not sure whether what I have described would necessarily be the case, but some clarification from the minister would be helpful.

Hugh Henry: That is the issue to which I referred when I described how amendment 255 will enable the commission to use its rule-making powers to specify circumstances in which it may rely on its own previous findings of fact or on those of a professional body. The consent of the professional body will be required, because of the possibility that its finding of fact might be misunderstood or might, as Jeremy Purvis suggests, have been made in a different context.

Amendment 255 agreed to.

Amendment 256 moved—[Hugh Henry.]

The Convener: The question is, that amendment 256 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
 Butler, Bill (Glasgow Anniesland) (Lab)
 Fox, Colin (Lothians) (SSP)
 Macmillan, Maureen (Highlands and Islands) (Lab)
 Maxwell, Mr Stewart (West of Scotland) (SNP)
 Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

ABSTENTIONS

Davidson, Mr David (North East Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 256 agreed to.

Schedule 3, as amended, agreed to.

Section 24 agreed to.

Section 25—Commission's duty to provide advice

The Convener: Amendment 276, in the name of Bill Aitken, is grouped with amendments 277 and 278.

Bill Aitken: It is not an exercise in semantics to suggest that there is a difference between the words "advice" and "information". We want the SLCC to be impartial. If we envisage

circumstances in which a member of the public with a justifiable complaint contacts a member of the commission's staff, we will agree that the member of staff's reaction should naturally be to advise the complainer how to complain. However, the provision of advice on the complaint itself is quite a separate issue. By changing the word "advice" to "information", amendment 276 would restrict the commission's activity to providing information to potential complainers on how to complain rather than advising people about their complaint. As the bill stands, the commission could find itself accused of being partial. I suggest strongly that this minor amendment would remove that potential difficulty.

I move amendment 276.

Jeremy Purvis: Amendment 276 is unnecessary. Section 25 provides that the commission must give advice on the process of making a complaint. It is fundamental for complainers to understand their rights in that regard. As far as I am concerned, amendment 276 would be very regressive indeed.

Hugh Henry: I do not share Bill Aitken's concerns about potential partiality. The advice that section 25 requires the commission to provide on request relates expressly to the process of making a complaint. The duty is intended to ensure that people who do not know how to go about making a complaint can be given guidance by the commission about the process involved.

I do not agree with Bill Aitken that there is a risk that the commission could stray into the substance of complaints in giving such assistance. As Jeremy Purvis rightly pointed out, section 25 clearly limits such advice to the process of making a complaint. The commission will certainly be aware of the need to be entirely impartial in its determination of complaints.

I oppose amendment 276.

Bill Aitken: This is not a moot point. I know what the minister's intention is in section 25 and I have no particular difficulty with it but, frankly, it is not reflected in what the section says at the moment. If we simply left out the word "advice" and inserted "information" it would be clear that the commission's duty is to provide information to individuals on how to complain rather than to give advice on complaints. An amendment is necessary, so I will press amendment 276.

The Convener: The question is, that amendment 276 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Fox, Colin (Lothians) (SSP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 276 disagreed to.

Amendment 277 not moved.

Amendments 109 and 110 moved—[Hugh Henry]—and agreed to.

Amendment 278 not moved.

Section 25, as amended, agreed to.

Section 26—Services complaints: monitoring, reports, protocols and information sharing

Amendment 111 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 257, in the name of the minister, is grouped with amendments 258, 259, 265 and 266.

Hugh Henry: Amendments 257 and 258 add to the list of matters that are to become the subject of information-sharing protocols between the commission and the professional organisations under section 26. Amendment 257 adds the provisional settlements that are to be accepted by the parties to the list. It is consequential to the amendments that were agreed last week, which inserted into the bill the process for proposing those settlements.

Amendment 258 relates to section 31(3) of the Legal Aid (Scotland) Act 1986, which confers powers on the professional bodies to exclude practitioners from providing legal aid and advice and assistance. The addition of this topic to the list will ensure that the commission will draw any abuse of legal aid that it uncovers to the attention of the professional body.

Amendment 259 places the professional organisations, and not just the commission, under a duty to enter into protocols under section 26. Given that the protocols are for the benefit of the professional organisations, there could be no reason for a body not to do that. Nonetheless, the commission should not be placed under a unilateral obligation.

Currently, the council of the Law Society has the power to withdraw a solicitor's practising certificate if it is satisfied that the solicitor has charged excessive fees or has breached the accounts rules. In practice, those matters are usually spotted during the society's monitoring and auditing processes. The bill preserves that

independent regulatory power and does not require the society to go through the commission before exercising it. Nevertheless, amendments 265 and 266 ensure that the commission is kept fully informed of those activities.

I move amendment 257.

Amendment 257 agreed to.

Amendments 258, 112 and 259 moved—[Hugh Henry]—and agreed to.

Section 26, as amended, agreed to.

Section 27 agreed to.

Section 28—Obtaining of information from relevant professional organisations

Amendment 260 moved—[Hugh Henry]—and agreed to.

Section 28, as amended, agreed to.

Schedule 2

FURTHER POWERS OF COMMISSION UNDER SECTION 13 OR
28

Amendments 86 to 89 moved—[Hugh Henry]—and agreed to.

Schedule 2, as amended, agreed to.

After section 28

Amendment 261 moved—[Hugh Henry]—and agreed to.

Section 29—Monitoring effectiveness of guarantee funds etc

The Convener: Amendment 279, in the name of Bill Aitken, is grouped with amendments 280 to 285.

Bill Aitken: The purpose of amendment 279, and of the consequential amendments in the group, is to focus the powers of the SLCC by enabling it to receive an annual report on the guarantee fund. The proposal is not unreasonable; indeed, my expectation was that the commission would be able to do that. However, section 29 of the bill cannot be described as anything other than a classic example of drafting that gives a commission powers that go well beyond those that it needs to undertake its agreed functions.

I understand that the proposal was not even consulted upon, which is unfortunate. In the consultation paper, “Reforming complaints handling, Building consumer confidence: Regulation of the Legal Profession in Scotland”, the question of extending the remit of the Scottish legal services ombudsman was raised. If the Executive planned to deal with the matter in that way, opinions on the proposal were split. As things

stand, the Executive, via the SLCC, is seeking to take powers that have nothing to do with how complaints are handled. We do not know what is meant by the provision that will allow the commission to

“monitor the effectiveness of ... the Scottish Solicitors Guarantee Fund”

or the professional indemnity insurance arrangements, and the minister might care to tell us how it is expected that the professional organisation will be able to give effect to any of the SLCC’s recommendations when it may not have the power to question how the claims are dealt with. The claims are dealt with by insurance companies under the terms of the master policy. Anyone who is dissatisfied with the settlement of a claim can refer the matter to the Financial Ombudsman Service. That would seem to be the way forward. Frankly, the powers that are sought for the commission are so excessive that they are draconian and they have nothing to do with its primary purpose, which is investigating service complaints.

Amendment 280, for which similar arguments could be advanced, relates to the master policy for professional indemnity insurance rather than the guarantee fund. Again, the insurers concerned will not be subject to the jurisdiction of the SLCC, so it is appropriate that section 29 should be amended to exclude the professional indemnity insurance arrangements. Amendments 281, 282 and 283 are consequential. Amendment 284 is necessary to ensure that section 30 will cover only service complaints. The bill seeks to extend the commission’s powers well beyond Parliament’s intentions.

I move amendment 279.

15:15

Mr Swinney: I do not think that I could disagree more with Bill Aitken on the issues that he has raised on section 29. At stage 1, Martyn Evans of the Scottish Consumer Council told us that there was a great deal of dissatisfaction with the exercise of the professional indemnity components of the master policy. Bill Aitken seeks to strike out of the bill reference to the professional indemnity arrangements, which would mean that they would be taken outwith the locus of the commission. Mr Evans’s concern has been part of the fabric of the debate and it is why the Government structured section 29 in the way that it did. I welcome the provisions in section 29, which represent an attempt by the Executive to tackle the issue that Mr Evans drew to the committee’s attention on 23 May and some of the wider concerns that have been raised with us on other occasions.

Although I cannot say exactly what is meant by the phrase “monitor the effectiveness of”, I can hazard a guess at some of the issues that the commission might want to consider. First, there has been a certain amount of debate about whether, in its present form, the master policy might be anti-competitive. I know that Mr Aitken might not be concerned about breaching the terms of European Union treaties—apart from the ECHR, of course, now that the new Conservative party has moved on—but article 82 of the relevant EU treaty imposes an obligation to ensure competitive practices. Once the master policy is negotiated between an insurance company and the Law Society, consumers cannot go and find alternative insurance that might be more competitively priced or more accessible. The master policy’s compatibility with the EU treaty provisions on competition must be addressed. It is reasonable for the commission to examine that issue on behalf of the consumer interest in Scotland.

Secondly, under section 1(2)(b) of the Solicitors (Scotland) Act 1980 the Law Society has an obligation to promote

“the interests of the public in relation to that profession.”

If a firm of solicitors that Mr Aitken happened to be part of were responsible for a misconduct claim that would increase the premiums of the policy, it would not be in my firm’s interest to counter the conduct of Mr Aitken’s firm.

Whether the master policy contradicts the Law Society’s obligation to act in accordance with section 1(2)(b) of the Solicitors (Scotland) Act 1980 must be examined in order to resolve the issue of the conflict of interests that might be faced in dealing with consumers’ interests. There is legitimate scope for inquiry in those two areas.

The third issue goes back to what Mr Evans told the committee on 23 May. There is the question of the effectiveness of the master policy and whether it delivers for consumers. It was obvious when we took evidence about the master policy and the people who are behind it that consumers are nowhere in the equation. The policy was about providing professional indemnity to legal practitioners; the consumer interest was nowhere on the horizon. The very modest powers that the Government has included in section 29 of the bill are therefore worth protecting. People in the community will think that those powers do not go nearly far enough, but I accept that the Government is taking a step in the direction of ensuring greater attention to the consumer interest. I acknowledge that the proposals will not satisfy everybody, but taking the steps that Mr Aitken has proposed in amendments 279 to 285 would mean undermining a very good provision in the bill that will provide the opportunity to examine

whether issues conflict in any way with the wider consumer interest. The Government’s objective is to improve attention to that interest.

Hugh Henry: It is important to remind the committee that the master policy and the guarantee fund are important public protections. They form part of the system of redress that protects people who have sustained losses as a result of the incompetence or dishonesty of their lawyer. For that reason and for the reasons that John Swinney has given, we need to be certain that the arrangements will work effectively and that clients will not suffer distress and inconvenience in seeking a justified settlement.

The former Justice 1 Committee heard concerns about the length of time that it took to make settlements under the master policy. The bill will give the commission the power to monitor the operation of the master policy, the guarantee fund and other funds and arrangements that are maintained by other professional bodies, and to make non-binding recommendations. Very light-touch regulation is proposed. As long as the policies and funds are operating well, there should be nothing to hide or do.

The new powers will help us to get a better picture of whether there is a genuine problem. The commission will not have to rely on anecdotal evidence, as the former Justice 1 Committee had to do, which was unfortunate. John Swinney was right. There will be people who will argue that we are going nowhere near far enough with the power, but we have no desire to go any further than is necessary or to interfere inappropriately. It is right that the commission will be able to oversee a significant area of redress for people who have suffered as a result of the incompetence or dishonesty of their lawyer.

Putting more information in the public domain to demonstrate that professional indemnity and guarantee fund arrangements work well is in the interests of the professional bodies, their insurers and the brokers. If we can give the public confidence about the arrangements, so much the better. If the public can access hard evidence, that will help to dispel any unfounded concerns that may exist.

The aim of amendments 284 and 285 appears to be to defend the responsibility of the professional bodies for setting standards of conduct and to keep the commission from intruding in the province of professional discipline. To that extent, they are consistent with everything that Bill Aitken has said and probably reflect the interests of those he is representing in the debate.

If those are the concerns that prompted the amendments, they are unfounded. The bill’s general policy is that the professional bodies

should retain responsibility for professional discipline and the handling of conduct complaints. It is important to put on the record, again, that the commission will be a regulatory body. As a safeguard, the commission is to oversee the way in which the professional bodies handle conduct complaints in order to ensure an acceptable level of public accountability. The commission will thus have powers that are broadly similar to the existing powers of the Scottish legal services ombudsman. The exercise of those powers will give the commission insight into how well practitioners and their professional bodies deal with conduct complaints.

The guidance role that section 30 gives the commission will not encroach on the responsibilities of the professional bodies to set standards of conduct and make related professional rules. The commission's oversight function will enable it to develop expertise about best practice in relation to the handling of conduct complaints and to offer guidance to law firms on standards for their complaints systems. The responsibilities of the professional bodies and the commission will not overlap but will complement each other.

Bill Aitken: For the second time in the meeting, the minister has inferred that the interests that I represent here today are of a sectarian type, to some extent, in that they relate to the legal profession. The interests that I represent here are the interests of the people of Scotland, which are best represented by ensuring that we have a Scottish legal profession that is as independent and as free from Government interference as possible, but monitored sensibly. That is why I voted for the bill. However, some of the bill's measures are not consistent with an independent and well-regulated Scottish legal profession. I will continue to represent those views in the interests of the people of Scotland.

Mr Swinney has the advantage of me in that I did not hear Mr Evans's evidence; I am sure that he made excellent points. However, who is the consumer in respect of claims under the policy? The claims will be made by the legal practitioners; it is they who have a contract with insurers. As one who dealt with insurance claims for long and weary, I can tell members that it is not infrequently the case that the claimant does not regard even the most reasonable settlements as fair. The fact is, however, that if there had been a consistent degree of difficulty with the existing system, we would have heard about it long before now. Therefore, the system appears to have been working.

Mr Swinney, in his most amusing analogy, referred to how I would feel if my legal firm failed to provide the appropriate degree of service. I can

assure Mr Swinney that I am not nearly clever enough to be a solicitor, so the issue would certainly never arise. The fact is that we are seeking to disturb arrangements that are commercially confidential for the individuals involved. If there is a difficulty, other remedies are open to the dissatisfied parties as things stand. Therefore, the amendments concerning both issues, namely the guarantee fund and the professional indemnity insurance, should be accepted.

The Convener: The question is, that amendment 279 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 279 disagreed to.

Amendment 280 moved—[Bill Aitken].

The Convener: The question is, that amendment 280 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 280 disagreed to.

Amendments 281 to 283 not moved.

Section 29 agreed to.

Section 30—How practitioners deal with complaints: best practice notes

Amendment 284 moved—[Bill Aitken].

15:30

The Convener: The question is, that amendment 284 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 284 disagreed to.

Amendment 285 moved—[Bill Aitken].

The Convener: The question is, that amendment 285 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 285 disagreed to.

Section 30 agreed to.

Section 31—Power by regulations to amend duties and powers of Commission

The Convener: Amendment 286, in the name of Bill Aitken, is grouped with amendment 288.

Bill Aitken: Amendment 286 relates to an issue that the Deputy Minister for Justice and other ministers will have heard raised by various members of the Opposition in recent times—namely, the extent to which legislation should be amended by means of statutory instruments. I am not suggesting that our current procedures are wrong in themselves, but under those procedures statutory instruments receive scant attention and are subject to limited debate. I do not think that we should be capable of amending legislation in this area without much fuller debate. The amendment is consistent with arguments that have been advanced in the past.

I move amendment 286.

Mr Stewart Maxwell (West of Scotland) (SNP):

Bill Aitken commented on the amount of scrutiny that subordinate legislation receives in the Parliament. As a member of the Subordinate Legislation Committee, I believe that the committee does a good job and exercises its powers over the Government and subordinate legislation very carefully. When it identifies difficulties and problems, it brings those to the attention of lead committees and the Parliament. Section 31 is a perfectly normal section and I see no reason for us to oppose it.

Hugh Henry: I have nothing to add to what Stewart Maxwell has said.

Bill Aitken: If Stewart Maxwell's contribution to the Subordinate Legislation Committee is in line with his usual performance in the Parliament, it will certainly be assiduous. I am sure that he considers matters very closely. Unfortunately, the rest of us do not often get that opportunity. We should legislate in this shorthand manner as seldom as possible. I think that amendment 286 is appropriate and I intend to press it.

The Convener: The question is, that amendment 286 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 286 disagreed to.

Section 31 agreed to.

Section 32—Reports: privilege

Amendment 113 moved—[Hugh Henry]—and agreed to.

Section 32, as amended, agreed to.

After section 32

Amendment 262 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 263, in the name of the minister, is in a group on its own.

Hugh Henry: The amendment protects the commission, its members and its staff from having to pay damages in respect of actions and

omissions in the course of carrying out the commission's functions, unless those actions or omissions were in bad faith or breached the human rights of another person. That should ensure that the commission does not have to operate in an unduly defensive or fearful way.

I move amendment 263.

Amendment 263 agreed to.

Amendment 291 moved—[Bill Aitken].

The Convener: The question is, that amendment 291 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 291 disagreed to.

Section 33—Giving of notices etc under Part 1

Amendments 114 to 116 moved—[Hugh Henry]—and agreed to.

Section 33, as amended, agreed to.

Section 34—Interpretation of Part 1

Amendment 229 moved—[Bill Aitken].

The Convener: The question is, that amendment 229 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 229 disagreed to.

Amendment 230 not moved.

Amendments 117 to 127 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 292, in the name of Bill Aitken, is in a group on its own.

Bill Aitken: The purpose of amendment 292 is to seek a definition of the word “negligence”, which is used in section 34. I am particularly concerned about the definition of “inadequate professional services” as referring to a practitioner who fails in his duty to provide a service of a

“quality which could reasonably be expected of a competent solicitor”.

The definition also

“includes any element of negligence in respect of or in connection with the services”.

The law of negligence in Scotland is dynamic, and that is entirely appropriate. It should change as case law is defined over the years. It is part of the law of delict and a branch of the law of obligations. By necessity, the law in that respect changes, but we should know where we are at this time. The general principles of the law of negligence entitle someone who feels that they have suffered as the result of a lack of duty of care to seek a legal remedy, which can include damages. However, it is not always a simple issue. The bill is not clear about the nature of negligence or how the general law will be applied, and further consideration must be given to that, because there will be difficult issues, particularly where non-solicitors and solicitors share liability arising out of a failure that might have resulted from negligence.

We need a definition of negligence in legislation, but the bill is silent on the extent to which court-based remedies are excluded or how they will apply in complex cases involving non-solicitor defenders in addition to the solicitor who is complained against. The reference to negligence in section 34 needs to be defined quite tightly and I feel that that is something that needs to be looked at again.

I move amendment 292.

Hugh Henry: Amendment 292 reflects a misunderstanding of the reason for the reference to negligence in the definition of “inadequate professional services”. The purpose of including a reference to the law of negligence in the definition of “inadequate professional services” in section 34 is to ensure that complainers can bring before the commission complaints that have an element of negligence, which otherwise they might have to bring as actions for negligence in the courts.

The criteria on the basis of which the commission will decide whether to uphold service complaints are set out in section 8 and were debated last week. They consist of a fairness and reasonableness test plus a duty to take into account the existing law, such as the law of negligence, and relevant codes and standards.

The commission is bound to take account of the law and I expect its decisions to be broadly in line with those of the courts, but the key point of the criteria is that the commission will be given more flexibility and will not be bound in a legal straitjacket, such as by the minutiae of case law on the duty of care in the law of negligence.

Amendment 292 would require the commission to undertake a full legal analysis of the minutiae before it was entitled to give redress. The commission would have to operate as a quasi-court of law, with all the complexity and detail that that would involve, which would fundamentally change the commission. That would add significantly to complexity, cost and time. It would move the commission away from being the regulatory body that I have described, which I hope will operate consumer-friendly dispute resolution and mediation procedures, to being more like a court of law. That would be a significant loss, so I oppose amendment 292.

Bill Aitken: I think that the minister accepts the potential for difficulty. For my part, I accept the potential for difficulty in the definition of negligence. However, we should take some steps, because the minister's negligence might not be my negligence. We require to achieve some balance in the terminology to satisfy the reasonable man, who is a figure in Scots law. What is reasonable? What is a reasonable definition of negligence? It is not beyond the wit of the Executive to produce something acceptable. On that basis, the amendment is necessary, so I will press it.

The Convener: The question is, that amendment 292 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Davidson, Mr David (North East Scotland) (Con)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)

Fox, Colin (Lothians) (SSP)

Macmillan, Maureen (Highlands and Islands) (Lab)

Maxwell, Mr Stewart (West of Scotland) (SNP)

Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 292 disagreed to.

Section 34, as amended, agreed to.

The Convener: That is as far as we will proceed with the bill today. I thank Mr Aitken, Mr Swinney and the minister and his team for participating.

Subordinate Legislation

Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Amendment Order 2006 (SSI 2006/466)

The Convener: We have one further agenda item in public, which is a negative instrument. The Subordinate Legislation Committee considered the order and raised no points. Are members content with it?

Members *indicated agreement.*

15:43

Meeting continued in private until 17:13.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Friday 13 October 2006

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00

Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation
Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID TYPETALK calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron