

# **JUSTICE 2 COMMITTEE**

Tuesday 31 October 2006

Session 2

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## **JUSTICE 2 COMMITTEE**

**† 28<sup>th</sup> 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)

### **CLERKS TO THE COMMITTEE**

Tracey Hawe

Alison Walker

### **SENIOR ASSISTANT CLERK**

Anne Peat

### **ASSISTANT CLERK**

Steven Tallach

### **LOCATION**

Committee Room 1

**† 27<sup>th</sup> Meeting 2006, Session 2—joint meeting with Justice 1 Committee.**



# Scottish Parliament

## Justice 2 Committee

*Tuesday 31 October 2006*

[THE CONVENER opened the meeting at 16:44]

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

**The Convener (Mr David Davidson):** Good afternoon, ladies and gentlemen. Welcome to the delayed 28<sup>th</sup> meeting in 2006 of the Justice 2 Committee. I apologise to all those who turned up at the scheduled time. I am afraid that we were unable to start the earlier joint meeting of the Justice 1 Committee and the Justice 2 Committee on time.

I remind everybody to switch off their mobile phones, pagers, BlackBerrys and anything else that squeaks and upsets the sound system. We have received apologies from Bill Butler and I welcome Cathie Craigie, who is attending as a substitute for him. I also welcome Bill Aitken.

Today is the fourth and final day of stage 2 consideration of the Legal Profession and Legal Aid (Scotland) Bill. We will consider amendments from after section 43 to the end of the bill. I welcome the Deputy Minister for Justice, Hugh Henry, and his officials.

### After section 43

16:45

**The Convener:** Amendment 343, in the name of the minister, is in a group on its own.

**The Deputy Minister for Justice (Hugh Henry):** Amendment 343 was lodged in response to a request from the Law Society of Scotland. The society's council's powers do not extend to solicitors when they act solely in the capacity of notary public. The amendment will require the council to consult notaries public on a draft of its rules, to take account of any representations that they make and to submit the rules to the Lord President for approval. A failure to comply with the rules on the part of a notary public may be treated as either professional misconduct or unsatisfactory professional conduct.

I move amendment 343.

*Amendment 343 agreed to.*

*Section 44 agreed to.*

### After section 44

**The Convener:** Amendment 358, in the name of the minister, is grouped with amendment 430.

**Hugh Henry:** Amendment 358 must be seen in the context of summary justice reform, legislative change for which is being taken forward in the Criminal Proceedings etc (Reform) (Scotland) Bill.

Amendment 358 will allow the Scottish Legal Aid Board the flexibility to impose such conditions as it considers expedient on granting summary legal aid following a plea of not guilty or at any time thereafter. Summary criminal legal aid will still be available, subject to the same eligibility tests, but the granting of legal aid subject to such conditions following a plea of not guilty would be open to review.

The board will be able to set conditions to the granting of legal aid and, where there has been a significant change in the accused person's financial circumstances, to assess whether the undue hardship test still applies and whether legal aid should continue to be in place.

The board will be able to impose conditions so that the granting of summary criminal legal aid is restricted to the intermediate diet. The continued granting of legal aid to the trial diet can be reassessed at that stage if the plea of not guilty is maintained. The interests-of-justice test could be revisited at that stage to ensure that it is fully satisfied and that summary criminal legal aid should continue to be made available for the trial.

New section 24(5A) of the Legal Aid (Scotland) Act 1986 is intended to provide the safeguard of a review mechanism. Existing section 24(6) of the 1986 act gives the court certain powers to adjourn a trial for a legal aid application to be submitted to the board if the court considers that, because of exceptional circumstances, it would be inequitable to proceed with the trial. Section 24(6) is amended to extend the power to circumstances in which summary criminal legal aid has ceased because the board was not satisfied that the statutory tests continued to be met.

Section 14(2) of the 1986 act contains a condition-making power for civil legal aid. It states:

"The Board may require a person receiving civil legal aid to comply with such conditions as it considers expedient to enable it to satisfy itself from time to time that it is reasonable for him to continue to receive civil legal aid."

If amendment 358 is agreed to, the board will have the power to make civil legal aid available for limited purposes and to attach conditions or restrictions when the application is approved.

Amendment 430 provides a review mechanism along similar lines to that which is provided for summary criminal legal aid.

I move amendment 358.

**Bill Aitken (Glasgow) (Con):** Amendments 358 and 430 make sense. A situation could arise in which, at the intermediate diet, no defence is available. It would be correct to allow legal aid to order inquiries to be made, but at that stage the accused person might well have no defence. On the basis of a condition having already been made, the situation would then change. The amendments are sensible and they should be supported.

*Amendment 358 agreed to.*

**The Convener:** Amendment 359, in the name of the minister, is in a group on its own.

**Hugh Henry:** The amendment strengthens the Scottish Legal Aid Board's powers in relation to the investigation of breaches of the code of practice for solicitors who are registered to carry out criminal legal assistance work. Section 25D of the 1986 act enables the board to investigate suspected breaches and to remove from the register the name of a solicitor or firm that fails to comply. However, it can remove a firm or an individual solicitor only if they are in breach of the code at the time of the investigation.

Generally, when there has been a breach of the code, the board will give the solicitor or firm an opportunity to comply within a reasonable timescale and will remove their name from the register only if they fail to do so. However, there may be cases when, even though compliance with the code has been resumed, the past breach is of such a serious nature that the board considers that the firm or solicitor should no longer be registered. Fraudulent accounting is an example of such a case. The amendment would give the board the power to remove solicitors or firms from the register in respect of serious historical breaches of the code.

I move amendment 359.

*Amendment 359 agreed to.*

#### **Section 45—Register of advisers: advice and assistance**

**The Convener:** Amendment 360 is grouped with amendments 361, 364 to 381, 383 to 402, 404, 406, 408 to 427, 432 and 459.

**Hugh Henry:** The amendments reflect the outcome of further informal consultation with advice sector stakeholders.

Members may recall that at stage 1 it was suggested that there were two main impediments to organisations taking up the extension of advice and assistance payments to non-legally qualified advisers. One was a policy objection that certain organisations have to means testing clients. The other was a perception that administration of case-by-case funding under advice and assistance would prove too complex and bureaucratic.

The amendments are designed to help address the second of those concerns. Amendment 428, which will be debated later, introduces a new grant funding power that is not dependent on the means testing of individual clients.

We have decided to remove the requirement for each individual non-legally qualified adviser who wishes to participate in the advice and assistance extension scheme to apply to the Scottish Legal Aid Board for registration. We believe on reflection that the requirement is too onerous and is unnecessary. In most cases, the track record of the organisation will be more relevant than an assessment of the individual adviser.

The amendments do not remove the requirement for organisations that wish to participate in the scheme to register with the board. If they do so, they will be signing up to compliance with the code of practice, which the board will develop and which will set out the standards to be expected from individual advisers. The work of the individuals involved will be subject to audit or peer review as arranged by the board. The penalty for failure to meet standards will be deregistration of the organisation.

Amendment 375 removes the requirement for the board to maintain a register of advisers. Amendments 376 and 395 specify that organisations are to be approved for registration in relation to the provision of advice and assistance by individual advisers on their behalf.

Amendments 373 and 374 provide for the register, which the board will maintain, to be renamed the "register of advice organisations", rather than "register of advisers", which is no longer accurate.

Amendments 364, 365 and 366 replace the current definition of a "registered adviser" in section 45 with a new definition of the term "adviser". An adviser will no longer be a person whose name appears on the register of advisers, but will instead be a person approved by a registered organisation to provide advice and assistance on its behalf.

Amendment 388 introduces a reference to this definition into new section 12B of the 1986 act, while amendment 392 removes the reference to the current definition of a "registered adviser" from that section.

Amendments 394, 400, 402, 414, 415, 418, 420, 421 and 426 remove all reference to registration and deregistration of individual advisers from new schedule 1A of the 1986 act.

Amendments 360, 369 to 372, 379, 380, 389, 391, 393, 396, 398, 399, 401, 409, 411, 412, 417, 422, 425, 427 and 432 delete references to registered advisers and the register of advisers,

and insert where appropriate references to registered organisations or the register of advice organisations instead.

Amendments 361, 367, 368, 377, 378, 381, 383, 384, 387, 404, 406, 408 and 410 deal with situations when reference to the individual adviser rather than the organisation continues to be appropriate in the context. The amendments remove references to individual advisers being registered advisers. Wherever the expression “registered adviser” appears, it now needs to be replaced with the term “adviser”.

Amendments 385 and 386 provide for the registered organisation rather than the individual adviser to receive payments due from the legal aid fund.

Amendment 397 would permit an individual, who can satisfy the Scottish Legal Aid Board that he or she can meet the requirements of the code of practice, to register not as an individual but as an organisation. It may well prove difficult for individuals to satisfy the board that they can meet the standards required, but there should not be a bar to registration if that can be done. If such an individual is registered as an organisation, he or she will be treated as an organisation for all purposes.

Amendments 413, 416, 419 and 424 deal with removal from the register. A separate procedure is provided for removal of an organisation that has committed a material breach of the code, regardless of whether it is in breach at the time of removal. That will ensure that the board can take action where the nature of the breach is sufficiently serious for rectification to be an inadequate solution.

Amendments 390 and 423 are small technical amendments. Finally, amendment 459 alters the long title of the bill to replace the reference to the register of advisers with a reference to the register of advice organisations.

I move amendment 360.

**Bill Aitken:** The amendments build on the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which sought to remove a monopoly. It is important to stress that what we are talking about here is advice and assistance and not legal representation. That being the case, I have no problem with the amendments.

*Amendment 360 agreed to.*

*Amendment 361 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 362, in the name of the minister, is grouped with amendments 363, 382 and 403.

**Hugh Henry:** Amendments 362 and 363 will ensure that non-lawyer advisers will be able to

provide the full range of advice and assistance. When the bill was introduced, two new subsections to define advice and assistance in section 6 of the 1986 act should have been included in section 45(3). Because they were omitted, the bill will not enable an adviser to provide advice on steps that an advice seeker might appropriately take, to take such steps on their behalf or to assist them to take such steps themselves. Amendments 362 and 363 correct that.

Amendment 382 is intended to ensure that, where an adviser takes steps on behalf of a person or assists them to take steps, they do so only in so far as such actions are within the terms of their rights of audience or right to conduct litigation. The amendment makes that limitation specific.

Amendment 403 relates to the registration of advice organisations by the board. It establishes the board's ability to link the registration of an organisation to a specific category of circumstances on which it has demonstrated expertise. Were an organisation able to register generally and be able to access advice and assistance payments for all the prescribed categories, the board would not easily be able to monitor whether the organisation was providing advice of sufficient quality across the board. That will be particularly important where the prescribed categories of circumstances on which advice can be given are capable of being adjusted over time to reflect changing needs and priorities. Amendment 403 specifies that the board should register an organisation for a specific category of circumstances but is sufficiently flexible that where an organisation is able to demonstrate that it has more than one area of expertise, it will be able to register in respect of more than one category.

I move amendment 362.

*Amendment 362 agreed to.*

*Amendments 363 to 404 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 298, in the name of Bill Aitken, is grouped with amendments 405, 407, 299 and 300.

**Bill Aitken:** The amendments all deal with the adviser code—an extremely important document that will govern the activities of advisers and registered organisations. It is imperative that it should deal with the most crucial aspects of advising and the framework within which advisers will work.

There requires to be a provision in the bill that ensures that the code will deal, inter alia, with the manner in which such advisers conduct the provision of advice, conflict of interest, contractual

and other obligation of such advisers, the holding of any money and the disclosure of and accounting for any commission. I cite an example of a potential of a conflict of interest. A member of a citizens advice bureau gives a client advice with regard to a planning application that the client feels would be detrimental. If the CAB member were also a member of the local authority or an employee of the developer, a conflict of interest would arise. Amendment 299 would remedy that problem.

17:00

The aim of amendment 298 is simply to ensure that the adviser code covers the important issue of advisers' qualifications. New schedule 1A to the 1986 act is deficient in that respect, so amendment 298 is necessary.

I turn to amendment 300. Under section 45, the Scottish Legal Aid Board will have to prepare an adviser code

"in relation to registered advisers and registered organisations."

Section 45, which will insert new sections 12A and 12B into the 1986 act, provides that the adviser code must include the conditions for qualification; specify the types of organisation that are eligible; lay down the expected standards, conduct, practice and training; and include arrangements for the monitoring of advisers. Those are fairly commonsense provisions. However, the bill does not require the code to include complaints provisions. We are of the view that that omission is not in the interests of consumers and that amendment 300 is necessary to correct that deficiency.

I move amendment 298.

**Hugh Henry:** I hope that Bill Aitken's concerns have largely been dispelled by the draft code of practice, which the Scottish Legal Aid Board sent to the committee, and by my letter that set out the categories that we are considering prescribing for advice and assistance extension.

Amendment 298 would introduce education qualifications and training requirements as a pre-condition of registration. The draft code contains provision on the on-going training of advisers, but a reference to educational qualifications would not be appropriate, as that would work only if widely recognised formal qualifications were available to non-legally qualified advisers in particular fields. In many instances, no such qualification is available, so advisers' practical experience and organisations' track records will be far more important than formal educational qualifications.

Amendment 298 does not fit with the Executive's policy of removing the requirement for individual

advisers to register with the board, which I outlined previously. The attributes of an individual adviser may be relevant to whether an organisation should approve that person to provide advice and assistance on its behalf—Executive amendment 405 deals with that point—but those attributes are not relevant to whether the organisation should be registered. Organisations will need to nominate individuals to provide advice and assistance on their behalf and they will be able to be selective in doing so.

Most of the matters in amendment 299 are already covered in the draft code of practice. However, a difficulty arises with heads (iv) and (v) in the amendment. The draft code contains provisions about the standard of financial reporting that the board expects. We can certainly consider whether a more specific provision on the holding of money is needed, but that will depend on the categories that ministers prescribe for the extension of advice and assistance. It would not make sense to require the code to contain material about that if the advice organisations in the prescribed categories were never likely to hold significant sums of clients' money. I also find it difficult to see how commission is relevant to the sorts of categories that we are considering prescribing.

Amendment 300 contains a reference to "registered advisers", which is not compatible with our policy of no longer requiring individual advisers to register. However, I agree that complaints handling arrangements are important. The draft code contains provision on the internal complaints handling arrangements that organisations will be required to have and it also requires complaints policies to explain how service users can complain to the board. I understand the case for lodging an Executive amendment along those lines and I am prepared to do so at stage 3. I hope that that satisfies Bill Aitken on that issue.

Amendment 405 will require the adviser code to include conditions that will have to be complied with before a person can be approved by a registered organisation as an adviser. To enable proper monitoring, the board intends to require notification of the details of all individual advisers before approval is granted. Other requirements may relate to formal qualifications, where appropriate, or, more likely, to relevant experience. Amendment 407 will require the code to place requirements on registered organisations to supervise the provision of advice and assistance by their advisers.

**Bill Aitken:** I have listened carefully to the minister, who has an advantage over me in that, as I am not a committee member, I have not seen the documentation to which he referred. That being the case, I will seek to withdraw amendment



298 and I will not move my other amendments in the group, but with the caveat that, if the documentation does not resolve the issues that I have raised, I will revisit the matter at stage 3.

*Amendment 298, by agreement, withdrawn.*

*Amendments 405 to 407 moved—[Hugh Henry]—and agreed to.*

*Amendment 299 not moved.*

*Amendment 408 moved—[Hugh Henry]—and agreed to.*

*Amendment 300 not moved.*

*Amendments 409 to 427 moved—[Hugh Henry]—and agreed to.*

*Section 45, as amended, agreed to.*

#### After section 45

**The Convener:** Amendment 428, in the name of the minister, is in a group on its own.

**Hugh Henry:** Amendment 428 will enable the Scottish Legal Aid Board to provide funding to providers of advice in the form of a grant. The bill already enables the board to provide case-by-case funding to non-lawyers. That is a valuable tool, particularly in fields in which the demand for advice can quickly increase, thereby causing a gap in advice provision. However, it was clear from our policy development work in the strategic review and from the representations that we received that the addition of a grant-funding power would make a valuable difference.

Amendment 428 inserts new section 4A into the 1986 act. New sections 4A(1) to 4A(11) essentially set out a process under which ministers will be able to set a cash limit on the amount of grant funding that is provided in any given period and to approve the criteria that the board intends to apply when it considers grant applications. That should help to ensure that the grant-funding power will be well targeted and will complement existing provision rather than duplicate grant-funding streams that are predominantly, and rightly, the domain of local authorities.

It is also important that the grant-funding power is framed in such a way that it does not enable grants to be claimed for work that is already funded by the board on a case-by-case basis. Proposed new sections 4A(12) and 4A(13) address that point.

New sections 4A(15), 4A(16) and 4A(17) provide that the financial eligibility tests and financial contribution rules that apply to the funding of individual cases should not automatically apply to grants, although the board may impose such of those tests and rules as is appropriate by way of condition attached to the grant. That is partly

because grants may be provided for support and development work and not for the direct provision of assistance to an individual advice seeker. It makes sense also because grant funding is not demand led, the overall cost is capped and the board may fund work in partnership with a variety of other organisations. Ensuring that the scheme can be operated in a simple and flexible way should give voluntary organisations the confidence to engage with the board and develop valuable projects.

I hope that that responds to some of the concerns that were previously expressed.

I move amendment 428.

**Maureen Macmillan (Highlands and Islands) (Lab):** I have one or two points of clarification, minister. I know that the word “person” can refer to an individual or a legal entity. The bill mentions individuals and organisations; does the use of “person” in new section 4A apply to individuals and organisations?

How can we scrutinise the conditions that the Scottish Legal Aid Board will impose? Will there be some sort of planning group to decide whether the grant conditions that the board imposes are based on the needs of the public? Who will have that oversight?

Will there be a separate budget line for the grant funding to organisations? How can we scrutinise it?

**Hugh Henry:** The scrutiny of the Scottish Legal Aid Board’s budget would be the appropriate opportunity to scrutinise the budget line for the grant funding.

There is a plan for an informal steering group on the development of the conditions and there is a requirement to publish them, so you will be able to see them.

The answer to your first question is yes.

*Amendment 428 agreed to.*

**The Convener:** Amendment 429, in the name of the minister, is in a group on its own.

**Hugh Henry:** Amendment 429 is necessary to ensure that Scotland complies fully with the decision of the European Court of Human Rights in *Steel and Morris v the United Kingdom*. The court held that the exclusion of legal aid for defamation proceedings violated the rights of Miss Steel and Mr Morris to a fair trial and to freedom of expression under articles 6.1 and 10 of the European convention on human rights. The case concerned an action for defamation that had been raised by McDonald’s Restaurants Limited. When the proceedings were raised, legal aid was not available for such cases in the UK, but exceptional circumstances were shown to exist in the case.

The scale of the case, the quantity of documentary evidence, the number of court hearings and the range of expert witnesses meant that the proceedings had been very complex. The court concluded that without legal assistance the applicants had been unable to present an effective defence. The defendants had also faced a substantial disadvantage when presenting their case, which was in contrast to the level of representation that was available to McDonald's. The result of the case has required the legal aid scheme in Scotland to be amended, to ensure that legal aid may be made available in exceptional cases that are similar in nature to the case of Steel and Morris.

I stress that legal aid will not as a matter of course be made available in defamation proceedings. As a general rule, legal aid is not available for such proceedings. Amendment 429 will not remove the general exclusion of defamation proceedings from the legal aid scheme. However, it will ensure that the exclusion is not absolute by providing that legal aid may be granted to individuals whose opponents in the proceedings have raised a counterclaim for defamation. The making of the counterclaim will not mean that legal aid must be withdrawn from the initial pursuer; legal aid may be made available for the defence of the counterclaim. However, as with all applications for civil legal aid, the Scottish Legal Aid Board will need to be satisfied that the statutory tests of probable cause and reasonableness apply before legal aid may be granted.

Although legal aid can currently be granted for defence of counterclaims, an amendment is needed before Scotland can comply with the decision in the Steel and Morris case. Amendment 429 will allow legal aid to be granted for persons who are party to defamation proceedings in exceptional—I stress “exceptional”—cases. Before SLAB will be able to grant civil legal aid in such cases, it must be satisfied that the existing statutory tests of probable cause, reasonableness and financial eligibility, as laid down in sections 14 and 15 of the Legal Aid (Scotland) Act 1986, are met.

Amendment 429 will introduce a new set of criteria that the Scottish Legal Aid Board must be satisfied are met before it can grant legal aid for such cases. The criteria will be set out in directions to be issued to the board by the Scottish ministers. The directions will indicate the types of criteria that must be met before funding can be made available. The issues involved will be similar to those that were identified by the European Court of Human Rights in the Steel and Morris case. They will also be similar to the factors that must be present before legal aid may be made available for such proceedings in England and

Wales. In England and Wales, funding can be approved only in exceptional cases of significant public interest or if there is convincing evidence that the case gives rise to exceptional circumstances. For instance, it must be shown that without publicly funded legal assistance it would be practically impossible for a person to bring or defend the proceedings, or that the lack of funding would lead to obvious unfairness in the proceedings.

As the general exclusion of defamation from the scheme will remain in place, legal aid will be approved in only the most exceptional cases. Amendment 429 will provide that legal aid for the defence of defamation counterclaims will be subject to the new test, which will be laid down in directions. The change in the law will bring consistency for all defamation proceedings, whatever the applicant's interest in the proceedings.

It was decided that it would be better to set out the eligibility criteria in ministerial directions rather than in regulations, given the subjective nature of the tests involved. The application of the tests will require an exercise of judgment, which would be very difficult to set down in regulations.

The directions will enable the board to make legal aid available in cases in which it is satisfied that the criteria set out in the directions are met. Discretion as to whether an application should be approved will lie with SLAB. The directions may make different provision for different purposes and may be varied or revoked at any time. They will also be published in such manner as the Scottish ministers consider appropriate. I intend the provision to come into force as soon as possible, to ensure ECHR compliance.

I move amendment 429.

**Bill Aitken:** The judgment in Steel and Morris v the United Kingdom seems to leave the door wide open to vexatious litigants. However, as the minister said several times, a grant of legal aid would be made only in exceptional circumstances, which offers protection in that regard. We should bear in mind that the law of defamation in Scotland is different from the laws that apply elsewhere—it is somewhat tighter.

The Executive is bound by the ruling of the European Court of Human Rights so there is no way we can avoid legislating along the lines of amendment 429. For that reason, we must support it.

17:15

*Amendment 429 agreed to.*

*Amendment 430 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 431, in the name of the minister, is in a group on its own.

**Hugh Henry:** Amendment 431 will make three changes to the Legal Aid Act (Scotland) Act 1986 that are needed to improve the Scottish Legal Aid Board's ability to employ solicitors for the provision of assistance with matters of civil law.

The first change relates to the fact that when the board incurs expenses in relation to solicitors whom it employs to provide assistance with criminal matters, through the Public Defence Solicitors Office network, the expenses are met from the legal aid fund. Similar expenses that are incurred in relation to advice on civil matters by solicitors who are employed in part V partnership projects are not met from the fund but from grant-in-aid payments from the Executive to the board. By amending section 4 of the 1986 act so that all such expenses, whether for civil or for criminal advice, are met from the fund, the board will be able to respond more easily to changing staffing levels or recruitment issues in part V projects, and to develop a new network of civil legal advice offices similar to the existing PDSO network, the expansion of which was recently announced.

The second change relates to the partnership projects that the board has developed by employing a solicitor to work with local advice-giving organisations. Currently there are five such projects, which provide valuable services to a range of client groups, including vulnerable young people in Edinburgh and people with disabilities in Lanarkshire. The projects are an important means of testing new services and fostering more collaborative working practices between services. However, the 1986 act restricts such projects to organisations that can be described as "local" and that have advice giving as their sole or principal activity. Amendment 431 will remove the two restrictions and enable partnership projects to be developed with, for example, a national mental health charity or a local body that provides health or social welfare services. That will be widely welcomed. Such projects could provide a further useful tool to help progress towards better co-ordinated legal advice provision across the country.

The final change that amendment 431 will make to the 1986 act is a technical one that makes it clear that the powers that the board has in relation to the terms and conditions of employment of its staff will also apply to the solicitors whom it employs. Currently the act specifies that only in relation to solicitors who are employed to provide advice on criminal matters.

Amendment 431 will also repeal sections 27(2) and 27(3) of the 1986 act, so that funding for solicitors who are employed to provide advice on civil matters can be provided from the legal aid

fund. To prevent double funding, funding for such work cannot be provided from another source.

I move amendment 431.

*Amendment 431 agreed to.*

### **Section 46—Contributions, and payments out of property recovered**

*Amendment 432 moved—[Hugh Henry]—and agreed to.*

*Section 46, as amended, agreed to.*

### **After section 46**

**The Convener:** Amendment 433, in the name of the minister, is in a group on its own.

**Hugh Henry:** Amendment 433 will extend the regulation-making powers that are contained in section 36 of the Legal Aid (Scotland) Act 1986. Section 36(1) allows Scottish ministers to make regulations that may seem desirable or necessary to give effect to or to prevent abuses of the act. Section 36(2)(c) allows regulations to be made that make provision as to the matters that are or are not to be treated as distinct matters for advice and assistance.

Amendment 433 is an extension of the section 36(2)(c) power. It will allow regulations to be made that provide SLAB with the power to determine the matters that are or are not to be treated as distinct matters for advice and assistance. It will allow a list of subject matters for which advice and assistance may be given to be issued by the board, following consultation with the Law Society of Scotland. The regulations that are to be made under the amendment will also be able to provide that the board can treat a matter that does not appear on the list as if it were included there.

New categories of cases may be added to the list by the board, following consultation with the Law Society. Those will easily be able to take into account changes in the law. It will be possible without regulations to remove matters from the list, but the board will be required to obtain the consent of the Scottish ministers, to ensure that no access to justice issues arise.

Amendment 433 will make changes to advice and assistance as outlined in the consultation that I issued in late 2004 and early 2005. The consultation was about the proposed reform of advice and assistance in civil cases. A number of changes are being taken forward in response to the views that were expressed in the consultation. Those will ensure that in civil cases the advice and assistance scheme will be flexible and will operate as efficiently as possible.

The finer details of the reforms are to be set down in regulations to be made under the

provision. For matters that appear on the new list, the application procedures for advice and assistance will remain unchanged. For matters that do not appear on the list, a diagnostic interview is to be introduced that will allow a solicitor to determine whether a matter, although not appearing to be distinct, should be treated as if it were. If so, an application will be made to the board seeking for it to be passported into the new scheme. There will be cases in which the solicitor will be paid a fee for the diagnostic interview only where the matter is not to be treated as a distinct matter, along the same lines as minimum-fee cases are treated now.

The 1986 act provides that it is the solicitor who makes the initial assessment as to whether, taking into account the usual eligibility tests, advice and assistance can be approved. Amendment 433 will make no change to that arrangement. Solicitors will still approve and make the initial grant of advice and assistance.

I move amendment 433.

*Amendment 433 agreed to.*

#### **Section 47—Advice, services or activities to which Act does not apply**

**The Convener:** Amendment 434, in the name of the minister, is grouped with amendments 435, 436 and 445.

**Hugh Henry:** Amendments 434, 435, 436 and 445 relate to section 47 of the bill. Section 47 observes devolved competence by disapplying the provisions of the bill in respect of advice, services or activities that fall within reserved areas. The effect is that the bill does not apply to complaints about consumer credit, insolvency, immigration or financial services, or to the provision of such services by practitioners. We propose that competence in those areas be provided by UK primary legislation or an order under section 104 of the Scotland Act 1998.

Amendments 434 and 435 will widen the original exclusion for financial services to cover two additional aspects that have been identified. The Law Society of Scotland was a recognised professional body under the Financial Services Act 1986 and retains the function of dealing with complaints against solicitors in relation to investment business carried on under the 1986 act, as that function was saved on the repeal of the act. Amendment 434 will therefore exclude activities that are mentioned in paragraph 5(1)(a) of schedule 3 to the 1986 act.

Amendment 435 will exclude certain regulated activities within the meaning of section 22 of the Financial Services and Markets Act 2000. Those cover such matters as dealing or arranging deals in investments, managing investments or giving investment advice.

Amendment 436 will simply extend the application of the definition of the words “complaint” and “practitioner” in section 34 of the bill to the references to those words in section 47(1). Amendment 445 is a minor technical amendment that is designed to simplify the amendment to section 65(5) of the Solicitors (Scotland) Act 1980.

I move amendment 434.

*Amendment 434 agreed to.*

*Amendments 435 and 436 moved—[Hugh Henry]—and agreed to.*

*Section 47, as amended, agreed to.*

*Section 48 agreed to.*

#### **Section 49—Regulations or orders**

*Amendment 288 moved—[Bill Aitken].*

**The Convener:** The question is, that amendment 288 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)

Craigie, Cathie (Cumbernauld and Kilsyth) (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 as follows: For 1, Against 6, Abstentions 0.

*Amendment 288 disagreed to.*

*Section 49 agreed to.*

*Sections 50 and 51 agreed to.*

#### **Schedule 4**

##### **MINOR AND CONSEQUENTIAL MODIFICATIONS**

*Amendments 344 and 345 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 437, in the name of the minister, is grouped with amendments 438 to 444 and amendment 446.

**Hugh Henry:** Amendments 437 and 439 are purely technical. Amendment 438 takes account of the new power that the bill provides for the council of the Law Society to impose a fine of up to £2,000 in respect of unsatisfactory professional conduct. A consequential amendment will be made to section 15 of the 1980 act.

In discussion with the Law Society, an issue has been identified that I believe needs further

consideration, so I will not move amendments 440 and 442.

Amendment 441 will remove from schedule 4 a provision relating to registered European lawyers. Our general approach to registered European lawyers and registered foreign lawyers is that the provisions in the bill, when enacted, will be applied to them by means of regulations that will be prepared under the power in section 2 of the European Communities Act 1972. That power was used to extend the application of the Solicitors (Scotland) Act 1980, in a suitably modified form, to registered European lawyers and registered foreign lawyers. We intend to use the same approach. Regulations will be laid before Parliament in due course, but in the meantime amendment 441 will, for consistency, remove from the bill a provision that deals with registered European lawyers.

Amendment 443 is consequential to the proposed repeal of section 38 of the 1980 act, which gives the Law Society of Scotland powers to obtain documents and freeze bank accounts. The amendment will replace a reference to section 38 powers in section 42C of the 1980 act by inserting in that section a full list of documents that the council might require a solicitor, firm or incorporated practice to produce or deliver.

Amendment 444 will ensure that section 52 of the 1980 act, which covers procedures on certain complaints and appeals to the Scottish Solicitors Discipline Tribunal, will extend to new appeals that are made to the tribunal under the provisions in the bill. The amendment will also extend the tribunal's rule-making powers to cover appeals by solicitors and conveyancing or executry practitioners against council findings on unsatisfactory professional conduct and retraining.

Amendment 446 will amend schedule 4 to the bill, which prescribes the constitution, procedures and powers of the Scottish Solicitors Discipline Tribunal.

I move amendment 437.

**Bill Aitken:** As the minister said, amendments 440 and 442 are problematic and will have to be revisited. The other amendments in the group are unobjectionable and should be supported.

*Amendment 437 agreed to.*

*Amendments 438 and 439 moved—[Hugh Henry]—and agreed to.*

*Amendment 440 not moved.*

*Amendment 441 moved—[Hugh Henry]—and agreed to.*

*Amendment 442 not moved.*

*Amendments 143 to 146, 346, 147, 265, 266, 443, 148, 347, 348, 149, 444, 349 to 352, 445, 353 and 446 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 447, in the name of the minister, is in a group on its own.

**Hugh Henry:** Amendment 447 will make four technical changes to the Legal Aid (Scotland) Act 1986. It addresses the difficulty that the Scottish Legal Aid Board has occasionally faced when a solicitor leaves a firm before the board has paid for legal aid work that he or she has undertaken. To avoid disputes about whether outstanding fees or outlay payments should be made to the individual solicitor or to the firm for which he or she worked, it is intended that all such payments be made to the individual solicitor and that any dispute be resolved privately between the firm and the solicitor.

To facilitate that, amendment 447 will remove section 12(1) of the 1986 act, which specifies that the word "solicitor" should also be taken to mean a firm of solicitors. References to payments to a solicitor in the remaining subsections will therefore relate only to an individual.

17:30

On section 19 of the 1986 act, amendment 447 will improve the fairness of the test that the courts apply when deciding whether expenses should be awarded from the legal aid fund to a successful non-legally aided party. Such a situation can occur when an action is unsuccessfully brought by a legally aided party against an opponent who does not receive legal aid. If the court decides to award expenses to the unassisted party, it can decide that those expenses should be paid from the legal aid fund rather than by the assisted party. At present, the courts can do that only if the unassisted party is likely to suffer severe hardship if an award is not made. We think that that test is too exacting and that it would be fairer if the courts were to make decisions based on whether the party would otherwise simply suffer hardship. Accordingly, amendment 447 will remove the word "severe" from section 19.

Section 25D of the 1986 act sets out the arrangements for unfinished work by solicitors who have been removed from the board's register of firms and solicitors that are eligible to provide criminal legal assistance. The intention is that, in such circumstances, the solicitor should quickly pass on their outstanding work and related documents to a registered solicitor. The act uses the term "forthwith" to express that intention, which has led on a number of occasions to disputes between solicitors and the board as to how quickly the transfer is expected to take place or at what

point the duty has been breached if the transfer has not taken place. To clarify that, amendment 447 will remove the word “forthwith” and enable the board to specify a period of time within which the transfer should take place.

Finally, in relation to section 34 of the 1986 act, amendment 447 will update the circumstances in which Legal Aid Board employees can pass on information about people who have applied for or received legal aid. Generally speaking, it is an offence for such disclosure to take place, but there are exemptions; for example, where information is required for an investigation by the Scottish Public Services Ombudsman or by the relevant professional bodies investigating complaints against solicitors or advocates. The amendment will simply update the terms of those exemptions to reflect the fact that complaints against the legal profession will be considered by the new legal complaints commission, and that conduct complaints will be remitted by the commission to the professional bodies for investigation.

I move amendment 447.

*Amendment 447 agreed to.*

*Amendments 150 and 151 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 448, in the name of the minister, is grouped with amendments 449 to 458.

**Hugh Henry:** Amendments 448 to 458 will adjust provisions that deal with the regulation of conveyancing and executry practitioners by the council of the Law Society, which are set out in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

I move amendment 448.

*Amendment 448 agreed to.*

*Amendments 449 to 453, 354 and 454 to 458 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 460, in the name of Bill Aitken, is in a group on its own.

**Bill Aitken:** Amendment 460 was a probing amendment, but I have found the answer that I wanted, so it is not necessary to move it.

*Amendment 460 not moved.*

*Schedule 4, as amended, agreed to.*

*Section 52 agreed to.*

### **Long title**

*Amendment 459 moved—[Hugh Henry]—and agreed to.*

*Long title, as amended, agreed to.*

**The Convener:** That ends stage 2 consideration of the Legal Profession and Legal Aid (Scotland) Bill. I thank the minister and committee members for their attendance, and I thank everyone for their forbearance, given that our previous meeting did not start on time.

The next meeting will be at 2 pm on 7 November, when we will take evidence on the Custodial Sentences and Weapons (Scotland) Bill, and consider the stage 1 report on the Christmas Day and New Year's Day Trading (Scotland) Bill.

*Meeting closed at 17:34.*

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