JUSTICE COMMITTEE

Tuesday 8 December 2009

Session 3

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JUSTICE COMMITTEE
34th Meeting 2009, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Angela Constance (Livingston) (SNP)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Dr Richard Simpson (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Sue Aspinall (Office of Fair Trading)
Kyla Brand (Office of Fair Trading)
Julia Clarke (Which?)
Richard Keen QC (Faculty of Advocates)
Tom Marshall (Society of Solicitor Advocates)
Paul Motion (Society of Solicitor Advocates)
Professor Alan Paterson (University of Strathclyde)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 8 December 2009

[THE CONVENER *opened the meeting at 10:11*]

Interests

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I formally open the meeting by reminding everyone to switch off mobile phones. There are no apologies, as we have a full turn-out of committee members.

James Kelly wants to make a statement.

James Kelly (Glasgow Rutherglen) (Lab): In last week's evidence-taking session for our al-Megrahi inquiry, the Cabinet Secretary for Justice made a number of references to Tony Kelly as the representative of Mr al-Megrahi. I just want to make it clear that Tony Kelly is in fact my brother. I have voluntarily updated my declaration in the register of members' interests to indicate that.

The Convener: It is important to stress that standing orders do not require such a declaration, but James Kelly has made that voluntary declaration in the interests of transparency.

Decisions on Taking Business in Private

The Convener: Item 1 is a decision on whether to take in private agenda item 5, which is consideration of whether to conclude or to continue the committee's inquiry into the decision on Abdelbaset al-Megrahi. Is the committee agreed that we take item 5 in private?

Members *indicated agreement*.

The Convener: Item 2 is a decision on whether to consider the committee's work programme in private at a future meeting. That would be in accordance with normal practice, so I assume that members will agree to that. Is that agreed?

Members *indicated agreement*.

Legal Services (Scotland) Bill: Stage 1

10:12

The Convener: Our substantive business today is our first oral evidence-taking session on the Legal Services (Scotland) Bill. Let me formally introduce Professor Frank Stephen, who is head of the school of law at the University of Manchester and the committee's adviser on the bill.

I welcome our first panel of witnesses: Sue Aspinall, who is team leader of the professions team at the Office of Fair Trading; Kyla Brand, who is the OFT representative in Scotland; and Julia Clarke, who is principal public affairs officer for Which?. Ladies, thank you very much for attending this morning. We will move straight to questioning, which will be opened by Bill Butler.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. How will the bill, and in particular the establishment of new business structures, benefit consumers of legal services in Scotland?

Kyla Brand (Office of Fair Trading): I thank the committee for inviting us to help it in its consideration of the bill.

We believe that allowing law firms to adapt their business models to a model of their choice, including allowing them to operate with other professionals, will give consumers more choice, deliver economies of scale and enhance access to justice.

The way in which that might work is that legal professionals who choose to operate in the same business with other professionals will be able to share overheads and perhaps offer a one-stop shop. That will provide more flexibility in the services that they can offer and will be of real benefit in local communities, where a business or individual consumer might wish to employ the services of, for example, both a lawyer and an accountant or both a lawyer and a surveyor.

10:15

The provisions that will allow firms to attract non-legal staff with managerial skills will assist them in providing new models of service and better customer service. We heard that a lot—from solicitors and consumer bodies—when we were conducting our inquiry in response to the Which? super-complaint.

The larger firms tell us that the ability to use outside finance will allow them to develop more dynamic models of service, which will enable them

to compete in the wider international arena and deliver client services more effectively.

Those are our principal comments about aspects of multidisciplinary partnerships.

Sue Aspinall (Office of Fair Trading): With regard to the specific provisions in the bill, we feel that providing for regulatory objectives and lay involvement in the governance of the Law Society will greatly contribute to consumer confidence in the legal services market. However, we feel that the consumer benefit would have been greater if members of the Faculty of Advocates had been allowed to become members of the new business models.

Bill Butler: We will take that on board. I am sure that the Faculty of Advocates will also note that point.

Julia Clarke (Which?): We agree pretty well with the OFT on this matter. The lack of competition in legal services is what caused us to launch our super-complaint. We feel that there are much newer ways of doing business that will provide benefits for consumers. Our experience is that consumers particularly like one-stop shops, especially with regard to the selling and purchasing of houses. We think that the changes will deliver economies that will affect prices in favour of the consumer, which is obviously a good thing.

Bill Butler: You talk about the benefits of the provisions in the bill. However, is there a danger of disbenefits to consumers? For instance, some people have said that there is perhaps a danger that outside ownership might lead to law firms offering only profitable legal services. What do you think of that?

Kyla Brand: I think that it would be a mistake to imagine that many unprofitable services are being offered now. We already hear of deserts in legal provision. There are ways in which the limitations of the current arrangements restrict the supply of some types of legal services in certain areas, such as family law, housing and debt services. That is already a feature of the market and is, perhaps, an argument for including new models that would make it easier to meet some of those market needs.

Bill Butler: Can the deserts that you speak of be made to grow again by the bill?

Kyla Brand: If you open a system up and allow people to create new models that they believe will meet a market need, you might well find that there are new areas of service.

Bill Butler: So, you envisage no disbenefits to the consumer.

Kyla Brand: The success of any new system depends on how robustly it is regulated. For us, consumer protection is a high priority, and we believe that competition among services is one of the ways in which that protection can be delivered. However, there must also be the kind of built-in protection that will give the consumers of legal services in Scotland at least the same protection that they currently have. We believe that that is embedded in the bill.

Bill Butler: Do you have anything to add, Ms Aspinall?

Sue Aspinall: Just that protecting the interests of the consumer and the public form one of the regulatory objectives of the bill.

Julia Clarke: That is right. Further, people can continue to practise as they have if they wish to; nobody will be forced into a new arrangement. A sole practitioner might still choose to operate in a certain way. However, in these difficult times, the sharing of expenses with a local surveyor or accountant might be what saves some sole practitioners. The bill gives people scope to move forward in whatever way they see fit.

Bill Butler: Thank you for laying out the theory so clearly.

Stewart Maxwell (West of Scotland) (SNP): Julia Clarke said that the one-stop shop would benefit consumers, particularly with regard to housing. How do the bill's proposals differ from what we already have? After all, people already go to large suppliers such as the Edinburgh Solicitors Property Centre, the Glasgow Solicitors Property Centre, the Aberdeen Solicitors Property Centre and so on.

Julia Clarke: I think that different models will emerge. Someone with a bit of entrepreneurial spark will see a space for, say, an accountant to team up with a local lawyer to provide a certain set of services. We will also find information technology specialists and others coming into the market, doing things in a different way, driving things in a different direction and providing different opportunities for people to buy and sell houses. The introduction of the home report has already brought something different into the market. I think that the market will adapt to what consumers want and that prices will reflect that benefit to consumers.

Stewart Maxwell: I see your general point about the involvement of accountants, managerial services, IT and so on, but surely, as far as housing is concerned, the large suppliers that I mentioned already pretty much provide a one-stop shop. I am trying to envisage the difference that the bill will make to me if I want to sell my house.

Julia Clarke: At the moment, different fees are paid at different stages of the home buying and selling process. That aspect could become more transparent if you dealt with a set of professionals who offered different services. I think that the bill presents all sorts of opportunities that we cannot yet see; as I have said, the market will, as usual, adapt itself to consumer preferences.

Robert Brown (Glasgow) (LD): I want to develop that point. At the moment, the Law Society of Scotland has arrangements to prevent conflicts of interest between solicitors acting on opposite sides of the same transaction. On your suggestion about lawyers, solicitors and surveyors acting together on domestic conveyancing operations, I find it extremely difficult to envisage how, for example, single seller surveys could be carried out by the same provider without enormous conflicts of interest arising that would be hugely disadvantageous to the consumer. Will you comment on that? What services did you have in mind?

Julia Clarke: As far as home reports and single seller surveys are concerned, the fact that surveyors have a legal obligation to buyers and sellers is very important and, indeed, the keystone to consumer confidence. I do not think that that is an issue—

Robert Brown: I am sorry to interrupt, but are you seriously suggesting that a firm acting on behalf of a seller should, as part of its in-house service, be able to instruct a surveyor to produce the survey on which the purchaser might rely? Such situations are notoriously difficult and can lead to all sorts of disputes between parties about, for example, dry rot that has not been identified and so on.

Julia Clarke: The bill contains protections to ensure that such regulatory conflicts are worked out.

Robert Brown: Can you take that a little further and tell us about the practical operation of such a system?

Julia Clarke: On the preparation of the survey by the sellers—

Robert Brown: Are you suggesting that the new entities that you are proposing would provide such services?

Julia Clarke: Not necessarily, but such a move would allow those services to be provided together. The same company would not necessarily act for both buyer and seller, but the home report would be prepared by the seller's team.

Robert Brown: In other words, by the legal entity.

Julia Clarke: Yes.

Robert Brown: What is the Office of Fair Trading's view on what I may say is a rather extraordinary proposition?

Kyla Brand: I just want to add one consideration. The OFT is in the process of doing a market study of home buying and selling and is looking at the operation of the home report as part of that. One of the questions that arises is who will be the surveyor. Obviously, there are other interests; in particular, we hear about the interests of the lenders and whose surveyor they want to use. A number of parties direct which service supplier is appropriate and which will therefore be chosen. It might be appropriate for the surveyor who is in the same firm as the lawyer who is involved in the transaction to be chosen; it might not be. However, that does not, in itself, reduce the opportunities to put the survey service in the right place to achieve the independence that someone might be looking for.

Robert Brown: I am really asking whether there would be a conflict of interest in such a situation. How would the public interest be advanced by that arrangement, given the notorious potential, if you like, for conflict between the buyer and the seller in relation to the details on which the survey has reported?

Kyla Brand: As I understand it, the purpose of the home report is to take some of the sting out of that and to provide an objective study that is available to both sides of the transaction.

Robert Brown: Does it not take away a substantial measure of the buyer's confidence in the home report if everything is dealt with not even at arm's length but by the same entity that is acting for the seller? I am sorry to press the point, but it is quite fundamental.

Kyla Brand: As has already been said, control has been built into the bill to ensure the highest level of professional service, whether professionals from different professions work together or as individuals. We do not anticipate that there will be any reduction in levels of professionalism, or in the confidence that consumers have in the services that are made available.

Robert Brown: We might as well say that the same solicitor should act for the purchaser and the seller and do the whole thing in-house, so that we get rid of the associated additional costs of separate representation.

Julia Clarke: No, I do not think so.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): On that point, when she talked about the consumer's interests, Julia Clarke said that the market will adapt to what consumers want.

Stewart Maxwell helpfully made the point that a lot of large companies work almost as one-stop shops for house sales and purchases. However, there are still solicitors working in small high street offices who are able to provide those services. Consumers choose what they want.

I still have not heard any satisfactory answers about how the proposals in the bill will benefit consumers. Probably the majority of the people I represent go to see their lawyer about house transactions rather than anything else.

Julia Clarke: That is absolutely right, and there will always be a place for the solo high street lawyer whom everyone knows and trusts and to whom they have always gone. However, some companies want to modernise and streamline their services and cut some of the associated costs. Frankly, we could use a bit of competition in this area in Scotland to improve services and drive down costs a little bit. If we free up lawyers to offer services in that way, people will take advantage of it.

Kyla Brand: There are two aspects to the issue. First, consumers have not had the choice of being able to make one visit to a local firm that might offer them legal and accounting services, for example. We have heard that people favour the idea of a one-stop shop—the demand might still be theoretical, but it has been reported to us.

The second aspect involves the profitability of services, which was referred to earlier. If a different approach does not work, firms will not stick with it. However, they tell us that they believe that there is an opportunity to reduce costs and therefore to make services cheaper for consumers, and they would like to be able to develop that approach. Firms will not have to do so: if they wish to stay as individual practitioners offering just one service, that will remain part of the market mix. However, what is proposed will allow firms to do things in new ways that might drive more imaginative and better services.

10:30

Cathie Craigie: Some people would say that the system is not broken, so why fix it? Why do you think the current approach not working? My big concern is about what will happen to the small firms of solicitors on the high street in the area that I represent if the new approach does not work and if firms do not, as you suggest, stick with it? They will disappear when bigger firms come in and take business from them for a time. The small firms might not come back because the solicitors retire or go to work for one of the big firms.

Kyla Brand: The sustainability of services is of great importance. At the moment, sole practitioners in the high street are having a difficult time sustaining their services. In offering new models, there is every opportunity for them to have a greater chance of being able to sustain their services.

Consumers are accessing all sorts of services in many new ways, and wish to be able to do so in even more wide-ranging ways. IT and buying online have been mentioned. There is a dramatic change in relation to face-to-face transactions in all areas, and there is no reason why legal services will be any different. We are seeing online transactions in house buying and selling, and there are other ways of accessing important but still customised services that do not necessarily come through an office on a high street.

Stewart Maxwell: I opened up this line of questioning because I was trying to get to the bottom of the practical difference that the bill will make to individual consumers; I am still trying to get to the bottom of that. Ms Brand stated that consumers would benefit from having joint legal and accountancy services. Who are those consumers? I can see that businesses might find joint services an advantage, but the bulk of my constituents, like Cathie Craigie's, are not businesses but individuals, and they will seek legal services, not legal and accountancy services. Is it just that some businesses, whether small or otherwise, would benefit from the bringing together of legal and accountancy services, or is there some wider benefit that I have not envisaged?

Kyla Brand: I do not want to give the impression that people will be flocking to acquire legal and accountancy services on the same day in connection with the same issue. However, many of us find that we need a lawyer, an accountant or both at different times in our lives. I suppose the intention is that people would not have to make different searches to discover who would be a good provider for them.

Other aspects might have arisen already in the work that has been done on the Legal Services Act 2007 in England and Wales.

Sue Aspinall: First, I should say that small businesses are included in our definition of "consumers". Stewart Maxwell asked about demand. Let me give the example of a sole practitioner in a rural area where there might be other professional firms. Some of those firms might find it easier to exist together and form partnerships that mean that they can keep going and offer their services to consumers, whereas being a sole practitioner might not be viable.

Stewart Maxwell: That is about the viability of two businesses coming together to make a more efficient business.

Sue Aspinall: Yes—to offer a range of services.

Stewart Maxwell: So those services would remain in place as opposed to being lost to smaller communities. I can see that argument, but I am still struggling slightly to understand what the advantages would be. If I wanted legal services today, I would go to see a lawyer. If I wanted accountancy services next year, I would go to see an accountant. I am trying to understand the difference between what currently exists and what might exist in future.

Sue Aspinall: I was trying to make the point that there might be firms that do not have enough clients to enable them to keep going on their own, and if they were to band together with other services, they might be able to make their businesses more viable and therefore continue to exist. The bill will enable such firms to bring in non-professionals, such as IT experts, who could help their businesses to innovate.

Stewart Maxwell: I accept that point, but I was making a slightly different point. There is a wider issue about the benefit of the approach and what difference it would make to consumers. We can explore that as we go on.

Nigel Don (North East Scotland) (SNP): Ms Aspinall has given examples of situations that she said might arise. I understand that, given the world of economics. However, under the current model, if a high street lawyer and a high street accountant want to work together, what is there to prevent them from setting up under the same roof, sharing a secretary and hiring in someone who understands computing? Why on earth do they need a new business model, whether it is a partnership or some other limited liability company, to do something that they can do anyway as sole traders? They can just work together, can they not?

Julia Clarke: Yes, they can, but they do not have the opportunity to develop a different model that offers different expertise. An IT expert who comes in to help a business will not own it and therefore have a direct stake in moving it forward through the kind of modernisation that the area sometimes lacks.

Under the bill, a surveyor would be able go into partnership with a lawyer and offer their expertise as part of the business. Currently, some banks charge fees for surveys—home reports, for instance—so a surveyor who was partnering a lawyer might offer the service for less money, as part of a one-stop-shop service. That is just one example of what might be possible.

Nigel Don: I understand the economics of the example that you gave, but what is to stop the lawyer and the surveyor doing that now, if they choose to co-operate?

Julia Clarke: The trouble is that people are not doing that now. We need the door to be opened, to let people think about the joint services that they could offer. Because that has not happened, services are not being offered. We need the door to be pushed open, so that people say, "We could do things differently. Why don't we have a go?"

Nigel Don: Forgive me, but I can open the door by telling sole traders that they can work together. Why do we have to change the legal structure to tell people about a door that is already open?

Julia Clarke: Because people are not working together, I suppose. The chance to own a business that crosses the professions would make such innovation far more likely. There can be economies of innovation, and the introduction of management expertise from outside the industry will be beneficial for legal services in Scotland. Things will perhaps be done in a more consumer-friendly way. We have found that people want legal services to be more user-friendly and a bit more modern.

The Convener: I will open the door for Bill Butler.

Bill Butler: Thank you, convener. It was remiss of me not to mention that some people fear that undesirable third parties might take over law firms if outside ownership is allowed in the way that is proposed. How will consumers be protected from such people?

Sue Aspinall: The ownership of law firms and law practices must be fit for purpose. It is a question of ensuring that there is robust regulation. Indeed, however many rules are in place undesirables might currently be working in law practices—

Bill Butler: I will not ask you to name any.

Sue Aspinall: I do not think that I could do so—

Bill Butler: There are likely to be some.

Sue Aspinall: The New South Wales model allows external ownership, and we are not aware of major problems having arisen in Australia. External ownership is envisaged in England and Wales from 2011, I think. It is a question of robust regulation.

Julia Clarke: That is exactly right. There will be a fit-to-own test—

Bill Butler: Are you talking about the provisions on fitness for involvement?

Julia Clarke: Yes. Those provisions will provide protection for consumers, along with all the other measures that are proposed.

Bill Butler: Is the fitness-for-involvement test robust enough?

Julia Clarke: I think so. We have no evidence that it is not.

Bill Butler: Do you have any evidence that it is?

Julia Clarke: That is always the difficulty with things that have not yet been implemented.

Bill Butler: Exactly—that was your previous answer.

Kyla Brand: As Sue Aspinall said, we know that the fitness-to-own approach has been made to work elsewhere in the world. In Australia, for example, the use of that approach in New South Wales has been expanded into other states. That example shows that outside ownership does not necessarily bring the kind of hazards that others have suggested may arise in this country.

Bill Butler: Do you know of instances in which there have been problems, or is the model working perfectly?

Kyla Brand: The fact is that Australia has adopted a similar approach to the approach that is proposed in the bill, with a rigorous set of conditions for those who wish to own firms. The Australian approach includes monitoring and the other provisions that the Government envisioned when it drafted the bill. As far as we are aware, no problems have been encountered thus far. You may regard the example as a slightly peripheral evidence set, but it is an example nonetheless.

The key is to have transparent conditions up front. In that way, anyone who proposes to own a firm that provides legal services as part of its service provision will be absolutely clear about the hurdle that they will have to clear. It must also be made clear to consumers that the owners have had checks made and that they are subject to continued monitoring. The provisions are there to ensure that a situation in which an owner fails to reach the standard can be dealt with. Given those provisions, we are comfortable that the approach can be made to work safely and in the interest of consumers.

Bill Butler: I am grateful for your explication of the theory.

The Convener: We must move on. If we are to get through what we want to get through, only one OFT representative should answer the question, unless one feels the need to augment what the other has said.

We turn to questions on the regulatory approach.

Cathie Craigie: I will be as concise and quick as I can be, convener. What evidence is there that the existing regulatory approach is not working? Do we need a fully independent regulatory body for the legal services market in Scotland that separates the representative and regulatory functions?

Sue Aspinall: From the evidence, we know that we are talking about public perception. If a body were to try to further the interests of both its membership and the public, tensions—even conflict—would arise. The best way in which to avoid conflict is to have a separation of the two roles.

Julia Clarke: Which? believes that there should be a separation between the two functions. The system does not work satisfactorily, so it cannot be said that it is perfect. At the very least, particularly in terms of public perception, separating the two functions would be an improvement.

Cathie Craigie: You referred to that in your submission. Do you want to add anything?

Julia Clarke: Obviously, the proposal for a lay majority and a lay chair is good news. That is progress, but our view is that there should be complete separation between the two functions. If that cannot be done, the proposed committee to advise the Government on future regulation is a way forward. It is important that its membership should be drawn from beyond the legal profession. It should certainly have a lay majority and a lay chair. It should be a statutory body because it is proposed that the Government will regulate the regulators. That is not ideal but, if it is to happen, it is important that we have a strong advisory body.

10:45

Cathie Craigie: What advantages to consumers would arise from having more than one approved regulator for licensed providers? What would be the benefit of regulatory competition?

Sue Aspinall: Competition should normally have benefits for consumers unless there is a particular market in which it is best to have only one provider. The OFT's position is that approved regulators have an important role to perform in the way that they license and we hope that, if there is demand for a choice of approved regulator, that will develop the number of licensed legal services providers coming through, which will mean that there will be more such firms for consumers to choose from.

Cathie Craigie: Did Julia Clarke want to say something?

Julia Clarke: No, I was just going to reiterate what Sue Aspinall said, so I will not take up your time.

Robert Brown: Scotland is a jurisdiction one-tenth the size of England. The submission from the Institute of Chartered Accountants of Scotland

indicates that we could get some of the advantages of wider choice and one-stop shops by extending the system under which ICAS can approve a solicitor to be a principal in a firm of chartered accountants. ICAS suggests that that might be applied to the Law Society in reverse, to adapt a much less bureaucratic model that, I guess the institute would argue, is appropriate to Scottish circumstances. Do the witnesses have a view on that? Can we achieve the same objectives by that sort of approach?

Sue Aspinall: I wondered how many solicitors had taken that route.

Robert Brown: I have no idea.

Kyla Brand: The model to which ICAS works was on the table in the discussions that led to the bill that is before you. My understanding is that it was considered somewhat too radical and a much greater departure from the existing arrangements than those in the bill. The OFT would certainly not discount that sort of simple arrangement. If we can build in adequate consumer protection, an unbureaucratic system is obviously preferable.

Robert Brown: There is a coalescence of interest on matters such as tax advice and certain things to do with divorce. A one-stop shop might have greater relevance in such an arrangement than in a partnership with surveyors, of which I was critical earlier.

Sue Aspinall: Yes.

The Convener: I take it, Ms Aspinall, that your position is the same as it has always been. I note that when you gave evidence to the Legal Profession Bill reference group you were clear that you would approve of the adoption of a separate regulatory committee.

Sue Aspinall: Do you mean for the Law Society of Scotland?

The Convener: Yes.

Sue Aspinall: The proposals amount to a separate regulatory committee. There is just no name change, as there was in England and Wales.

The Convener: Are you happy with that?

Sue Aspinall: The preference is for a clear indication of separation. The Law Society will have a separate regulatory committee, but how will that be perceived externally by consumers? Will they be aware that there is a separate regulatory committee?

Nigel Don: Given that three of the four grounds of the Which? super-complaint related to advocates, is Which? happy with the bill?

Julia Clarke: No. We feel that it should cover advocates clearly. We see no reason for a bit of legal services to be hived off and, to be frank, not allowed to modernise. We are not happy with that aspect of the bill.

Nigel Don: In what way would you like the advocates to modernise or—perhaps more fairly—what you would like the result of that modernisation to be?

Julia Clarke: We would like them to be able to form alternative business sructures—firms that include both lawyers and other professionals—and would like consumers to be able to commission an advocate directly, which is still not usually the case. We would like advocates to be able to work in different, more modern, more accessible and more transparent ways, and would like their regulation and representation to be separated, so that the public could have more confidence in the system.

Nigel Don: What do you hope to achieve by that?

Julia Clarke: We hope to achieve a more modern, user-friendly legal services industry in Scotland, in which people know what they are paying for, that has a competitive market, so that people can get the best price, and that allows people to understand more about the legal services process that they are using.

Nigel Don: What expectation do you have that the consumer—the man in the street, who is not in this room—could choose between advocates?

Julia Clarke: I am not saying that everyone would want to choose their advocate, but some consumers are highly educated and informed and are capable of that. They should be able to do so.

Nigel Don: Is the 0.5 per cent of the population to which you refer not able at the moment to work through a solicitor to get the right advocate?

Julia Clarke: Why should they have to pay a solicitor to do that? I accept that the majority of people will not want to rush off and commission an advocate. However, for those who do, the current arrangement is sometimes an indication of how the service is set up. At the moment, it does not always offer choice to the consumer.

Nigel Don: If I have guessed my numbers correctly, it makes sense for the 99.5 per cent of the population that has no idea of how to choose an advocate to go to a solicitor to do that. Apart from anything else, people do not know the language in which to discuss the subject that is before them. The solicitor can identify the issue, work out the language and sort out who the barrister should be. Is not the system pretty good at the moment?

Julia Clarke: We are not saying that the system does not work for the majority of people. The bigger point is that, under the bill, advocates will not join ABS arrangements and there will still be no clear separation of regulation and representation in the Faculty of Advocates. That should be corrected in the bill. Unfortunately, it will not be.

Nigel Don: I hope that our other witnesses will answer my questions in a moment, but I would like first to pursue this point with Julia Clarke. I am told that 460 advocates practise in Scotland. That is a fairly small bunch of professional, highly qualified people. Do we really need a complicated structure for the regulation of 460 people who are regulated by the court anyway?

Julia Clarke: The consumer principles are the same wherever people live in the United Kingdom. People are entitled to the same level of transparency and the same protections in the industry with which they are dealing. If services do not modernise, the consumer has no way of demanding their modernisation—they are just presented with what is available. If there is no opportunity for choice, the consumer cannot make their needs felt and must keep taking whatever is delivered. Unfortunately, that is the case at the moment.

Nigel Don: Would you not prefer to have a service—especially a legal one—that is regulated by the judges of the High Court rather than by some consumer watchdog? If I want lawyers, whose business is speaking to a court, to act professionally in my interests and the interests of justice, would I not much prefer them to be guided and regulated by the Lord President rather than by another organisation?

Julia Clarke: I cannot see what is wrong with independent regulation that is properly regulated and comes with all the necessary safeguards. I think that everyone was keen that that should be in place and, by and large, that is what is proposed in the bill.

Nigel Don: Does the OFT have a view on the ground that I have covered?

Sue Aspinall: On the direct access aspect, I appreciate that we are talking about small percentages, but it is really a question of the small amount of people who are sufficiently educated and familiar enough with court process having the choice to take a direct route. Further, it would be up to individual advocates to decide whether they wanted to offer their services in a direct manner. Direct access exists in England and Wales and a number of barristers there have not chosen to go down that route.

There is a small number of advocates—some 460. The bill now provides for the Faculty of Advocates to be subject to the regulatory objectives. That does not affect the role of the Lord President. The members of the faculty can choose whether they wish to provide their services via the independent referral bar or, instead, form partnerships or join with others.

Nigel Don: So, you are concerned that advocates might feel restricted in their current environment and might want to do something different.

Sue Aspinall: Yes. I think that there is evidence that there are advocates who wish to adopt different business models.

James Kelly: You will be aware of the solicitors guarantee fund, which ensures that no member of the public can be defrauded by a solicitor. It provides essential protection. Do you agree that that scheme benefits the public?

Julia Clarke: It does, and we would not want that protection lessened for people who used legal services under any other arrangement.

James Kelly: Do you accept that the introduction of alternative business structures might undermine that fund and, therefore, lessen the amount of protection that the public receives?

Julia Clarke: I do not see how that would necessarily happen.

James Kelly: How do you see the fund being implemented as we extend into alternative business structures?

Julia Clarke: I suppose that that is a matter for the people who are taking part in the scheme to work out. It is like the master policy. We would like more competition to be introduced so that there is not just one provider, because that involves a potential conflict of interests. This might be a good time to look at the issue.

James Kelly: Do you agree that there are difficulties in changing from the current system, which involves all solicitors contributing to the fund, to a system that involves other professionals, such as accountants? Do you think that there will be difficulties in imposing such a levy on them?

Julia Clarke: That is part of the regulatory conflict that has to be worked out between the professions so that consumers are as protected as they are now. Different professions have different schemes, and that has to be worked out by the professions that might want to be involved.

James Kelly: Does the OFT have any views on the matter?

Sue Aspinall: We would like the guarantee fund to apply to ABSs, as we wish consumers to be protected regardless of whether they go to a traditional practice or an ABS. I think that there is

a way to ensure that the fund can apply to ABSs, but how that is done is a regulatory matter. I believe that in England and Wales—where they have a similar fund called the compensation fund—a levy is placed on anyone who is registered to practice and offers legal services in an ABS.

11:00

James Kelly: The minister has indicated that he does not intend to proceed with contingency fees. Do you have any views on the application of contingency fees?

Sue Aspinall: The OFT's view is that any funding mechanisms that give consumers choice to secure funding for legal services can only be a good thing. We would have to see the proposals on how that would be done and how it would be regulated.

James Kelly: Do you accept the principle that some people have put forward, which is that if someone wins a case for compensation and is awarded £100,000, that sum should be awarded in full to the claimant and any costs should be attributed to the losers in the case?

Sue Aspinall: There are many different funding systems in England and Wales, and that is one of the many flaws that have been identified. It cannot be right that legal fees are recouped from damages, so different ways will have to be devised whereby the consumer and the provider both get their appropriate share of the outcome.

James Kelly: Ms Clarke, do you have any views on the issue?

Julia Clarke: There are difficulties with contingency fees and conditional fees, but if it is a case of fees or no access to justice, fees are obviously better than no access to justice.

James Kelly: How easy will the new regulatory regime be for consumers of legal services to understand?

Julia Clarke: The average person rarely uses legal services, except perhaps when they buy a house. They want the system to be accessible and understandable, and to know who is paid a fee for what, what that cost is and whether there is competition to ensure that they get a good deal. I am not saying that every consumer will understand the whole regulatory background, but if the safeguards are in the bill, to some extent that does not matter, just as it does not matter, in some ways, that they do not understand the present framework. It just has to be easy to use at the time and easy to access if something goes wrong.

James Kelly: Does the OFT have a view?

Kyla Brand: Yes. There are two additional points. We believe that consumers need to understand the rules, systems and services that are available to them. In that context, various comments have been made about the possibility of covering public legal education because, as citizens, we rarely have enough of an understanding of how our legal system works for us. The bill might be a trigger for providing consumers with some of that new information. Its provisions are bound to be complicated. The issue will be how that complexity can be communicated effectively to consumers. Regardless of whether that is done in one of Consumer Focus Scotland's inimitable guides, it will need to be made clear what the changes are, why they are being made and what they will mean for consumers. That is for further down the road. It might even be important to provide a diagram that demonstrates where all the different bodies sit. There is the wider issue of how much we understand how our legal services work for us as consumers.

Robert Brown: I was not entirely sure of the thrust of the OFT's evidence on the guarantee fund. One of the advantages of solicitor regulation is the existence of the professional indemnity policy and the guarantee fund. Is it your view that, however this is done, there will need to be a guarantee fund in place for other providers?

Sue Aspinall: We would like to have reciprocal arrangements for consumers so that that does not become an important factor in the choice about which provider they go to. We want them to know that they are sufficiently covered whether they go to an ABS or to a traditional practice.

Robert Brown: Does that mean yes or no?

Sue Aspinall: The guarantee fund would relate to providers of legal services.

Robert Brown: Okay. Through organisations such as the Association of British Travel Agents we try to provide increased protection against travel agents running off with people's funds, going bust and so on. Should not the provision of the same level of protection for the consumer be a principal objective of the regime that we put in place with the bill?

Julia Clarke: Yes. The consumer should certainly have a level of protection equal to that which is available under the traditional arrangements.

Robert Brown: The Scottish Government is considering lodging amendments at stage 2 to regulate will providers. Does Which? support that proposal?

Julia Clarke: Frankly, we think that there is some opportunity for people other than lawyers to write wills. We would like that to be examined. We

have no evidence that that would result in any difficulty, provided that things are properly done. We think that there is opportunity for competition in that area, which would benefit consumers.

Robert Brown: Let me explore that a little bit further. What is the relationship between Which? and Which? legal services?

Julia Clarke: As part of our organisation, Which? legal services offers legal services to the public for a set fee.

Robert Brown: The written submission from the Scottish Law Agents Society mentions Which? legal services—I must confess that I knew little about such services before—as an example of what it calls "execution only" legal services. Referring to Which? legal services, the submission states that its

"terms and conditions in relation to Wills provide … 'The Service does not provide legal advice'. 'The Service uses software for the assembly and drafting of a Will based on the answers you have given in your Will Interview Questionnaire. Your Will will therefore be generated automatically to reflect the answers you have given. You alone are responsible in ensuring that the answers and information you provide are correct and accurate".

I think that the terms and conditions also make it clear that the service operates under English law. That sounds like not so much a legal service as a technical IT service, which has little regard for the intricate complications of will drafting. Will you comment on that?

Julia Clarke: I suppose that that is part of the opportunity that people should have to access different legal services, which is partly what we are hoping will happen. We hope that there will be a variety of service provision in Scotland, so that people can pick the service that is appropriate to them. Obviously, people who have a hugely complex estate would want to go to a solicitor for a will, but someone who has very simple affairs to settle might want to choose that way. It really depends on who you are and what your circumstances are. Certainly, I think that the provision of a plethora of services is important.

Robert Brown: Most lawyers would say that the interpretation of wills and the effects of intestate law are among the most complex and difficult areas of law because of the challenges and disputes that they lead to. Do you accept that?

Julia Clarke: I accept that that is sometimes the case, but in other cases people have fairly straightforward affairs. It really depends on who you are. Finding the appropriate level of support and services is very sensible.

Robert Brown: That leads on to the more complex question of the place of professional knowledge. Obviously, there is competition among solicitors and advocates, who are trained by quite a lengthy process. One would not expect a brain surgeon to have his business opened up to competition.

Julia Clarke: We would not expect a brain surgeon to take out someone's tonsils, for example. Having the right professional for the right piece of professional work is important. We need the right safeguards.

Robert Brown: That is my point. Where do professional standards and training come into all this?

Julia Clarke: Which? has properly trained lawyers to hand among its staff. That is where that sits.

Robert Brown: Under the bill, would that be a necessary requirement for alternative providers? Would they need to have fully qualified lawyers if they were operating in the legal sphere?

Julia Clarke: In Scotland, for instance, we have independent conveyancers. We would like to see more competition in that area, as people use such legal services quite frequently. Added competition could drive down prices and benefit the consumer. At the moment, such services are regulated by the Law Society of Scotland, which we feel is not appropriate.

Robert Brown: My point is, where does professional competence come into it? What standards of competence will be required of people who operate in such fields? I do not think that licensed conveyancers are trained solicitors per se.

Julia Clarke: They have legal training, but I cannot say exactly to what standard.

Sue Aspinall: Licensed conveyancers undergo training to get the qualification, which is obviously more focused on their role. I do not believe that it is as detailed or lengthy as solicitor training. Similarly, will writers in England and Wales are members of a number of bodies and have to undergo training and continuous professional development.

Robert Brown: I suppose what I am getting at is the division between different sorts of areas of the law. There are clear areas, such as appearing in court as a McKenzie friend, for which a preponderance of legal training would be important, but other areas may not require that as much. For example, for issues of welfare law, citizens advice bureaux and others may come into the field and give very good advice. Does the Office of Fair Trading have a view on which core legal services require professional legal training?

Sue Aspinall: Any professional training or skill has to be appropriate to the service that is offered.

Robert Brown: Can you say in what areas that has to be the case and in what areas it is maybe more of an overlap with other professions?

Sue Aspinall: That is a bit more difficult to do. Obviously, if someone deals with complex cases, their required training and level of qualification must be higher than for someone doing regular, everyday procedures that do not need such a steep learning curve and for which the skills are different. To use the surgeon analogy, I imagine that someone would need far more skill to be a brain surgeon than to offer accident and emergency help in an ambulance.

Robert Brown: Where does the expertise come from for feeding into the regulatory body? If it is not from the Law Society, ICAS or another professional body of that kind, where does the expertise come from that enables the regulatory body to set standards for other groups or people as to the level of training and so forth?

Sue Aspinall: Obviously, organisations such as the Faculty of Advocates and the Law Society have been around for many generations, if not centuries, so they have evolved over time. Some of the newer bodies may well have been approved under statutory provisions whereby they must provide a suitable scheme of arrangements to the Lord Chancellor or the Scottish ministers, who then ask for input from the Lord President and the OFT. They will therefore all start in that way, then be developed over time and monitored and reviewed, as are the rules of the Law Society and the Faculty of Advocates.

The Convener: I think that that is as far as we are going to get, although Cathie Craigie has a final, brief point.

Cathie Craigie: Would the OFT have made such strong representations in support of the bill if Which? had not lodged its super-complaint? Which? is a charitable organisation representing consumers. Members around the table have pointed out that we recognise consumers as members of the public and not necessarily as large business. Before the super-complaint was submitted, what sort of consultation did you undertake with the public? What do you say to the perception out there that the bill is for big business and will drive down the business in the high street? What do you say to the point that the bill is an open door for third parties to come in and profit, rather than for consumers to receive justice?

Julia Clarke: Obviously, when we launched the super-complaint, the idea was to improve things for consumers. We still believe very firmly that that will be the case.

Cathie Craigie: What was your evidence? We have not heard any of that this morning. What was your evidence and research before submitting the complaint?

Julia Clarke: We knew that there continued to be problems with legal services.

Cathie Craigie: How did you know?

Julia Clarke: Just from consumers bringing complaints to us and—

Cathie Craigie: Well, you would know how many complaints were coming in then.

Julia Clarke: We do not necessarily have huge numbers of complaints, so I cannot say that that is the case. We sometimes cannot prove consumer detriment, but we know that, as a general principle, choice and competition opens doors for consumers to receive better-quality but cheaper services. I suppose that that general principle is our evidence base, as opposed to having specific evidence on legal services.

11:15

Cathie Craigie: So there are no facts or figures that you can share with the committee.

Julia Clarke: No more than there are on the side of the status quo to prove what consumers want. The issue is difficult. We simply have to apply general consumer principles as best we can.

Cathie Craigie: What about the point about profits?

Julia Clarke: In general, competition drives down prices for consumers and offers a range of ways of doing things that throw up benefits for people. We have seen that time and again over the 50 years of our history. When fair competition is introduced and consumers have choices, they tend to benefit. We believe that that will happen with the proposals that have been made.

Sue Aspinall: Before the Which? super-complaint, the OFT was involved in the research working group, along with members of the Law Society of Scotland, the Faculty of Advocates and the Scottish Consumer Council. The Scottish Consumer Council brought many concerns about consumer issues to the table in 2005 and 2006. The catalyst for the bill was not the super-complaint; it was the work that was done before that in the research working group.

Cathie Craigie: Did you refer to the review working group?

Sue Aspinall: The research working group. Its name does not slip off the tongue.

Cathie Craigie: I understand that that group concluded that a couple of minor changes were needed, but that a lot more research had to be done before legislative change should be made. Where has that research been undertaken?

Sue Aspinall: The OFT and the Scottish Consumer Council often thought one thing while the Law Society and the Faculty of Advocates thought something else. I am afraid that I cannot recall the areas in which research has been undertaken.

The Convener: Stewart Maxwell will ask the final question.

Stewart Maxwell: I want to pick up on a small point. Julia Clarke talked about straightforward wills. Let us consider a will being made up for me by Which? legal services using the system that Mr Brown described. I and all my relatives and friends live in Scotland, and I own property only in Scotland. In Which?'s view, is it appropriate for that will to be drawn up under English law?

Julia Clarke: I do not have a great deal of information about that, so I cannot be very helpful to you, I am afraid. I am sorry. However, I can certainly find out about the matter and come back to you on it, Mr Maxwell.

Stewart Maxwell: It seems odd to me.

Julia Clarke: I take your point.

The Convener: Julia Clarke has given an honest response, for which I am grateful.

Thank you very much for your attendance, ladies. There will now be a brief suspension.

11:18

Meeting suspended.

11:19

On resuming—

The Convener: The second panel consists of, in splendid isolation, Professor Alan Paterson from the centre for professional legal studies at the University of Strathclyde.

Good morning and thank you for attending, Professor Paterson. We will go straight to questions. How satisfied are you that the bill addresses the specific issues that were examined by the working group on the legal services market in Scotland?

Professor Alan Paterson (University of Strathclyde): I should start by declaring an interest. I have connections with the Scottish Legal Complaints Commission, Citizens Advice Scotland, the Scottish Legal Aid Board and the joint standing committee on legal education. I have also had connections with the Law Society of Scotland in that I served on its council. However, I make it clear that I am here in my personal capacity as an independent academic.

You asked to what extent the bill addresses the issues that the research working group raised. I think that the working group left a number of questions up in the air, and in some ways I am not sure how far the debate on the fundamentals has moved on. However, the Law Society has voted in favour of the proposals and the Government is in favour of them, so we now have the bill.

The Convener: We have the bill, but we do not have the act.

Professor Paterson: That is true.

Cathie Craigie: It seems like you have a foot in every camp in the legal profession, Professor Paterson. The Law Society's opinion on the whole issue changed considerably in the space of a year or so. Have you any idea why solicitors were able to come together in that way to change their view?

Professor Paterson: That is a very interesting question. I was on the council of the Law Society when it happened, but I cannot answer your question. Being on the council of the Law Society does not mean that one is privy to all the internal debates that go on at the upper reaches of the society. I suspect that the large law firms made their views very clear and that that had an influence, but I must also report to you—I do not think that this information is private—that the vote in the council on alternative business structures was very clear. Those of us who were in the minority were clearly in the minority and those who were in favour had a strong, solid majority. Those in favour were not individuals from large law firms; they were from high street firms, rural firms and so on. I was surprised by the degree of support that the ABSs attained. It must be the case that many of those individuals see opportunities in them.

The Convener: I take it that you do not think that the status quo is an option.

Professor Paterson: I am not sure that the status quo has been fully understood or developed. The status quo allows multidisciplinary practices, and there is no problem with multidisciplinary practices with different professionals working in the same firm, provided that one professional grouping—for legal services, it would be the lawyers—are in charge of the firm, are regulated to be in charge of the firm and have the responsibilities of running the firm and complying with the professional standards and the regulatory objectives. To me, that does not pose problems.

There can be disciplinary problems for the non-lawyer professionals in the practice, but that can be dealt with by holding the lawyer partners responsible for their non-lawyer colleagues. That is how it works and it is an effective mechanism. A multidisciplinary practice has all the advantages of a multidisciplinary partnership, except that the

non-lawyer members cannot take a share of the profits. However, with a bit of imagination, ways of doing that, which are quite legal, can be found.

I never understood those who wanted what was called the legal disciplinary partnership to allow the human resources or IT staff who were important to the organisation to have equivalency in its operation. I always thought that it was possible to do that anyway with a degree of imagination, but others felt that those staff needed to be made partners, which is why there was a drive to multidisciplinary partnerships at that level.

Nigel Don: I want to pursue that issue briefly. I was speaking to the previous witness panel about the fact that it seems that the door is already open to doing precisely the type of thing that you have suggested. Surely, if the HR boss, but not the director, was on a performance-related pay system, it would not be particularly difficult to get most of the economic benefits that we are talking about—although I appreciate that bonuses are not flavour of the month—without having to change the legal structure.

Professor Paterson: I agree with you on that, but I am afraid that my viewpoint did not prevail.

Nigel Don: I will return to the subject of advocates. Your written evidence to the committee describes the statutory framework as "skeletal", which is fair comment, given that you were referring—I presume—to section 82 of the bill, which does not say very much at all. What additions do you think should be made?

Professor Paterson: If you examine the provisions for improved regulation in the Solicitors (Scotland) Act 1980, you can see that, on regulation, we can go a lot further than the three sections that appear in the bill. I am not necessarily saying that we should go that far, but in the 21st century the notion that there should be consumer and public input into the regulation of professions is becoming widely accepted across a range of professions.

The Faculty of Advocates has accepted that in relation to complaints, and it should accede that it is the way forward for regulation, as it is for the Law Society of Scotland, the Law Society of England and Wales and the Bar Standards Board in England and Wales. It is the way forward in many professional organisations, as it ensures that the public interest is fully recognised.

I do not believe in separating the regulatory and representative arms of the profession. It is important—indeed, vital—for the future of a healthy profession that it keeps the professional interest and the public interest in mind, and holds them together in tension, as section 1 of the 1980 act requires.

Nigel Don: Forgive me—I was actually referring to chapter 2 in part 4 of the bill, beginning with section 87, which deals with regulation. I wanted to get that correct on the record, because I had forgotten the number.

In my discussion with the previous panel, I suggested to one witness that regulation by the court ought to be adequate. Do you feel that that is adequate under the circumstances?

Professor Paterson: Not in the 21st century. In Scotland, whenever there has been a tricky regulatory problem in the past, we have had a slight tendency to say, "Oh, we'll give it to the Lord President". That leads to overload, or the potential for it, particularly if we do not give the Lord President the staffing, the office and the support that he or she needs to carry out that function.

There has been a tendency to leave everything to the Lord President and to assume that whoever holds that office can carry out more and more functions. That is not a good tendency to have with regard to regulation. I have no objection to the Lord President playing a role, but if he or she is to play a role in approval, along with ministers, some of the things that apply to ministers should apply to the Lord President. In other words, he or she should be asked, or expect, to receive comments from consumer and other bodies—whichever organisations are consulted under the regulations in the relevant sections of the bill—and move in the direction of a modern regulator.

11:30

Nigel Don: Does that mean that we necessarily have to go away from the Lord President being notionally the right person? Do we just have to ensure that he—possibly she, in time—has the appropriate staff to do that regulatory work? That might be cheaper than generating another body.

Professor Paterson: Indeed, but he must also be approachable and expect to receive representations from a wide range of interested stakeholders and individuals. That is the way in which regulation is moving.

Nigel Don: Might that be achieved simply by introducing a duty to consult a list of consultees, if necessary?

Professor Paterson: Yes. That would be a start.

Angela Constance (Livingston) (SNP): What evidence is there that opening up the legal services market to both banks and supermarkets will increase access to justice?

Professor Paterson: None of us knows the answer to that question, but all of us—including the consumer movement, the SLAB and the Law

Society—have views on it. We have relatively little research evidence on what will happen, but we have a lot of hypotheses about what might happen.

Retail analysts have done a fair amount of research into the impact of supermarkets and it is not all negative, which is why we all go and shop in supermarkets, but what would be the impact of supermarkets delivering legal services? According to the analysts, supermarkets have led to the closing down of many high street butchers, bakers and so on. Some niche markets have survived, but statistics and charts are available that show the decline of the high street provider. One could not really object to supermarkets providing exactly the same or a better legal service—to a higher quality and at a cheaper price, as they would say—but it is not clear that that would be the case. Although some people have argued that legal services are just like a can of beans, I am not sure that they are exactly the same.

One argument is that, being smart businesses, the supermarkets will enter the areas of legal practice and legal services from which they can make significant profits, whereas they might not be so attracted to the areas in which there is less money to be made. In rural areas, there is not a huge amount of money to be made from legal aid work even if a firm is efficient—and if a firm is not efficient, it cross-subsidises legal aid.

My concern on that front is that supermarkets will not choose to do legal aid work. They might do it—it has been suggested that there might be new providers in that area of legal practice because of the provisions in the bill that focus particularly on access to justice—but I do not believe that supermarkets will see enough financial incentives in doing legal aid work, especially in rural areas. That might lead either to high street firms going under or, more likely, to high street law firms not doing work that they regard as non-remunerative.

Angela Constance: Do you have similar concerns about banks?

Professor Paterson: I suppose that I do. We are all a little less trusting of banks now than we were two years ago. Two years ago, when we had these debates, there was talk of light-touch regulation down south. The Law Society hoped that we would have light-touch regulation, and Clementi adopted the financial services model. However, many people now think that that model has not worked particularly well and that—as the Government has said in relation to the bill—we need robust regulation.

Angela Constance: You have already touched on the regulation of multidisciplinary practices. In your view, does the bill provide a satisfactory framework for dealing with divergences from and differences between respective professional standards and codes of conduct?

Professor Paterson: As my written evidence suggests, that is not my view. To my mind, one of the clearest issues with alternative business structures is the fact that professional providers and, indeed, non-professional providers have different regulatory standards. In other words, how do we prevent standards being gradually watered down to the level of the grouping whose standards, one might say, are lower?

Although all professional groupings have—often quite high—standards, they do not all have the same standards. With regard to conflicts of interest, lawyers have the stronger standards and offer the greatest protection to the public, whereas other professional groupings tend to have slightly more relaxed approaches to such matters. In a multidisciplinary partnership, there will be pressure, intentional or otherwise, to move away from the stricter standards that apply to lawyers—or at least those in Scotland—towards a more relaxed approach to conflicts of interest. Personally, I think that that would be a bad thing.

Angela Constance: Instead of leading to a lowering of standards, could the overarching framework provide opportunities to raise the bar for other professionals?

Professor Paterson: If the bill spells out the professional principles a bit more than it does at the moment and includes what I regard as the more stringent standards, it is likely that the new entities will be required to achieve those standards. I also hope—and I note that the bill does not state this fully—that all legal services providers in alternative business structures or working as a licensed legal services provider will be required to comply with the higher standards.

Anomalies will arise if members of an LLSP do not comply with the standards and enter into a conflict of interest. I understand that, if someone or several people in an entity breach the conflict of interest standards, the issue will be policed and the entity disciplined through a regulatory complaint mechanism. However, the lawyers in the entity will be disciplined according to their standards, while any accountants involved will be disciplined according to their standards, which, as far as conflict of interest is concerned, are more relaxed and permit more information barriers. Other non-professionals might be judged against lesser—or the same—standards, but the point is that we will get into a regulatory mess and have what I call ethical Esperanto. What ethical code will apply to these beasts? I hope that it will be the lawyers' ethical code, but when so many of the people involved will be non-lawyers it will be difficult to expect them to attain and be inculcated with those conflict of interest standards. I am not saying that it will be impossible, though.

Bill Butler: I suppose that my question is also about ethics. In relation to the regulation of third-party ownership, how satisfied are you that the fitness for involvement tests will be effective in excluding criminal elements from investing in or taking control of law firms?

Professor Paterson: That is a real problem; indeed, the Law Society itself is worried about it. I suppose that you could follow the Solicitors Regulation Authority in England and set out a series of tests to exclude people with recent criminal convictions from being able to invest in firms and so on, but it would be difficult to do and would certainly open up a risk area.

Bill Butler: Is that because a close relative or relatives of someone with a criminal background might be given the wherewithal to invest?

Professor Paterson: People will think up all kinds of ways of trying to avoid the regulations, so I am with you on that score and I hope that the committee will think hard about the issue. The problem is whether you can prove that the system will work.

Someone asked earlier what the Australian standards on third-party ownership are. I had a research assistant look at the issue a year ago, and we found that the Australian tests are not particularly clear. I e-mailed the two lead regulators in Australia a week ago, knowing that I was coming to the committee, so that they could give me an update. Unfortunately, I have not received a response from them, but I can supply the information in written evidence when I get it—I know both the regulators.

Bill Butler: That would be very useful, because we have not yet had anything on which to base our deliberations on this particularly difficult issue.

On international comparisons, other than Australia, does any other country have such a test?

Professor Paterson: Not many other countries have gone for multidisciplinary partnerships or external ownership of investment and law firms, so the answer to your question is no. The Americans, who we might think would have gone for it, have hitherto been fairly resistant, although there are one or two weakenings. The big drive in the States towards MDPs came from the accountants, and the Enron scandal put a stop to that for several years.

Bill Butler: Yes, I can understand why.

Robert Brown: What is the situation in European countries, which is one market that one might think we would be interested in? For example, are there multidisciplinary partnerships in France, Germany or Italy?

Professor Paterson: There are in one or two instances, as tax accountants and lawyers can form partnerships in certain European countries. However, the tax accountant is a very specialised professional, so such a system does not mean that management consultants or accountants can be in partnership with lawyers; it is self-contained and it has not proved to be a problem.

Stewart Maxwell: I take Professor Paterson back to Bill Butler's question on the risk of criminal elements investing in or taking control of law firms. We can all see how it could be done, and it has been done with other firms and businesses—the person who seems to own the business does not necessarily control it. However, in practice, is there a genuine risk of such elements taking control of law firms? Why would they? It would be just as easy for them to employ a lawyer as to take control of a firm—if not easier.

Professor Paterson: Yes, I take your point.

The Convener: I think that Professor Paterson has anticipated some of the questions that James Kelly intended to ask. Is there anything that you wish to follow up, Mr Kelly?

James Kelly: As has been said throughout the evidence sessions, the regulation that is proposed is complex. One concern that has been raised is that the budget that is allocated to overseeing it is perhaps minimal—the starting figure is around £13,000. Do you have any views on whether enough finance has been provided to support the new regulatory system?

Professor Paterson: Is that Government finance?

James Kelly: Yes.

Professor Paterson: The figure sounds a bit on the low side. Ministers will perform the role that the Legal Services Board performs down south, and I think that they may find that it costs rather more than £13,000. The Legal Services Board is a very lean outfit and was designed in that way; it has a relatively small staff of 35. The Government might find that it has to spend a little more than the figure that you mention.

11:45

Stewart Maxwell: I will follow on from the issue about ministers' involvement, although not so much their budgetary involvement. Arguments have been made in evidence that there is a problem with the bill creating a regulatory and overseeing role for ministers and the independence of the legal profession. Do you share that concern and, if so, why?

Professor Paterson: I see where the argument is coming from, but the fact that ministers are to be

subject to the better regulation principles and scrutiny means that I do not have a great concern. I understand the concern, but external ownership and multidisciplinary partnerships make me worry about a threat to the independence of the profession as well. Those are all threats that come with the bill. Presumably, the Government will be open to judicial review of anything that it does as a regulator, so that could be a further protection.

As I said in my written evidence, I would not necessarily be opposed to the Lord President playing a role in regulation, but it would have to be fairly confined to areas of legal competence.

Stewart Maxwell: Are further safeguards required? Should other provisions be made to ensure that independence, or does the bill strike the balance as best it can?

Professor Paterson: On independence from the Government, I can see that there is an argument for bringing in the Lord President in the kind of role that we discussed earlier. However, the situation would be awkward. Who would decide on an application? Would it be the minister or the Lord President? Would the Lord President have a veto? Would they decide jointly? I am not sure that I quite see the answers.

I wonder whether, at the end of the day, we are going to be forced into having a legal services board. You might say that that is bureaucratic, but it would be a super-regulator, and the way in which the Legal Services Board is set up in England and Wales guarantees independence.

Stewart Maxwell: Would it be proportionate for Scotland to have such a body?

Professor Paterson: That is the debate. The ministers think not.

Stewart Maxwell: What do you think?

Professor Paterson: Frankly, it depends on how it is done. I can see the argument, and it is finely balanced. I am not necessarily in favour of more bureaucracy for the sake of it, but I can see certain advantages in having an independent legal services board.

Cathie Craigie: We have written evidence from a host of interested individuals who represent different parts of the Scottish legal profession. One submission suggests that, if the bill is passed in its present form,

"the independent Scottish legal profession as we know it will ... be in danger of being lost forever."

The submission goes on to say that

"once this process begins there is a similar danger that the practice of Scots law will reduce".

The implication is that firms will move south and establish their practices there. Do you have any comment on that?

Professor Paterson: I saw that and I was intrigued because one argument that the large law firms might have used—if they used arguments—was that they might move south if changes were not made.

Much of what the large law firms in Scotland do is not within reserved areas—in other words, someone does not need to be a Scottish solicitor to do it. A firm could therefore move south and re-register as an alternative business structure in England and Wales and, if many firms did the same, it would have quite a serious impact on the provision of legal services, the separate legal system, and the legal culture of Scotland.

Fortunately, most large law firms value being Scottish solicitors—whether it is because of the brand or the independence that they enjoy—so it is less likely that they will move south as a result of the changes. Indeed, it is more likely that they will move south—or, at least, register there—if we do not have the changes.

Robert Brown: Earlier, with regard to execution-only legal services, I asked about will writing. Do you have any concerns about the explanations that we were given? We were told that no legal advice was necessary and that it can be an IT matter involving the answering of questions. Do you regard that sort of service provision as desirable?

Professor Paterson: All providers of legal services should deliver an adequate professional service whether or not they are doing it for free. With regard to whether they have to perform to the legal standard that is required of lawyers, I am sure that the consumer movement would say that that is unnecessary—one must bear in mind advice that is given by citizens advice bureaux in that regard.

I occasionally worry about execution-only legal services, especially when lawyers deliver them. There are circumstances in which they can do so, but I am not keen on that happening.

Robert Brown: Earlier, with regard to conflicts of interest, we heard about the possibility of surveying services being supplied by legal firms as part of a new entity. Do you have any observations on that?

Professor Paterson: I saw the conflict of interest in the situation that you were talking about.

One argument that is made in relation to alternative business structures is that there is an inherent conflict of interest. The one-stop shop sounds like a good idea—I have already said that

it is a good idea, in relation to multidisciplinary practices—but there is an inherent conflict of interest. If a lawyer finds that someone who has come through their door is also in need of an accountant, they will most likely send that person to their accounting partner rather than to a niche specialist down the road.

In most circumstances, however, the convenience of using the internal accountant—who will, we hope, deliver a good service—will outweigh the fact that that service might not be quite as good as the one that would have been provided by the niche specialist down the road.

The Convener: Thank you, Professor Paterson. You have given us exceptionally useful evidence.

11:53

Meeting suspended.

11:56

On resuming—

The Convener: I welcome the final witnesses of the morning: Richard Keen QC, dean of the Faculty of Advocates; Iain Armstrong QC, vice-dean of the faculty; Tom Marshall, vice-president, civil, of the Society of Solicitor Advocates; and Paul Motion, secretary of the society. Thank you for your attendance. I am sorry that your appearance has been slightly delayed—as you probably saw, we were dealing with some complex stuff.

We move straight to questions. Is the current model for advocates and solicitor advocates in Scotland fit for purpose in our times?

Richard Keen QC (Faculty of Advocates): I believe that it is. I noted that Professor Paterson referred to the proposed regulation of the faculty as "skeletal". I would use the term "concise". The structure of the bill is important. In that context, I draw the committee's attention to section 86, which is fundamental to the regulatory regime that is proposed. The section provides that the regulatory authorities, which include the Lord President and the Court of Session, be subject to the regulatory objectives. That is the umbrella under which the scheme proceeds. The regulatory objectives are to be found in section 1 and have primacy not only in their numbering but in their impact on the bill as a whole. If one appreciates that the regulatory objectives are central—they are the pillar around which the bill is constructed—one can see that, although the provisions for some aspects of the regulation of the Law Society of Scotland and the Faculty of Advocates may be concise, they are effective.

I return to the question, as I ought to do.

The Convener: Indeed.

Richard Keen: I consider that the present system works effectively and that the proposal will be fit for purpose. I add one point, which Nigel Don raised. In the context of the regulation of the faculty, which is principally involved in advocacy before the supreme courts, an immediate form of regulation is an effective form of regulation, which is the court exercising its right to regulate the behaviour of those who appear before it.

12:00

Tom Marshall (Society of Solicitor Advocates): As the committee is aware, a review into rights of audience is going on, which was instigated by the Cabinet Secretary for Justice. The Society of Solicitor Advocates is actively participating in the review and we think that it would be discourteous to pre-empt its findings.

We set out the principles on which we believe that rights of audience must be exercised in the paper that we provided to the committee this morning. Those principles apply to all lawyers and are internationally accepted throughout the European Union. They are the principles of conduct, and they apply as much to solicitors as they do to advocates, because they are found in the Law Society of Scotland's standards of conduct and in the Faculty of Advocates' guide to the professional conduct of advocates. That is the fundamental basis on which we believe that rights of audience must be exercised. The bill's main impact on solicitor advocates would therefore be in the context of solicitor advocates who were a part of or employed by a licensed legal services provider.

The Convener: Are you content to leave your evidence at that? I know that you might be inhibited about commenting until the interim report is produced in January.

Tom Marshall: Yes, if I may.

The Convener: I understand the sensitivities of the situation.

Stewart Maxwell: How effective is the court as the ultimate regulator of advocates? The witnesses considered that point in their submissions, but it would be useful to discuss it.

Richard Keen: In my view the court is an effective regulator, at two levels. First, ultimately the court approves all regulations of the faculty—and indeed may veto the regulations of the faculty—on admission and conduct. That is an overarching regulatory role. Secondly, there is a more fundamental and immediate form of regulation, which is connected to that. When an advocate appears in front of the court, he knows that the judge before whom he appears has the

right to regulate his conduct and to ensure that he behaves properly and professionally, in the interests of his client and in no other interest. The judge may intervene in the course of a hearing, although that would be exceptional, to point out that he is not happy with the conduct of an advocate or the manner in which representation is being carried on.

Those two levels of regulation have operated for about 300 years. That is not necessarily a point in their favour, but they have evolved and they have been effective. In my view, one has to look beyond the express provision of regulation—that is, the upper level—and bear in mind the secondary level of regulation, which is also highly effective.

Stewart Maxwell: In practice, the court involvement that you are talking about happens during a hearing. What about the wider regulation of advocates? As you say, the judge would intervene infrequently during a hearing to make the kind of statement that you have suggested. How are advocates regulated in their day-to-day work, rather than just in court?

Richard Keen: The regulations on the conduct of advocates are initially promulgated and then submitted to the Lord President of the Court of Session. What then follows is a series of meetings between the court and the faculty with regard to any proposed change in the regulations. It is necessary for the faculty to make a case as to why there should be some change in its own regulation, and only if the Lord President accepts that change will it be made.

Stewart Maxwell: Do you accept that there is a perception among some members of the public that that is a bit of a cosy relationship?

Richard Keen: That is sometimes suggested. I point out that one must have regard not only to consumer interest but to the public interest in the administration of justice. If we want to maintain a strong, independent Scottish legal system, we require a strong, independent Scottish legal profession. We will not necessarily weaken that by introducing outside regulatory bodies and I am not suggesting that we would, but we have an effective system of regulation that has maintained a strong, independent Scottish legal profession and, in turn, a strong, independent Scottish legal system. I note that three things distinguished Scotland between 1707 and the introduction of this Parliament: the church, education and the law. We managed to maintain all three for 300 years.

Stewart Maxwell: Strangely enough, I have no argument with the maintenance of the independence of the Scottish legal system or of those who practise within it. However I think that, in passing, you accepted that to move the regulation of that system to an independent body would not necessarily change that. Do you accept that involving non-lawyers in the regulation of advocates would not alter the independence of the legal profession? If not, what is the problem with non-lawyers being involved in the regulation of advocates?

Richard Keen: It is a question of how and why as much as anything else. If we want to maintain the independence of the courts—which is fundamental—and of the legal profession, there must be a dividing line between the courts and the executive. That is already recognised by the Judiciary and Courts (Scotland) Act 2008, which provides for the position of the courts and the Lord President.

If you are looking to future regulation, you can address various models of regulation. Scotland has maintained the model of regulation by the court over a long period. That model is not unique to Scotland—it is employed in many of the states of the United States and elsewhere in the Commonwealth—but it is effective in ensuring direct regulation.

Regulation by the court does not exclude the interest of the public or the consumer because, under section 86 of the bill, the Lord President and the Court of Session in general are bound to proceed in accordance with the regulatory objectives when looking to the regulation of the legal profession. Those objectives are set out in section 1. Professor Paterson asked whether the Lord President would consult and receive the opinions of certain parties, but he is bound to because only by doing so can he adhere to the regulatory objectives. He must know what is in the public interest.

Stewart Maxwell: I fully acknowledge your point on section 86 and, indeed, on the basic regulatory objectives that are set out in section 1. That said, why would there be a problem if non-lawyers were to become involved in regulation? Would that, of itself, cause difficulties? I think that you accept the public perception that self-regulation is an issue. I am talking not only about lawyers: members of Parliament have come up against the problem in recent times. Do you accept the analogy?

Richard Keen: We are not self-regulating. I like to think that we might be, but I know as a matter of fact that we are not. Not everything that I suggest to the Lord President is adhered to or agreed to; I can assure you of that.

There is also the issue of proportionality. The 17,000 barristers in England and Wales make for a formidable regulatory issue. In Scotland, we have a bar of 460 people. We could think up a complex model for Scotland such as the bar standards board that is in place in England. However, if we were to impose that on the

relatively small bar in Scotland, we would be imposing an enormous overhead in relative terms on the delivery of legal services. At the end of the day, the customer—the consumer—pays the overheads.

Stewart Maxwell: Albeit that I accept your argument on proportionality, the question remains with regard to which side of the argument we come down on. Do the other panel members have anything to add?

The Convener: I am particularly interested in what Mr Marshall might have to say. Do you wish to adopt the dean's argument, detract from it or add anything?

Tom Marshall: I do not want to impinge on the workings of the Faculty of Advocates. I return to the original question. The disciplining of solicitor advocates was at the forefront of discussions in 1990 when extended rights of audience were being debated in the House of Lords during the passage of the Law Reform (Miscellaneous Provisions) (Scotland) Bill. In the main, the debate in the House of Lords was conducted by Scottish judges who were also members of the House of Lords. They were very keen to ensure that the solicitors who were to appear in the supreme courts would be subject to the same kind of disciplinary procedures and practices as advocates. That was the main intention behind the wording of section 25A, as it became, of the Solicitors (Scotland) Act 1980.

Difficulties and differences remain. Clearly, there is a close relationship between judges and the Faculty of Advocates. All the judges in the supreme courts are former advocates who are used to having a degree of contact and exchange, in which problems can be dealt with in a relatively informal way without someone having to kick up a ruck or the matter having to be exposed or dealt with in the public gaze. Some may think that such an approach—in which not everything is done in the open—is no longer appropriate, but some little issues can be dealt with quietly by people just getting on with things instead of having a huge hoo-hah and a big public debate at vast expense.

Solicitor advocates feel that there may be scope for changes that would achieve the original objective of ensuring that solicitor advocates are treated exactly the same as advocates and that disciplinary procedures and issues of conduct can be dealt with in exactly the same way. At the moment, the system does not quite achieve that even though that was the intention. That is where the Ben Thomson review comes in and, as I have said, it would be better to wait and see what he says about the detail of that.

12:15

Nigel Don: How many solicitor advocates are there? I have no idea.

Tom Marshall: At the moment, there are about 250.

Bill Butler: Good afternoon, gentlemen. Issues of professional misconduct by an advocate will continue to be referred to the faculty for investigation. What safeguards are required to ensure that the system of self-regulation is patently fair and equitable?

Richard Keen: One has to take a step back from the point at which a matter is referred to the faculty. Any such complaint goes first to the Scottish Legal Complaints Commission—all complaints go to the commission, without exception. The commission then determines whether it is dealing with a service complaint or a conduct complaint. If it decides that it is a conduct complaint, it will refer the matter back to the faculty. If the faculty did not then deal with the matter, the commission would come back very quickly and ask what was going on. Inevitably, if a conduct complaint is referred back from the commission, it is dealt with through the faculty's system, on which, as you know, there is lay representation. Thereafter, if a complainer is not satisfied, the case may be appealed or referred back to the commission. However, whether it be a service complaint or a conduct complaint, it always goes back to a lay commission. There was a time when judges might have dealt with complaints informally. However, that is what happened in the past; nowadays, if we receive complaints, they go to the commission.

Bill Butler: They are never dealt with informally.

Richard Keen: Not any more.

Bill Butler: When was the last time that a complaint was dealt with informally?

Richard Keen: I will explain my experience in that regard. When a judge is concerned about the conduct of an advocate, he may write me a letter. If that letter involves a complaint about the conduct of that advocate, I make the complaint to ensure that it goes to the commission.

James Kelly: What would be wrong with a system in which consumers had direct access to advocates?

Richard Keen: There is a system of direct access to advocates, but it is generally limited to professionals who are seeking opinion work. A firm of accountants or surveyors can instruct an advocate directly when it wants an opinion. For example, we are currently dealing with the Chartered Institute of Patent Attorneys. Other

bodies of that ilk have rights of direct access to advocates.

Why should the general public not have direct access to advocates? That simply could not happen under the existing model. Let us take, for example, a criminal case. If someone has been charged on indictment, they go to a solicitor. If, in due course, they need to be represented in court, that solicitor may instruct counsel. If, however, the person who is charged with an offence goes directly to counsel, counsel is not equipped to make the inquiries and undertake the preparation that is always essential in such a case. Counsel is not in a position to go out and take statements or liaise with police officers—that is not our business model. We simply cannot function in that way; we are a referral bar.

However, we do not prohibit direct access. In circumstances in which opinion work or similar work is sought, we will accept direct access. It goes further than that—for example, we have recently considered changes in our regulations to allow direct access for things such as employment tribunal work.

James Kelly: I realise that they will not want to compromise the on-going consultation, but how do our witnesses feel about the current system of solicitor advocates? Has it helped to increase competition and choice in legal services for consumers?

Tom Marshall: Undoubtedly, it has. The benefit of a solicitor advocate was always the closer relationship that he might have with the client, given that the client approaches a firm of solicitors in the first place. Initially, the solicitor that people approached might have been a solicitor advocate, although that perhaps happens less now, as the model is becoming more and more like that of the Faculty of Advocates, in that solicitor advocates operate purely as such within a legal practice. Initially, clients had an opportunity to go directly to someone who would present his or her case in the supreme courts, whereas, before the system was introduced, there had to be the instruction of the solicitor and then the involvement of the specialist pleader to present the case. The solicitor advocate has a potential advantage in that they are a specialist pleader with those skills, but at the same time they might be in a closer relationship with the client and therefore more aware of the client's requirements. They are not a purely separate professional with the particular role that the dean of the faculty has just described.

Richard Keen: I will add one point on that. In theory, the system should increase choice but, in practice, there are areas of law in which it has not done so, particularly in criminal work. That is a regulatory problem, which is related to the point that Professor Paterson made on the issue. When people go to a firm of solicitors and explain that they have a particular problem, for example that they have just been charged with murder, too often, they are offered the solicitor advocate who is the partner of the person with whom they are having an interview, so they do not have the option of going to Queen's counsel or a member of the faculty. That is not to decry the system of solicitor advocates; it is just to point out that there is a regulatory issue that must be addressed.

The Convener: That is of course part of the present inquiry, following on from the Woodside appeal.

Richard Keen: Indeed.

Nigel Don: I return to the point that Mr Keen made about direct access to counsel for opinions. Ignore the fact that I am an MSP and consider me an ordinary citizen who happens to live in a house on an estate where the factor is not doing a terribly good job. That is a current issue, as Mr Keen might be aware. Because I have some legal background, I can see what the issues might be and I do not need a solicitor to tell me that, but I really want counsel's opinion. How would I get that, other than going through a solicitor? Is there an option?

Richard Keen: You would have to go through a solicitor in that case. From our perspective, one issue is that we do not know that you have a law degree, so we do not know the extent to which you can analyse the problem and determine what the issue is. I can say from personal experience that when counsel are asked to provide an opinion, we are often asked to answer a series of questions, but we often end up redrafting the questions before we give the answers. It is fundamental to such matters that people know which questions to ask. Of course there are people out there who are perfectly able to determine what question to ask and what question they want answered, but we have to decide where to draw the line. There will be some people who are above the line and who would be able to instruct counsel without going through a solicitor and some who would not. It is a question of determining where we place what I would call the safety net. We do that by reference to the background and qualifications of those who instruct the opinion. A simple example is perhaps accountants, but there is a long list of bodies that can now instruct counsel directly for opinion work. That has not been opened up to the general public because we have to put the safety net somewhere.

Nigel Don: You say that the list is essentially made up of professional bodies. Is that list on your website?

Richard Keen: Absolutely.

Nigel Don: So although the public have perfect access to that list, they do not have perfect access to you—in fact, they have no access to you. Any individual has to go through a solicitor.

Richard Keen: That is correct.

Nigel Don: If that is the way it is, so be it. That has at least clarified the point.

Cathie Craigie: Underlying the bill's approach to advocates is an assumption that advocates who wish to benefit from practising in a business entity involving other advocates, solicitors or third parties can do so by becoming solicitor advocates. What costs would be incurred by an advocate in doing so? Would they lose any status?

Richard Keen: The costs would be minimal. We have had instances in the past year in which people have left the faculty and become solicitors within a short period—I am talking about days. I do not know what the Law Society charges them to go on the roll of solicitors. However, it would not be a difficult thing to do.

This is one of the interesting aspects of the Scottish bar as distinct from the English bar. As you may know, in England and Wales, the training regimes for the bar and for solicitors are entirely separate. You might do a law degree or you might not, but the two regimes separate at birth and never meet again. It is fair to say that about 95 per cent of advocates in Scotland have all the qualifications required to be a solicitor. In fact, the only ones who do not have those qualifications tend to be people who have come from England and qualified for the bar up here. Almost everyone else has all the requisite qualifications to go on the roll of solicitors.

The issue that I raised in the context of the bill was whether people should have to requalify as solicitor advocates—should they become a member of the Law Society or should they be able to practise in the High Court with their previous right of audience? In England, if a barrister becomes a solicitor, he carries with him his right of audience in the Supreme Court. That does not happen in Scotland, and it is not covered in the bill. I do not think that it is a necessary prerequisite because in fact the transfer is fairly straightforward.

There is a difference going the other way. Many solicitor advocates become solicitor advocates only for the purposes of criminal work. Therefore, if they wanted to go the other way, they would have to address the issue of civil qualifications, too.

Cathie Craigie: So it is easy to transfer out and not quite so easy to transfer back in.

Richard Keen: I believe that that is the case.

As regards loss of status, that must be in the eye of beholder.

The Convener: Mr Marshall, I will not ask you to comment on any potential loss of status.

Tom Marshall: I am much obliged.

The Convener: Do you have anything else to add in general terms?

Tom Marshall: Transferability—the mutual recognition of qualifications, if you like—is another issue that is being considered by the review. Again, I anticipate that the committee may hear more about that in due course.

The Convener: Yes, indeed.

Paul Motion (Society of Solicitor Advocates): On a point of clarification, the Society of Solicitor Advocates is a voluntary organisation and does not have a formal role in the regulation of solicitor advocates. For the committee's information, the current split of our membership is approximately 60 per cent civil practitioners and 40 per cent criminal practitioners.

Robert Brown: The faculty has set its face against non-lawyer ownership of legal firms. Will you give us an idea of your thinking about the risks associated with that model?

Richard Keen: There are potentially very real risks. You may be aware of the Bain report in Northern Ireland, which concluded that the risk there was very significant, largely because of the historical background. There was a great deal of concern that firms of solicitors would come to be controlled by factions within the shadows of Northern Ireland politics.

It is possible to put safeguards in place, but as soon as somebody puts up a fence, someone else finds a way round, over or under it. Professor Paterson candidly acknowledged that earlier. With shadow directors and shadow owners, the business can be difficult to regulate. There is a real issue there. The question, if I may put it back to the committee, is a political one: is the risk such that you should not take that step as far as outside ownership is concerned?

12:30

I have a concern for the Scottish legal profession. Although the arrangements would not impact on the bar, if we do not embrace the proposed model but the larger firms want it, they might be tempted effectively to reincorporate themselves in England. We do not want to see that happen.

Robert Brown: Does that work both ways? Risks have been voiced about the potential for English firms to take over Scottish firms. The

same end result would emerge if the whole idea of multidisciplinary partnerships was allowed to proceed.

Richard Keen: English firms take over Scottish firms already. As Mr Marshall will be able to confirm, Thompsons England and his firm, Thompsons Scotland, are two parallel partnerships. No doubt they are entirely separate legal entities but in reality they operate in close co-operation.

I do not think that there is a real risk of English firms storming in and taking us over. I believe that we can fight our own corner and that, as long as we deliver the service that the consumer and the public need and want and provide suitable means of access to justice, we can maintain our independence. My greater fear is that if a business model is available in England but not in Scotland there will be a temptation for some larger firms to go down and join the English Law Society and leave the Law Society of Scotland. That would not be a good thing.

Tom Marshall: I am less concerned about the involvement of lawyers from other jurisdictions. I hasten to say that Thompsons Scotland and Thompsons England and Wales, although they bear the same name, no longer have any relationship. Once upon a time, they had a closer relationship than they do now. We have mutual clients, but we operate entirely separately.

My particular concern relates to something that was said earlier about perception. If a new licensed legal services provider with outside ownership acted for a client in a court case that was lost, and if the client subsequently discovered that the owner of his law firm had a financial interest in the opponent in the case, the client's perception—even if the lawyer who had been handling the case was entirely oblivious to the situation—would be that the service that he had received was somehow tainted by the relationship between the owner of the law firm and the opponent.

As I see it, and as we say in our submission, section 51 says that owners must behave properly, in that they must not actively take steps to impinge on the legal work of the organisation. In the example that I just cited, no active steps would be involved—it would be a passive situation. It seems that the bill does not deal with such situations; in my respectful view, it should.

The Convener: There being no other questions, I thank the witnesses very much for their attendance.

Richard Keen: I thank the committee for receiving us and listening to us.

The Convener: Always a pleasure, Mr Keen.

12:34

Meeting suspended.

12:35

On resuming—

Subordinate Legislation

Justice of the Peace Courts (Sheriffdom of North Strathclyde) etc Amendment Order 2009 (SSI 2009/409)

The Convener: Item 4 is on subordinate legislation. There is one negative instrument for our consideration today. I draw members' attention to the cover note. The Subordinate Legislation Committee has not drawn any matters to the attention of the Parliament in relation to the order.

As members have no comments to make, are we content to note the order?

Members *indicated agreement.*

12:36

Meeting continued in private until 13:27.

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