JUSTICE COMMITTEE

Tuesday 15 December 2009

Session 3

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JUSTICE COMMITTEE
35th 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:

Michael Clancy (Law Society of Scotland)
Caroline Docherty (WS Society)
Katie Hay (Law Society of Scotland)
Lorna Jack (Law Society of Scotland)
Colin Lancaster (Scottish Legal Aid Board)
Tom Murray (Scottish Legal Aid Board)
Robert Pirrie (WS Society)
Michael Scanlan (Scottish Law Agents Society)
Ian Smart (Law Society of Scotland)
Robert Sutherland (Scottish Legal Action Group)
Kenneth Swinton (Scottish Law Agents Society)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 15 December 2009

[THE CONVENER *opened the meeting at 10:01*]

Legal Services (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning ladies and gentlemen. I formally open the final meeting in 2009 of the Justice Committee, and remind everyone to switch off their mobile phones. There are no apologies as the committee has a full turnout.

The first item is continued consideration of and taking of oral evidence on the Legal Services (Scotland) Bill. I welcome the first panel of witnesses, who are all from the Law Society of Scotland. They are: Ian Smart, president; Lorna Jack, chief executive; Michael Clancy, director of law reform; and Katie Hay, law reform officer. Mr Smart, I take it that you will be lead witness, so if I and other members put the questions to you, you can allocate them to the appropriate officer.

Is the Law Society convinced that the bill is necessary and that the establishment of alternative business structures will benefit users of legal services in Scotland as well as practitioners?

Ian Smart (Law Society of Scotland): The short answer to your question is yes. The bill largely implements the policy that the Law Society adopted at our annual general meeting in May 2008.

We support the proposed legislation for a number of reasons. The first is simply that the legal profession's structure is changing. The conventional view of a solicitor in Scotland is someone who is in a relatively small and modest partnership of three or four solicitors based in a county town, but the profession's current demographic is far from that. Three quarters of all solicitors are now employed in one capacity or another. Some are employed by the state—locally or nationally—and others by the private sector directly, but a good number of them are actually employed. The old partnership model is in steady decline. The Law Society already allows limited liability partnerships and, since 1990, incorporated practices, and we see the bill as the next stage.

It is clear that in some areas—more in relation to commercial users of legal services—there is demand for a one-stop shop, where more than one professional service is provided under one roof. Recent research by KPMG south of the border—albeit it involved the Scottish market—indicated that a substantial 75 per cent of commercial users of legal services welcomed that model. We looked into that model and, frankly, had some concerns about the ethical issues, but they have been worked through in our policy and in how the Government has implemented that policy through the bill. We see no reason why the bill cannot be the next stage in modernising the provision of legal services to the public.

The Convener: For the record, can you remind us how many members the Law Society has?

Ian Smart: We have approximately 10,500 members.

The Convener: Do members' views differ on the way forward?

Ian Smart: We would not kid the committee that there is no difference of opinion. We can say only that at the annual general meeting vote on the matter, it was agreed by a margin of more than four to one to endorse the principle of alternative business structures.

We have reservations about some of the technicalities of the bill, which we will be happy to go into as the questioning develops. Although there is a perfectly respectable opinion that is opposed to the bill's principles, particularly that of external ownership of legal businesses, all the evidence suggests that that is a minority opinion.

The Convener: You will have heard the evidence of Professor Alan Paterson last week, who suggested that the proposals are driven by the larger partnerships. Do you have a comment on that?

Ian Smart: We cannot lose sight of the fact that the larger partnerships are an important part of the Scottish legal services market. It is fair to say that the larger firms see themselves as most immediately in a position to take advantage of the changes. However, smaller firms might do so in some circumstances. One change in the legal market in my time has been that while client-facing services were overwhelmingly—almost universally—provided by solicitors in the past, increasingly, in certain areas of the market, paralegals play an important role. At present, it is not possible for paralegals to be part-owners of a business. An employee share ownership scheme is not possible in the legal business, although it is in just about any other business. Small firms are likely to take up that opportunity.

Bill Butler (Glasgow Anniesland) (Lab): I have a question about fact, just because I am inquisitive. What percentage of votes at the Law Society's annual general meetings are cast by the larger partnerships?

Ian Smart: To give a broad breakdown of the profession with very round figures, one third of members are in-house solicitors—people who work directly for central or local government, Standard Life, the Royal Bank of Scotland and other major corporate institutions—one third work in the traditional high street model as partners or employees, and one third belong to the big firms, which we define as those with more than 20 partners.

Bill Butler: That is handy, but it does not quite answer the question. You say that the types are divided into thirds, but what percentage of votes are exercised at AGMs by, let us say, the big firms? Is it one third, or do they have a larger percentage? That was the question.

Ian Smart: We operate with one solicitor, one vote. We have a system of proxy voting, so a member can appoint someone to cast a vote on their behalf. The president of the Law Society commonly has the largest number of proxy votes at general meetings. The voting is inclined to be affected by what is on the agenda. We had a special general meeting in the past year on criminal legal aid fees in which almost all the votes were cast by criminal legal aid lawyers, with in effect no participation by the bigger firms. The particular group in the profession that has an interest in what is on the agenda is inclined to be represented more. Mr Maxwell will know that home reports were controversial. On that issue, a huge number of votes were cast, mainly by proxy, but they came largely from solicitors who were involved in domestic conveyancing, as they had a direct interest.

Bill Butler: I am obliged for that answer. One solicitor, one vote is very democratic, and I agree with that. Do you have a breakdown of the votes that were cast by the more traditional, smaller partnerships to show what percentage of that third voted for the bill in principle and what percentage were against it?

Ian Smart: I do not and, to be honest, it is not really possible to give you that breakdown. I can tell you that approximately 1,000 votes were cast at the AGM and that the margin in favour was more than four to one. However, we did not analyse the composition of the minority, or indeed the majority.

Bill Butler: That is a pity, but thanks for that.

Robert Brown (Glasgow) (LD): I want to pursue that. Can you tell us how many proxy votes were cast at the AGM that considered the principles behind the bill?

Ian Smart: The voting at the meeting was 801 to 132. We have figures for the show of hands at the AGM. If you give me a moment, I will try to find the reference.

Lorna Jack (Law Society of Scotland): The other thing about the bill is that it is not mandatory; it is a permissive bill that will allow new structures but will not stop the traditional parts of the profession, particularly those in private practice, remaining structured as they are. We are in favour of that.

The Convener: Do you have the figures now, Mr Smart?

Ian Smart: Yes. On a show of hands, the vote was 49 to 18, which gives you an idea of the number of people who were present. On a proxy vote, the result was 801 to 132. Probably 10 times as many proxy votes were cast as there were people at the meeting. I have to say that that is quite often the situation at such meetings, because they take place during the working day and working lawyers cannot always take time out of the office to come to them. They are inclined to entrust their vote to somebody they know.

Robert Brown: You indicated that criminal lawyers were usually the ones who voted on criminal legal aid issues. Was that the case with the big firms at the meeting that we are talking about? That is what I was asking—I think that Bill Butler was asking that, too.

Ian Smart: Yes. The big firms were particularly animated about getting this policy through. You will hear later from the Scottish Law Agents Society, which is probably the single most representative group of the high street firms. As Mr Maxwell knows from his experience of the home reports, the SLAS has the ability to organise very well if its membership is animated enough about a matter. It chose not to organise in opposition to the policy.

Robert Brown: I take that point absolutely, but we would not be pursuing these angles were it not for the fact that there appears to be quite a bit of legal opposition to the policy. The Scottish Law Agents Society and others appear sceptical. Do you want to comment on that? Is the profession overwhelmingly in favour of the policy, which you rather implied at the beginning, or is that view overwhelmingly driven by the large firms, which is the impression that one gets from the evidence that we have seen so far? I am asking you to draw that out from the figures.

Ian Smart: I say with due modesty that a number of people around the table know me and the sort of law that I practise. I have never worked for a large commercial firm and I have no interest in ever doing so. I have always been a supporter of the policy. I know that a large number of others in the small-firm sector can see advantages to it.

I will give you a practical example. At present, you cannot provide legal services to the public if you are not in a business that is wholly solicitor

owned. Mrs Craigie and I know a local solicitor in Cumbernauld—he lives elsewhere now—who practises employment law. His business model involves him, a management consultant and a human resources professional—they have a business that gives advice. If their clients are taken to an employment tribunal, it is possible for him to represent them at that tribunal, because such tribunals are not in the reserved area. However, if his clients are sued in court, it is illegal—indeed, it is a criminal offence—for him to represent them, because his business structure does not allow it.

We heard the Office of Fair Trading's evidence. We have to say that the idea of your routine high street surveyor and your routine high street solicitor getting into the same partnership is fanciful. However, there might be business vehicles that involve a solicitor as one of a number of people who bring together different skills to deliver a specific bespoke service. We do not have a difficulty with that in principle.

Robert Brown: I can see the argument based on the example that you gave, but I can also see potential limitations. I want to break this down, as there seem to be a number of different issues. I presume that the issue of the ability of Scottish law firms and English law firms to be in partnership together is relatively uncontroversial. There is also the issue of lawyers, accountants and surveyors going into partnership. In the tax field, for example, one can see that there is a certain match with lawyers and accountants. You talked about partnerships with surveyors and lawyers, as did the OFT. Not to beat about the bush, are there not problems with conflicts of interest there?

Ian Smart: I did not see the OFT giving evidence, but I had the opportunity to read the *Official Report* of it. The suggestion that, within one business, a surveyor might value a house for the seller and the solicitor might act for the purchaser is inconceivable to us, because there would be a patent conflict of interest in such a business model. You described that model as "extraordinary". The OFT chose a bad example. However, somebody might create a bespoke model, such as a business that offered a land acquisition service that scouted out land for clients. The business would have a land agent, a surveyor and a solicitor to deliver a seamless service that involved identifying and valuing the ground, negotiating the price and acquiring the ground. That would all be done by one partnership of different professionals. We have no difficulty with that business model.

10:15

Robert Brown: Does that lead into the problem of the sort of non-lawyers with whom lawyers can go into partnership, in what circumstances and for what purposes? That arises in connection with the regulation of will writing, which was raised last week. On the face of it, the example in the Scottish Law Agents Society's submission of will writing that does not involve legal advice makes my hair stand on end—I say that as a former solicitor. I am raising the brain surgeon issue. Should some areas of legal practice be only for lawyers? Are other areas, for which the professional training is less important, not as exclusive?

Ian Smart: I am conscious that I am doing all the talking, so I will pass that to Michael Clancy to answer.

Michael Clancy (Law Society of Scotland): The bill will not affect the scope of the reserved areas under the Solicitors (Scotland) Act 1980—

Robert Brown: What are the reserved areas?

Michael Clancy: They are the preparation of writs that relate to conveyancing, of documents in respect of confirmation of executors and of writs that relate to court process. Those reserved activities can be done only by solicitors and some other professionals; to do them for gain in any other circumstance is an offence. The clear answer to Robert Brown's earlier question is that the reserved areas will be unaffected by the bill and such activities will still have to be done by a solicitor in a licensed provider situation.

It should be remembered that in a licensed provider firm—if such creatures come into being—the head of legal services will have to be a solicitor. One can envisage that the head of legal services will be responsible for ensuring compliance with the law and practice in relation to the preparation of the documents that I mentioned.

Robert Brown: Is the list of reserved issues long enough? Should additions be made?

Michael Clancy: We have spoken about our concerns about unregulated services. It is fair to say that we have concerns about unregulated will writing services. We would certainly sanction extending regulation to them.

Robert Brown: Does further work need to be done to dig down into the problem of the sort of people who can go into partnership with lawyers and how all that should work? One feels that we are bringing out evidence and that we have perhaps not thought about some matters—the Law Society has a particular view. Does more work need to be done to identify limits or restrictions on or to expand who lawyers can go into partnership with and for what purposes, and how that is regulated?

Ian Smart: First, we should say to avoid doubt that the bill is permissive. We expect our

regulatory rules to restrict with whom one can go into partnership. That will apply to any model that we are prepared to regulate. We have said that our policy inclination is to regulate only businesses that are clearly and primarily legal businesses, although their activities might cover other areas. The bill does not give us monopoly regulation powers, and other regulators could enter the market, but before other bodies are allowed to be regulators they will have to show that they have in place appropriate rules and codes to deal with regulation.

It is important to talk about external ownership. We have talked so far only about partnership; external ownership is almost a separate matter. As I said, in certain circumstances external ownership could also be internal ownership, as there could be employee participation, but the bill specifically provides for a fitness-to-own test to be passed. We are strongly of the view that that test is an essential part of the proposals and that sections 50 and 51 are therefore essential to the bill. We make no bones about the fact that if those provisions were not in the bill, it would not have our support.

James Kelly (Glasgow Rutherglen) (Lab): I come back to the vote that took place to establish the Law Society of Scotland's support for the bill. From the figures that you have provided, people who attended the meeting made up less than 10 per cent of the overall vote: 752 of the votes seem to have been proxy votes. How would you defend against criticism that a situation could arise in which one person from a firm turned up and cast 30 or so proxy votes in favour of the proposal? How would you defend against criticism that that was potentially undemocratic compared with a postal ballot, which would ensure one member one vote in a secret ballot?

Ian Smart: For the avoidance of doubt, the consultation did not consist of a single event. The AGM was the culmination of a lengthy consultation process that we undertook throughout the profession.

The Law Society is governed by a governing council, which has 53 members, who are elected by all sections of the profession: 44 are elected geographically and a further 9 are selected from particular interest groups in the profession, such as the Procurator Fiscal Service, the Scottish Government and legal representatives from local government and the education side of the law. The matters in the bill were all debated in full at our council and were then made the subject of a consultation paper, which went out to the entire profession. A motion tabled by the council stated the position that would be put to the general meeting and there was every opportunity for people to organise.

I come back to what I said, which is that, bluntly, it is regrettable—we make no bones about it—that we do not get a greater degree of participation, but it tends to be the case that people organise when they are strongly in favour of or strongly against something. The position on the bill was that a certain section of the profession was very strongly in favour of the proposals and the rest of the profession was essentially neutral.

We are not seeking to disguise the fact that, on our council and elsewhere, there has always been a minority opinion in the profession that opposed the proposals in principle. We can say only that we tested opinion over a period of time and all the evidence that came back to us was that the position that we have arrived at was the dominant opinion within the legal profession in Scotland.

James Kelly: How do you defend against criticisms that using proxies rather than having an individual postal ballot was an undemocratic way in which to conduct the vote?

Ian Smart: We do it that way because, under the standing orders of the Law Society, our AGM has a variable agenda. Motions are tabled, but amendments can be tabled on the day, so it is difficult to say in advance specifically what will be voted on and where we stand on matters. It has been in the Law Society's constitution since it was created in 1949 that we deal with people's inability to attend events by having proxies. It is difficult to see, particularly on such a complex issue, how we could find a single question that we could put out to a referendum—for want of a better phrase—that would give us a clear result. The consultation document that we produced is substantial; it is not a single paragraph proposition. The bill is a substantial piece of legislation and it was not possible to reduce it crudely to a yes or no question.

James Kelly: I have one final question on the process. You have indicated that you conducted a consultation process to inform the decision. What research and analysis did you carry out on the proposals in the bill?

Katie Hay (Law Society of Scotland): I can give a bit of background on the consultation. In September 2007, we held a conference on the future of the legal services in Scotland, at which the Cabinet Secretary for Justice was the keynote speaker. At that conference, the cabinet secretary foreshadowed his response to the OFT's response to the Which? super-complaint by saying first that the status quo was not an option and that restrictions would need to be lifted but that, basically, he would offer the Law Society of Scotland—and, I think, the Faculty of Advocates—the opportunity to come up with proposals on how those could be lifted in the profession's interest.

We drafted a consultation paper that was 24 questions long and focused on all the different models of business structure. The consultation ran for three months. We produced a report analysing the responses—we can make that report available—but a brief run-down is that we received 92 responses, of which 28 per cent were from firms of one to five partners and 24 per cent were from firms of 30-plus partners. It is fair to say, obviously, that some respondents were for the change, some were against it and some thought that it was probably an inevitability. The respondents did not really point to one definite course of action, but they said that, regardless of whether the legal profession was to be liberalised, its core values had to be upheld, its independence had to be protected and consumer safeguards had to be in place.

Bearing in mind that we were given a mandate to come up with proposals, we took from the consultation that we should propose a policy that liberalised the legal services market without compromising on robust regulation and that offered those solicitors who did not want to opt into such a regime the ability to continue to practise within a traditional model. We also aimed to do that while maintaining core values and protecting our independence. That was the intention behind our policy paper, which was very much informed by our consultation exercise.

I would be happy to forward the consultation report to the committee, if members are interested.

The Convener: Perhaps that could be done.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Good morning. The Law Society of Scotland is a respected organisation, such that when it speaks people tend to listen. However, the level of response to the society's consultation is disappointing. For a society that comprises 10,500 solicitors and 1,200 partnerships or companies, 92 responses is not a high response rate.

Prior to 2007, the Law Society was opposed to the proposed changes. At the conference in 2007, the Cabinet Secretary for Justice seems to have said, "This is the only game in town, so you must change or we will pass you by." I would like to know a bit more about why the Law Society's opinion changed so much, from being outright opposed to the ideas to agreeing to the general principles of the bill.

Like other colleagues, I am also concerned that—to any outsider who does not know how the society's AGM works—it appears that a big company came in with a carrier bag full of proxy votes that changed the society's opinion. I know that the panel has already tried to answer that point this morning, but that hardly seems a transparent and just way to go about representing 10,500 people.

Ian Smart: I can say only that our structure gives every solicitor the opportunity to entrust a proxy vote to someone else, who will cast the vote on that person's behalf. That has been the society's structure since time immemorial. There is no perfect way to represent our membership, given the geographical issues involved—solicitors from rural Scotland cannot realistically be expected to come to one place—and the fact that the AGM needs to be held during the week, which is when court practitioners in particular have other commitments. However, we did not entrust everything to that single big-bang approach. As Katie Hay emphasised, we also went through a consultation exercise.

Why did the society's policy change? It did so for two reasons. The first reason was because that was what the membership wanted. You should not underestimate the significance of that. If our membership had continued to oppose ABS in principle, the democratic will would have been carried through. I probably would not have been here as the president if that had been the case, because I have always been on the other side of the policy argument, but in a democratic organisation people are entitled to change their view.

10:30

I have never believed that it is a valid argument to say that something must happen in Scotland because it has happened in England and Wales, but the second reason was the changed legal environment in England and Wales following the Clementi review and the Legal Services Act 2007. Many of our bigger commercial firms saw the danger that the liberalisation of the market in England would allow big firms in the City of London to encroach on Scotland. The view was therefore taken that we must be given the opportunity to compete with them on a level playing field. It is ironic that we can preserve the independence of the Scottish legal profession and avoid it being taken over by the behemoth legal 500 firms in London only by matching what has been done in England.

The Convener: I want to move on, but I have a couple of questions before we do. Can you encapsulate briefly the advantages for legal services users of the bill's implementation?

Ian Smart: I have tried to give a number of examples of different structures that might emerge. I make no bones about emphasising that we feel that the bill will primarily be in the interests of commercial users of legal services, who are a huge part of the market. We cannot give you a

percentage, but the bigger legal firms overwhelmingly do commercial work. There is clearly a demand from their client group for what the bill proposes, otherwise it would not be happening.

The Convener: You anticipate that, if the bill were not passed, business would be lost to Scotland, because much of the business that our big firms carry out would move south.

Ian Smart: The danger is that we could see our big firms choosing to go to and be regulated in England and Wales, which is an option for them, given current cross-border provisions. If they have an office in London, as almost all our big firms do, the tail can wag the dog, because the firms can choose to be regulated in England and Wales if that allows them a more liberal business structure. The other danger is that if English firms are allowed external capital, they will be capitalised to the extent that they could start simply taking over even some of our biggest firms and treating them as subsidiaries.

The Convener: I will allow Mr Brown only a brief question, because we have a lot to get through.

Robert Brown: Is there any way of cutting off the top level of solicitors to allow all that you mention to happen in a way that does not interfere with the operations of the more traditional one third at the bottom?

Ian Smart: The key point, which is a very important aspect of the bill, is that none of what I have described will be compulsory; it will be entirely voluntary. The bill says specifically that the traditional form of legal practice, whether it is a partnership with other solicitors or a sole partnership, is not to be affected at all. The regulatory area is difficult, but we think that the Government has achieved a compromise that allows everybody to get what they want from the market but preserves the importance of a unified legal profession, which we might get a chance to say more about later.

The Convener: We have had a lengthy kick at that particular ball, so we will move on to other issues. Mr Smart and his colleagues have already answered a number of questions that we intended to ask, so members will no doubt dovetail their questions accordingly. We turn now to the independence of the legal profession.

James Kelly: Mr Smart, you referred in a previous answer to the importance of protecting the independence of the legal profession in Scotland. How will the proposal to ascribe regulatory powers to the Scottish ministers protect the legal profession's independence?

Ian Smart: If you do not mind, I will get Lorna Jack to answer that.

Lorna Jack: I think that we have already made known our view on this question. We see a need for the Lord President's role to be re-established beyond just simply being a consultee so that it involves an approval mechanism. We therefore think that the bill needs to be amended in that respect—we have made that point.

In their evidence, others have talked about the need for a super-regulator, as exists in England and Wales. However, we feel that that is inappropriate for the Scottish market, given its size. Given that the bill provides for ministers to decide after taking independent advice, we do not think that there is a requirement for a super-regulator. If you supplement that with a role for the Lord President in approving regulators, you will ensure that the independence of the legal profession is protected. We would have concerns about there being an additional layer—a quango—and about the cost of that to consumers of legal service in Scotland and, potentially, to taxpayers. The basis of our argument about ensuring the independence of the legal profession is that, alongside ministers, the Lord President takes a role in approving those who get to regulate people who deliver legal service.

Michael Clancy: I will supplement Lorna Jack's comprehensive answer. There are provisions in the bill in respect of the regulatory objectives whereby approved regulators and indeed, by virtue of section 86, the existing regulators, such as the council of the Law Society, the Faculty of Advocates and—[*Interruption.*] I will just wait for the noises off to stop outside the committee room. [*Interruption.*]

The Convener: I will suspend the meeting until we find out what is going on.

10:36

Meeting suspended.

10:37

On resuming—

The Convener: The committee will reconvene.

Michael Clancy: One of the regulatory objectives of the bill is to promote the independence of the legal profession. That applies not only to approved regulators but to the existing regulators under section 86. Furthermore, the Scottish ministers, who have a particular role to play in relation to the approval of regulators, are also captured by the regulatory objectives in section 4, "Ministerial oversight". The trouble is, of course, that ministers are to act in the way that is set out

"only so far as practicable".

That provision needs to be strengthened a bit.

Lorna Jack adverted to the role of the Lord President. We certainly think that the Lord President's role should be enhanced from the position in the bill. In the original consultation, "Wider choice and better protection: a consultation paper on the regulation of legal services in Scotland", the Lord President was listed as being someone who had to agree to the authorisation or rescission of authorisation of an approved regulator, yet, in the bill, he turns out to be a "consultee" in that process. It would be appropriate for the Lord President to be reinstated to his position as someone who acts in concert with the Scottish ministers in that respect.

Where the bill deals with the specific role of the Scottish ministers regarding elements in the legal profession, there are concerns about how that will work. In my earlier discussion with Mr Brown, I referred to section 39, "Head of Legal Services", in which it says that the head of legal services has to be a solicitor. However, under section 39(9), the Scottish ministers can make regulations about that person's functions. It is inappropriate that the Scottish ministers should be able to tell a solicitor what to do.

Furthermore, section 35, which deals with ministers' step-in powers, includes the proposition whereby ministers could create an approved body that would be involved in the licensing of those who deliver legal services. That is also a difficult issue, because as the Scottish ministers could create an approved body, they would then have to approve that body, so there would be a kind of infinity loop of ministerial control. That, too, should be struck from the bill.

I think that I have covered everything, but Katie Hay has a point to add.

Katie Hay: It is just a small point. In his response to the consultation, the Lord President thought that his office should have a role in the authorisation of regulators of alternative business structures. He made the point that

"the risks posed to the due administration of justice by inadequate regulation are sufficient to merit that level of involvement on the part of the holder of that office."

The Convener: That deals with those issues.

James Kelly: I have one final point. Are the funds that are outlined in the financial memorandum to the bill adequate to meet the costs of the regulation that will come into force if the bill is passed?

Lorna Jack: That is a difficult question to answer, given that we face an unknown picture as far as the number of licensed legal service providers and the number of regulators that might step forward are concerned. It is clear that the bill provides for the opening up of the regulation system to regulators beyond the Law Society of Scotland. We made that clear in our evidence on the financial memorandum.

An attempt is being made to ensure that the proposed system is more cost effective than what we have seen south of the border by avoiding the creation of superstructures or super-regulators. In England and Wales, the Legal Services Board and the Office of the Legal Services Complaints Commissioner cost around £39 million, which is split between the Law Society and the Ministry of Justice. Right now, they have only one regulator to regulate—the Solicitors Regulation Authority. In Scotland, we want to avoid a situation in which multiple regulators step forward and such a cost structure is required, certainly before we know how many regulators we might be dealing with. This year, solicitors in England and Wales have faced an initial leap in costs of 20 per cent on top of their practising certificate fee, which has gone on paying for those superstructures.

The Convener: We move on to questions on regulation which, to some extent, has already been dealt with.

Stewart Maxwell (West of Scotland) (SNP): Before I ask about regulation, I take the panel back to section 39(9), which Mr Clancy mentioned and which I have just had a look at. Given the need for flexibility to cope with unforeseen circumstances, if section 39(9) were removed from the bill, how could changes and adaptations be made other than through primary legislation?

Michael Clancy: Another mechanism could be employed, whereby the approved regulator could make changes to the role of head of legal services under the licensing or practice rules that have to be issued by the approved regulator. That would be one way in which the functions could be changed.

Stewart Maxwell: Would that not result in self-regulation by the regulator?

Michael Clancy: No, because the head of legal services is not part of the regulator. The head of legal services is someone who is employed by a licensed provider or who is a principal in the licensed provider firm.

Another route would be to have the approved regulator ask the Scottish ministers to make regulations, but that is a different track.

Stewart Maxwell: I can see the relevance of your second option, and I recognise your earlier points about the Lord President's role.

I move on to ask about the kind of regulatory bodies that might be set up under the bill. Should a fully independent regulatory body separate representative and regulatory functions? Would such a model better meet the needs and interests of consumers?

Lorna Jack: There has been a lot of confusion about what the separation of regulation and representation means. How we interpret it is how it is set out statutorily, which is for the potential regulator such as the Law Society of Scotland to have an obligation to the profession and the public in relation to the profession. That does not challenge any voluntary representation that others might have in other ways. There are already bodies such as the WS Society, which provides terrific support services, and organisations such as the Glasgow Bar Association and the Family Law Association. There are a number of voluntary bodies that support the profession.

The Law Society's current obligation to the profession and the public is no different from the responsibility that we see in other professional bodies. The Institute of Chartered Accountants of Scotland and the professional bodies for surveyors and architects all carry an obligation to uphold the integrity of their profession in the interests of the customers whom they serve. We see ourselves as a professional body in that respect. We therefore believe that we can be a competent regulator of licensed service providers in the legal market, as others might be.

10:45

Stewart Maxwell: You do not share the concerns of some of those who have supplied written evidence about the dual function that would occur if the Law Society became one of the regulatory bodies.

Ian Smart: We have that dual function at the moment.

Stewart Maxwell: I appreciate that.

Ian Smart: The matter is visited from time to time within the profession. I have been on the council of the Law Society for 11 years, and during that time it has been debated periodically. On each occasion, we came to the conclusion that the current situation was the best available, as did the Parliament during its early days when it looked into the matter in an inquiry into the regulation of the legal profession in Scotland. We can easily point to flaws in the system from the point of view of the consumer's interest or that of the profession, but we have a compromise for a profession of 10,500 in a relatively small country, and there is a degree of clarity.

As Cathie Craigie said, people understand what the Law Society is and the role that it holds, and that understanding exists not just within the profession but among the general public. We have an identified role in Scottish public life. The danger in fragmenting that is that it will not be entirely clear who speaks for the legal profession, and if someone has a client complaint or a general complaint about the legal profession, it will not be clear to whom they will make the representations that they want to make.

Lorna Jack: We have suggested that the bill needs to be amended in this area, particularly when we think about other regulators that might step forward into the licensed service provider field. The bill does not require a level playing field in terms of compensation to customers. We have said that there needs to be commonality between regulators in serving both the professional need and the public interest need.

Stewart Maxwell: One of my colleagues might want to question you further on the level playing field aspect.

I return to the point that Robert Brown raised earlier about conflicts of interest. Is it your view—I think that I picked up that it is—that it is best for the regulatory bodies to deal with the regulation of conflicts of interest, rather than for the bill to deal with it?

Ian Smart: I think that that is our view. We anticipate that certain things will be in our regulatory rules. A fundamental rule that applies to the profession at present is that solicitors do not act where there is a conflict of interest. There are very limited exceptions where there are family members on opposite sides of a transaction and so on but, generally speaking, that is the rule. Another golden rule is that the solicitor's money and the client's money never mix. The firm's financial affairs must be kept separate from the client's financial affairs, and the client's money must be guaranteed in all circumstances against business failure, dishonesty and negligence.

All those things are likely to be in any regulatory regime that we propose. In the end, the matter is one for the Scottish ministers, but we hope that they will insist that all those things are in the regulatory regime of any alternative regulator, because we believe that they are essential public protections.

Stewart Maxwell: I agree. In effect, the question is beginning to crystallise into how we ensure that that will be the case. If it is done in the way that you suggest, how will we ensure that other bodies that want to set up as regulators effectively follow a similar example? I am sure that the committee will discuss that in some detail.

Michael Clancy: The provisions in the bill for reconciling different regulatory conflicts between professional bodies might go a long way towards meeting your concern.

Katie Hay: I also point out that, in the regulatory scheme that will have to be approved by the Scottish ministers before an approved regulator can be authorised, it will have to be able to

demonstrate how it will deal with regulatory conflict.

Nigel Don (North East Scotland) (SNP): Good morning, ladies and gentlemen. I was going to ask you about your concerns about the level playing field with regard to the regulatory burden, but I suspect that you have said everything that you wanted to say about that. Is there anything else that you wanted to say on the matter?

Lorna Jack: We have focused on the compensation aspect, but another area where there should be a level playing field is complaints handling.

Nigel Don: As your written submission is pretty comprehensive on such matters, I will not pursue that line of questioning.

Given that firms can already get loan capital and protect it with a floating charge and can employ other professionals on bonus schemes and with other mechanisms that give them a significant commercial interest in the company, do we actually need ABSs at all?

Ian Smart: I tried to give one or two practical examples of what is not provided in the current market. We are lawyers, after all, and there is a great deal of ingenuity in the way things operate. I gave the example of employee shared ownership but employee bonuses that are tied in some way to performance or the quantity of business that a firm gets are common, even in the smallest of firms, and are in no sense illegal.

Perhaps I should turn the question back on you. We examined whether there was an ethical difficulty with further liberalisation and concluded that there was not. If there is no ethical difficulty, why not let it happen? I understand your point that, through incorporation, firms can to some degree secure the interest of external capital. However, it is my understanding that, at the moment, it would not be legal to tie external capital holders' reward to a firm's performance. Any such reward would have to be fixed, as if a firm were simply paying back the money that, as most firms do, it had borrowed from the bank to manage its day-to-day affairs.

Nigel Don: Is that such a disaster? Why should those who simply provide the money reap any other rewards?

Ian Smart: One could argue from an entrepreneurial point of view that anyone who launches a new business venture is taking on risk and should therefore receive a proportionate—or, indeed, disproportionate—reward.

Michael Clancy: Legislation for ABSs is also necessary to deal with certain restrictions that are set out in the 1980 act, which regulates solicitors. Those restrictions, which include allowing licensed providers into reserved areas, are all detailed in section 90 of the bill.

Nigel Don: Playing devil's advocate for a moment, I think that we will all acknowledge that, compared with models elsewhere that have been mentioned, Scotland is a relatively small place and that, even if these provisions are agreed to, there will probably never be more than two regulators: the Law Society of Scotland and ICAS. Could we not achieve all the benefits that we hope to accrue from the bill by making relatively small changes to the regulations that cover those two organisations and be done with it?

Ian Smart: As far as our interests are concerned, the honest answer to your question would be yes. If you are playing devil's advocate, I suppose I should play devil's advocate on behalf of the consumer lobby and say that what you describe would in effect be the Scottish Parliament delegating monopoly regulation powers to two randomly chosen organisations and creating an artificial restriction on other people entering the market. In terms of market intelligence, we agree that, to the best of our knowledge, the only other seriously interested player at the moment is ICAS. It is interesting that, in England, which allows for a multiplicity of regulators under a super-regulator, the Solicitors Regulation Authority is the only player two years after the Legal Services Act 2007 came into operation.

Nigel Don: That is consistent with my observation of the real world, and we occupy the real world. Although we have listened to people giving us, dare I say it, rehashed O level economics about why things should happen, I do not see any evidence that they will. If we are all in the same place, I wonder whether we need to go down that route, but perhaps that is for another day.

The Convener: Indeed. We now turn to the fairly vexed question of outside ownership. Cathie Craigie will pursue that matter.

Cathie Craigie: Is there a danger in the bill that outside ownership might lead to law firms offering only profitable legal services to the exclusion of less profitable work?

Ian Smart: There are two separate questions in that. There is provision for the transparency of external ownership in the bill that, in an odd sort of way, does not really exist in the traditional model. If a solicitor sets up in business under the traditional model and trades within the Law Society's rules, there is no scope for an investigation of where the money came from to set up the business in the first place. It is regrettable but undoubtedly true that, from time to time, solicitors find themselves unduly indebted to an unsavoury client. Within the current model, there is

the example within the past 18 months or so of a solicitor who provided a false alibi for someone on a robbery charge to whom the solicitor had become unduly indebted. That is the current model. The bill provides for greater transparency and visibility of the external investor in a business. Sections 50 and 51 provide for a fitness-to-own test to be applied by a regulator. Therefore, we are not concerned about that.

Your wider question is about profitable legal services. Undoubtedly, high street firms have traditionally regarded themselves as having some kind of public service duty; they have provided services that are profitable overall—or they would not be in business at all—but they have felt under an obligation to provide assistance in unprofitable areas in the public interest. However, we are conscious that that element is going, even within the traditional model. People are cherry picking. In particular, when financial times are hard, people have to concentrate more on the work that is definitely making them a profit.

Behind all that lurk separate access-to-justice issues, which I hope we will get the opportunity to talk about. We do not think that ABSs are the issue here. The issue is a change in how the legal services market is operating, unfortunately.

Cathie Craigie: We are picking up a concern in the written evidence that we have had so far. A few years ago, the "Tesco" word was tripping off everyone's tongues—large organisations might come in and mop up all the profitable work, which would affect the smaller high street firms. Such firms are more than just solicitors but they still want to make a profit. They do a lot of pro bono work for organisations in their community, but if they do not get a profit out of that local community, they will go somewhere else. If people look for cheaper legal services online or somewhere else, that threatens the smaller high street solicitor.

11:00

Ian Smart: I agree with that as a statement of principle, but people are being unrealistic about the extent to which that is already happening in the legal services market. High street firms are already under pressure from people who have commoditised certain elements of legal services. Domestic conveyancing is the most obvious example, but we could argue that summary criminal work, which is also fairly profitable, is increasingly being commoditised and concentrated in a few hands, too.

However, that is almost a separate issue from the one that we are dealing with in the bill. I make no bones about the fact that, when the process started, our big worry was not so much about the supermarkets entering the market, but about the banks doing so. We were worried that, when somebody got a mortgage from the Royal Bank of Scotland, HBOS, Lloyds TSB or whoever, the bank would package everything up and provide a lawyer from a central call centre. The one and only bright spot in the banking collapse is that there is now no prospect of the banking regulator allowing banks to move into what is in effect the one remaining independent bit of the market. That is not as much of a danger as it once was.

Michael Clancy: We should not forget that, under section 11, the licensing or regulatory scheme must take account of competition issues and whether there would be a material disadvantage to competition in a particular area as a result of an application for a licence. An approved regulator has to have those issues in mind to ensure that granting a licence does not produce an imbalance.

Cathie Craigie: The granting of one licence for the whole of Scotland might produce an imbalance. One licence might make it easy for people to deal with their legal needs over the telephone or by going to Edinburgh or Glasgow. I apologise if I am taking a wee step back, but why are we going in the direction in the bill when, from the written evidence that we have received, it seems that only two other countries in the world—England and Australia—have done the same?

Michael Clancy: People can get legal advice over the telephone or internet at the moment. Therefore, we are not persuaded that the granting of a licence will cause a rush of people to leave their traditional relationships with firms to seek advice from a firm that has obtained a licence and is doing all its business over the internet. The challenge of new technology and how the legal profession in its broadest sense relates to clients through it is a topic for another day.

On support for change in the way in which legal services are delivered, sure enough the Legal Services Act 2007 in England and Wales is the first exponent in these islands of changes in the way in which solicitors can relate to other professionals and deliver services. There have also been changes in Australia, and changes are afoot in Europe, too—we cannot forget what is happening in Europe. An earlier question related to the Clementi review in 2006-07 but, before that, Commissioner Monti had embarked on a European Commission-sponsored review of the legal profession in Europe in which he found a number of restrictions. That resulted in a relaxation of restrictions in countries such as France, Germany and Italy.

I take it to be understood that we cannot compare the legal profession in France to that in Scotland, as there are inherent differences, but it is possible in France for certain arrangements to

be made in terms of what is called la société pluridisciplinaire. In Germany, under the Bundesrechtsanwaltsordnung, solicitors or lawyers can enter into relationships with accountants, tax accountants, patent agents and others. In France the règlement intérieur national allows for similar changes. In Italy, all the restrictions have been removed on certain forms of relationship between lawyers. We tend to think of Europe as fortress Europe, with no change happening there. That is not entirely true. I understand that Spain and some of the Nordic countries now permit external ownership.

Cathie Craigie: One submission suggests that the bill is a "threat to Scots Law", which will "lead to its marginalisation" and allow people from outside Scotland to work in Scotland—people

"for whom Scots law is an alien system".

The submission goes on to say that the legislation in England

"does not threaten English law."

Ian Smart: Obviously, our view is that having a separate system of Scots law is a matter of critical importance. There are already cross-border firms in operation and, ironically, if there were a liberalised legal services market in England and a restricted market in Scotland—albeit one in which the liberalised sector could operate in Scotland, which is the current legal position—the independence of the Scottish legal profession would be imperilled. The danger is that some of the big commercial legal firms in Scotland would continue to practise in Scotland but choose to be regulated in England and Wales. Some of the biggest English firms have already set up branch operations in Scotland. They have done that perfectly amicably; those operations are at the smaller end of the business. However, many of our big firms have a London base and they could choose to switch their regulation—to use an in-vogue phrase—to England and Wales. It is not change that is a danger to the independence of the Scottish legal profession, but no change.

Cathie Craigie: So you disagree totally with the view in the submission?

Ian Smart: I disagree fundamentally with it.

Michael Clancy: We talk about the preservation of Scots law, and we have to stand back and look realistically at the situation. The institution in which we are sitting is one of the foremost bulwarks against the denigration of Scots law or it becoming an item in the history books. Ten years ago, the Parliament came into being to rejuvenate Scots law, and it has done that. We have to be proud of that achievement and not toll the bells for the funeral of Scots law. In fact, legislation that is permissive may give Scots law an opportunity to shine across the world and to provide access to justice to many more people than we serve at present.

Cathie Craigie: That is exactly why we must take very seriously the submissions that we receive and put the views that are expressed to our expert panels.

My next question is for Mr Smart. Earlier, you spoke of money from sources that are not squeaky clean. The committee is concerned that the bill is not strong enough to ensure that third parties with a chequered past cannot invest in a law firm. You said that you could not support the bill if it did not include sections 50 and 51. Do those sections cover properly any practice that takes money from an outside source?

Ian Smart: Again, although the question is put to me, I will defer to the experts: Michael Clancy or Katie Hay.

Michael Clancy: I would defer to the experts too, but I will try my best to answer—you will just have to put up with me.

Section 50 sets the test for fitness to own. We have to read the section closely to work it through, but by and large it operates on the basis that an outside investor has to be a fit and proper person—their financial affairs have to be in order, they have to be of good character and probity, which include their associations, and they have to fulfil certain conditions. The conditions are examples of what might be thought to be things that would count someone out of being an outside investor, such as their being made bankrupt or sequestrated for example.

Your question concerned criminal activities—

Cathie Craigie: It was not just about criminal activities. We have all heard anecdotal evidence that money is channelled through tanning parlours or car washes, for example. The committee is concerned that, if we do not get the bill right, the next big thing will perhaps be to use a firm of solicitors to channel money.

Michael Clancy: That is why the bill makes provision that someone cannot be an outside investor if they have committed an offence of dishonesty, have been sentenced to a period of imprisonment of two years or more or have been given a fine for any offence. Under section 51, not behaving properly includes soliciting "unlawful or unethical conduct". As far as it goes, the bill answers some of those points. We can talk around the margins of whether the reference to an offence of dishonesty could be embellished so that it covers an offence of serious violence, for example. We could talk about whether the reference to a fine on level 3 on the standard scale is appropriate or whether it should be level 2, and

whether the reference should be to two years' imprisonment rather than one. Those provisions could be tightened in that way.

A key part of the issue is that the head of legal services has to be a solicitor. Under section 39(7), the head of legal services is given duties to ensure that the practice fulfils its duties under the bill and under any other enactment. If there is a failure to fulfil those duties, the head of practice gets involved and has to report it to the approved regulator.

The reference to any other enactment is important, because it will bring in all the legislation that we have in respect of anti-terrorism, proceeds of crime, anything involving serious organised crime and the Criminal Justice and Licensing (Scotland) Bill, which is awaiting stage 2. All of that will come under the words "another enactment." A contravention of the serious organised crime provisions in the Criminal Justice and Licensing (Scotland) Bill—if it is enacted—would be a reportable issue.

Once the approved regulator receives such a report, what does it do with it? I do not know what a future approved regulator will do with it, but I can tell you what we do with such reports at the moment: we report to the Serious Organised Crime Agency and we have meetings with the Scottish Business Crime Centre. One would expect an approved regulator to develop a relationship with those law enforcement agencies to ensure that a money-laundering tanning salon, for example, does not rebadge as a licensed provider of legal services.

Cathie Craigie: Could association with a criminal—

Michael Clancy: What would happen if Mrs Corleone wanted to buy a law firm? I suppose that the approved regulator would turn to schedule 8 to the bill. They could ask Mrs Corleone for her name and address and it would be an offence for her not to give them. It would also be an offence for her not to answer any other reasonable question, such as, "Are you married to Don Corleone, the famous mafia boss, and do you really want to own this law firm?"

If an association were discovered, that would put an approved regulator on notice that something was up. If I remember rightly, the Criminal Justice and Licensing (Scotland) Bill contains provisions on association, which I know vexes the committee a bit. I am sure that, by dint of co-operation, we will be able to pin down the precise terms of what an association is and how it impacts on the capacity to own.

11:15

Cathie Craigie: Will regulators be able to regulate people who want just to invest money in a firm rather than to own it?

Michael Clancy: Yes—the bill uses the term "outside investors".

The Convener: We will now deal briefly with difficulties that might arise with multidisciplinary practices.

Angela Constance (Livingston) (SNP): I will be brief. Mr Smart, many of your answers have touched on issues that relate to multidisciplinary practices. You have said a few times that some ethical issues have been worked through. On the regulation of multidisciplinary practices, are you satisfied that the bill provides a decent framework for dealing with different professionals who have different codes of conduct?

Ian Smart: We think so, because the bill is permissive, although more work will need to be done at the regulatory stage.

We looked for ages for a simple example of an ethical conflict that people would understand, and we came up with an example that concerns lobbyists. As members may know, registered lobbyists must declare all their clients so that they cannot act nominally for one person when in reality they are acting in another's interests, whereas under our professional rules it is a breach to disclose the identity of clients without their permission—that is part of the veil of confidentiality in consulting a solicitor. We concluded that the conflict of those ethical codes could not be squared, so solicitors and lobbyists could never form an MDP. In other respects, their interests fit neatly together—if a lobbyist advised clients on changes that they wanted to make to a bill and a lawyer drafted the proposed amendments, that would be an advantage—but we cannot see how those professionals could be contained in one practice.

We will undoubtedly not be prepared to allow some associations for those reasons or simply to preserve the dignity of the legal profession—for example, we do not imagine that a multidisciplinary practice that involved a solicitor and a rag-and-bone man who could clear houses for executries would be appropriate.

Angela Constance: The other example that you gave was of a conflict between surveyors and solicitors. If I remember rightly, you described such a partnership as somewhat fanciful and an obvious conflict of interest, so it could not happen. Are you saying that, when professional codes of conduct obviously clash, the issue will be headed off because such professionals will not be able to go into business together in the first place? If that

is so, the issue of regulating conflicting professional standards is in some respects redundant.

Ian Smart: To be fair, I answered the earlier question in the context of the OFT's bizarre proposition to the committee that, in one firm, the surveyor could act for the seller and the solicitor could act for the purchaser. I do not imagine that the surveyors' code of conduct would allow that, never mind the solicitors' code of conduct. It would be an obvious conflict of interest.

I gave the example of a legitimate partnership between a solicitor and a surveyor in a land-development business enterprise, but in it they would patently be acting for only one client—they would not act for the sellers of the land as well as its acquirers. That would be out of the question for us and I suspect—although the committee would need to ask—that it would be out of the question for surveyors, too.

Angela Constance: You are confident that conflicts of interest can be dealt with adequately.

Ian Smart: We are. We must deal with such matters as we go along. I agree with what Nigel Don said about regulators but, of the people who are in the market at the moment, the other obvious group with whom many solicitors have associations is independent financial advisers. It is now a common business model to have people in solicitors firms who give investment advice. They are professionals and are regulated by the FSA, but they cannot be partners or part owners in the business in which they work. Their regulatory code is similar to ours, and we think that any regulatory conflicts can be worked through.

Stewart Maxwell: I do not want to go into a long list of possible business models and various people who might or might not be involved. You just gave a couple of examples of models that might seem inappropriate. What is your opinion of an association between a solicitor and a medical professional in medical negligence cases? Would there be a conflict of interest in that or in cases in which private investigators are involved? Could such a conflict be worked out, or should it not be worked out?

Ian Smart: You have asked two different questions. I have a fair amount of medical negligence work and one absolutely critical factor is that the medical expert must be independent. A lawyer's case would fail if their medical expert had a financial interest in its success. Ironically enough, one reason why the litigation in the McTear case failed—in the opinion of the judge—was that the medical experts were acting pro bono and therefore had an interest in having it found that smoking causes cancer. I cannot see how the business model that you describe could work, as that example demonstrates. Thinking off the top of my head, I suppose that in certain circumstances—in cases involving adults with incapacity, perhaps—there might be scope for a joint business model, but I am only flying that idea.

A model involving a private investigator is interesting. I talked about the concept of employee shared ownership. Some of the bigger firms will have employees who are charged with taking statements and doing investigatory work, and they might well be in a position to participate in an employee shared ownership arrangement. For us, we would need to be careful of the touting rules if people were in more formal partnerships with private investigators. There would be clear regulatory issues if people were improperly attracting business and getting around the solicitors' code by employing somebody who is not a solicitor to go out and say, "Why don't you transfer your business to Ian Smart? He's a great lawyer." I imagine that provision to prevent such touting would be in any regulatory regime that we put in place for a multidisciplinary practice.

Stewart Maxwell: It was not just the touting that I was thinking about; it was also that it would be in the interests of the private investigator to come up with evidence that is helpful.

Ian Smart: We see that, but such things are tested in court. Under the current system, it is not that dishonesty takes place, but it is a common fault among trainees who take statements that they put into the statement only the bits that help their case, such as, "I saw everything clearly", and miss out other bits, for example that it was pitch black or foggy. That is a common fault under the present system. There is nothing malicious about it, but if people talk up their case in that way it all just falls apart in court.

The Convener: The McTear case highlighted the potential dangers of litigants adopting the practice that we envisage of medical people working with the lawyers. The same issue would arise under several other headings, as I see it.

Robert Brown: Listening to some of the examples from the Law Society consultation, it struck me that the society could probably give us written guidance on which of the business models might be appropriate and, more particularly, which would not, so that we are aware of some of the issues. If the witnesses could give some thought to that after today's meeting, it would be useful to get a flavour of those issues.

My other question is about market failure. Social law is often regarded as a difficult area, but I suspect that it will not be greatly affected by the bill as citizen's advice bureaux and law centres do such work. In areas such as immigration, housing law and social welfare, lawyers find it difficult to

make a profit and, even more particularly, they do not have expertise. Have you any comment to add on the implications of the bill in such areas?

Ian Smart: In some ways, I do not think that the bill really impacts on that. The issues that you raise are serious—we are in no doubt that there are significant issues to do with access to justice. The bill has a regulatory objective to promote "access to justice", but we do not think that that can be done by market forces—there are wider issues.

We propose to have a summit meeting in February, independently of the bill, to get everybody round the table. That means not just the Law Society but Citizens Advice Scotland; charities who give legal advice, such as Shelter; perhaps big public interest law firms, some of whom members will be aware of; the judiciary; and the Scottish Court Service. Many of the issues of access to justice are not just about access to lawyers but about processes that put people off accessing the system. It is no secret that we are huge partisans of the Gill review, which we think deals with a number of the issues. Basically, in February, we will try to get everybody into the one place to discuss them.

There is one fundamental issue, however. The traditional 1949 legal aid model assumed that, if someone walked in off the street to see them, high street firms would be prepared to undertake any kind of legal case. However, the reality is that, as the law has become more specialised, firms do not have the expertise, and lawyers now practise defensive law as there is an element of danger in taking on a case when they do not know what to do, because they are more likely to end up with a claim or a client complaint. The easy option is just to turn the business away, particularly when it is work that is not, or only marginally, profitable. That situation therefore needs to be worked through.

A strategic review was carried out just before the previous election, and we were broadly supportive of its conclusions on much of the social welfare law. The new Administration did not shelve it but simply said that it would take the matter under review. We understand that it is in the process of revisiting that, and we encourage it to do so. We know that the Cabinet Secretary for Justice is concerned about issues around access to justice, as indeed are we.

The Convener: Mr Smart, the committee is grateful to you and your colleagues for coming this morning. It has been an extremely useful evidence session. I suspend the meeting briefly while the witness panel changes.

Ian Smart: I am told by the chief executive that I should wish you all a merry Christmas.

The Convener: That is reciprocated.

11:27

Meeting suspended.

11:30

On resuming—

The Convener: I welcome to the meeting our second panel of witnesses: Michael Scanlan, president, and Kenneth Swinton, council member, of the Scottish Law Agents Society; Robert Pirrie, chief executive, and Caroline Docherty, deputy keeper of the Signet, of the WS Society; and Robert Sutherland, convener of the Scottish Legal Action Group.

We will go straight to questions—and I suggest to the witnesses that if they agree with what has already been said they should give a simple confirmation. I will begin with a question that I asked the Law Society: do you believe that the bill is necessary and that the establishment of alternative business structures will benefit users of legal services in Scotland as well as practitioners? I invite Michael Scanlan to respond.

Michael Scanlan (Scottish Law Agents Society): I am delighted to respond; however, I point out that I have only one expert with me, and I will probably have to defer to Mr Swinton on a considerable number of matters. I thank the committee for allowing me to appear as a late substitute.

The SLAS is the largest voluntary organisation of solicitors in Scotland, with a tremendous range across the country. We have in excess of 1,600 members, most of whom are high street practitioners. We feel that there is no necessity for the bill; there is certainly no necessity to introduce the concept of ABS in Scotland. Recently, we asked our membership a very simple question: "Are you in favour of ABS or against it?" Of the 400 responses we received, 85 per cent were against the introduction of ABSs in Scotland.

The elephant in the room is that ABS really means large legal firms getting together with chartered accountants and bankers. In Scotland, a tremendous number of small firms provide a range of services in the reserved areas, whereas a substantial proportion of the services that the small number of large firms provide to business and public bodies are not in those areas. As I am sure that you are aware, there have already been two fairly high-profile failures, not of ABSs as such, but of parallel partnerships involving accountants and firms of solicitors. That in itself is evidence that such an approach simply cannot work, no matter how you might try to legislate for it.

In our view, external capital simply equiparates with external ownership and can lead only to

conflict. It also makes it more likely that Scottish firms will register in England or will be taken over by English firms. Moreover, non-lawyer providers are unlikely to move into areas where there is demand but where the work is not so profitable, which at the end of the day comes down to consumer interest. ABSs are likely to cherry pick conveyancing and executry work, which generates reasonable profits, and that will have a substantial impact on the high street service, for which such work is its lifeblood. If the high street service has its lifeblood removed, it is unlikely to be able to sustain its existence with less profitable areas of work.

There is also a major possibility of conflict at all levels of ABSs. One has only to think of the relatively recent case involving the infamous Prince Bolkiah, a firm of chartered accountants in England and Wales and the concept of Chinese walls to see that such an approach simply does not work. For all those reasons—and, indeed, for many others that I am sure will be explored in questioning—we feel that the bill is a sledgehammer to crack a nut.

Robert Pirrie (WS Society): Good morning. Our view is that the merits of the bill are unproven. Our honest answer to your question is that we do not know whether the bill will have a beneficial effect. We think that there are dangers. While we do not want to stand in the way of the permissive aspects of the bill, our principal concern is what the consequences of the bill will be for the considerable virtues of the current system, and especially the independence of the profession.

The Convener: Did you consult your members about that?

Robert Pirrie: No. We have not carried out a formal consultation.

Robert Sutherland (Scottish Legal Action Group): In short, we agree with the views of the Scottish Law Agents Society. We find some of the Law Society's comments in support of the bill unconvincing. In particular, the Law Society's main justification, which is that Scottish firms may decide to go down to England and register there, resulting in harm to the provision of legal services in Scotland, does not fly. It is a bit like suggesting that Rangers and Celtic will go off and play in the English Premier League and that that will harm Scottish football. We think that it is unlikely that the big firms in Scotland would desert the Scottish legal market, although we expect that they would want to take part in the bigger English legal market.

We understand the justification for the bigger firms supporting the proposal: it will allow them to obtain capital such that they could match the greater potential capitalisation of large English firms. However, we anticipate that the consequence of that will be something like the consequence of the changes that were introduced in mutual societies, when building societies, insurance firms and others demutualised in order to get access to capital. There are now no large, independent mutual societies left. They all pursued a particular line and they have all gone bust. While that will not be exactly the consequence of the bill, we think that it will lead to Scottish firms being taken over by English firms, and that what were described as Scottish firms will simply be representatives of English firms.

Stewart Maxwell: I am not clear about a couple of points, including the idea that if ABSs were introduced firms would, in Michael Scanlan's words, cherry pick. I am not sure that I understand what prevents a firm from deciding to specialise in a particularly profitable area of law at the moment—in other words, to cherry pick. What prevents that from happening now, and what would change if ABSs were introduced? What is the difference?

Michael Scanlan: You are absolutely correct that there is nothing to stop that from happening now. It would be fairly safe to say that, in the main, the larger firms generally do not operate in the area of domestic conveyancing. Once they get into bed with accountants, however, and the accountants see profitability in that area, views could change. That is our fear.

Stewart Maxwell: If you will excuse me, that is a rather odd interpretation. Are you saying that legal firms do not have a mind to being profitable but that suddenly, if an accountant comes on board, they would be interested—

Michael Scanlan: Different ideas will come about as to the direction in which particular firms might go.

Stewart Maxwell: That is interesting, but I am not sure that I am convinced by it.

You also talked about the resistance to ABS shown by your survey. I cannot remember the exact figures, but I think you talked about 400-odd responses. Were those responses about ABSs in general or were individual respondents saying that they did not wish to be ABSs? It is clearly not compulsory. It may well be that a lot of the traditional firms remain as they are. They will not be forced to become ABSs. What is the objection to other firms becoming ABSs if they wish to do so?

Michael Scanlan: We did not ask whether other firms should become ABSs. We presented the simple question, "Are you in favour of or against the introduction of ABSs in Scotland?" The response was that 85 per cent were against. I suppose you might follow that up by asking why, if

that was our members' response, we did not do something at the much-talked-about AGM of the Law Society of Scotland, but we did not have the response at that time. We took the view that, as the bill is largely permissive and as it will affect the larger firms, we as a society would stand back from that. It was only when the bill was published and we were able to look at the nuts and bolts and see the detail of the bill that we came to the conclusion that our society had to speak out against the proposal.

Stewart Maxwell: But the publication of the bill was the end point of a long period of discussion, as we heard this morning. I am slightly confused about why you would say nothing all the way through and take a view only at the end point, when the bill was published. I understand that the issue crystallised when the bill was published, but there has been a long-standing discussion on the issue and it has particularly been discussed in the past couple of years. Why did you stand back, in your words, and say nothing until the bill was published?

Michael Scanlan: We are a society of solicitors and we represent all sorts of churches within the legal profession. We took what we thought to be a proper and right view when the Law Society was debating matters. It came up before the AGM that it would perhaps not be right for us to go along to an AGM and pretend to represent our members' views at a time when we did not have those views. It was only when the bill was published and the detail came out that we reached the conclusion that the proposal would not necessarily be in the interests of the consumer and a good thing.

Stewart Maxwell: I have a final question for Mr Pirrie. You expressed the view that you do not see the need for change from the status quo. I suppose I can sum up your view by saying, "If it ain't broke, why fix it?" However, we are not in the same situation that we were in a few years ago. The situation has changed in England, which obviously has an impact on what happens in legal services in Scotland. Why do you still hold that view?

Robert Pirrie: It would be wrong to say that we object to the permissive provisions in the bill that will enable ABSs. We are unconvinced about the change, but not to the extent of standing in its way. We recognise that there have been changes.

The process started effectively and with a strong message. Indeed, the Law Society said so earlier. We heard the phrase, "The status quo was not an option." We were presented with a situation in which a considerable number of interests were saying that the changes had to be made. If one feels that something's merits and hazards are unproven, it would be wrong entirely to stand in its way, but it is right to ensure that, if the experiment proceeds, the safeguards are maximised to ensure that it does not damage what is already in place.

Stewart Maxwell: That is entirely reasonable.

Robert Brown: I am not sure what you mean by the permissive provisions in the bill. If the bill goes ahead, a traditional model will be required to compete with somebody who decides to set up an ABS. Will you explain what you mean by the permissive provisions?

Robert Pirrie: That is a significant point. I started by saying that the need for the changes that the bill introduces is perhaps unproven. When I said that, I was mindful of the fact that, as Mr Scanlan said, there have already been significant moves in Scotland to form MDPs. One of the biggest experiments in the English-speaking jurisdictions involved Scotland's largest law firm being part of an MDP, so it has been done. However, it was done within the regulatory framework at the time, which placed certain restraints on it.

The bill, on the other hand, contains a positive encouragement to go about it. That is the significance of the word "permissive". The effect is utterly unproven, given a regulatory backdrop that is favourable to that type of body as opposed to one that is full of complications.

11:45

Robert Brown: Mr Scanlan, I am struck by the simplistic nature of the question that the Law Agents Society asked about whether firms were for or against the introduction of ABSs. We have heard from the Law Society that the situation is a bit more complicated than that. Can I divide it into bits, as I did before? There is the issue of lawyers in Scotland and England collaborating in various ways. Is there a particular objection to that?

Michael Scanlan: No. Freedom of movement permits that.

Robert Brown: There is then the question of lawyers collaborating with other professionals—accountants and so forth. We heard evidence from the chartered accountants that their rules already allow a solicitor to be a principal in a firm of accountants. They suggested that a method of handling the issue might be to allow the reverse under the Law Society's rules. Would that cause you difficulties?

Michael Scanlan: I do not think that that would cause us difficulties. In fact, to some extent, we address that in our written submission. There is nothing to prevent LLPs from injecting capital into a law firm. They could remain employees or be designated directors of this, that or the other.

Participation and profits could easily be given in the form of bonuses on an annual basis.

Robert Brown: What sort of areas or propositions do you object to? The further development of non-professional non-lawyers is linked to the issue of outside ownership.

Michael Scanlan: I defer to Mr Swinton on that.

Kenneth Swinton (Scottish Law Agents Society): We think that there would be considerable risks in external ownership. There is a difference between a professional and someone who invests with a view to making a profit. The latter would not have the same ethical or educational background or the qualifications that professionals have.

Robert Brown: Okay, so external ownership would be an issue. What about the issue of paralegals, investigators and other people of that sort possibly being allowed to be principals in law firms?

Kenneth Swinton: Those are examples of external people.

Robert Brown: They are internal, really, are they not?

Kenneth Swinton: Well, they may be employees of the firm but there are difficulties in saying that a private investigator has the same professional background as a solicitor, an accountant or a surveyor. The ethical issue would cause us difficulty with that.

Robert Brown: Is the difficulty one of professional training, confidentiality and issues of that sort?

Kenneth Swinton: In studying for their diploma in legal practice, solicitors will receive training on professional ethics. There will be a compulsory element of professional ethics in every solicitor's training, which will cover confidentiality and conflicts of interest. I cannot speak for the requirements of other professions, but I do not see that being the case for external shareholders who are not professionals.

Robert Brown: I was thinking of the brain surgeon argument that we come back to occasionally, that one would not get a non-qualified person to do brain surgery. Are you happy with the currently regulated areas of the law? Do you think that, under the bill, those might be extended in the public interest so that non-professional lawyers would be included in them?

Kenneth Swinton: The parameters of regulation are a different matter. The bill seems to offer an opportunity to regulate other providers of legal services outwith the currently regulated areas. In our written submission, we make specific reference to will writers, for example. That is a point that you explored with the witnesses on last week's panels.

We also refer to claims companies. Although there is comparatively little evidence at this stage of detriment to consumers as the result of the operation of claims companies in Scotland, one need only look south of the border for that. The Ministry of Justice has removed 116 claims companies from authorisation because of undesirable commercial practices since the inception of that regime under the Compensation Act 2006. The bill offers the opportunity to provide a mechanism whereby, if consumer detriment were to be shown in Scotland, the Scottish ministers could extend the regulatory parameters to claims management companies.

Robert Brown: Your written submission provides some evidence on will writers. Can you elaborate a little on your concerns about non-professional people involving themselves in will writing? You referred to the lack of legal advice. Supposing that legal advice is given, is there an issue with that? Can you tell us about the difficulties or otherwise of that aspect of the law?

Kenneth Swinton: The bill does not change the regulated perimeter, so will writers will be able to continue, unless amendments are lodged at stage 2. I understand that the minister may be considering such amendments.

We gave examples in our written evidence of the potential for detriment. However, will writers might also find themselves in a position of trust where they are appointed as executors and have opportunities for misfeasance in the conduct of an executory, for example. I think that there are areas in which there could be consumer detriment. I have no examples of that from Scotland, but I have seen a press report about a will writer in England who absconded with £0.75 million of an estate.

Robert Brown: Wills are always said—at least, they were when I was in the profession—to be complicated things with lots of issues, particularly with the complicated family structures that there are now, I suppose. Is that a particularly difficult thing for a non-legally trained professional to get right? If a will just involves a wife and two children and is very straightforward, why should it not be done by a non-lawyer?

Kenneth Swinton: Drafting a will can be complex, depending on the family situation, as you suggest. Our principal concern is that the terms and conditions that may be imposed by will writers absolve them of any liability for any advice that is given. It is open to someone to use an execution-only service, provided that they have been given clear information as to the nature of the service that is being provided. There is currently no

obligation to do that. When people sign up for a mortgage, they get a warning notice that their home is at risk. Something as simple as that could be put into regulations to say that no advice has been given, people are on their own and should just fill in the blanks.

Robert Brown: I suppose that I am asking the question beyond that. Should that service be allowed? Or, because of the complexities that underlie it, should people not be allowed to do it unless they are legally qualified?

Kenneth Swinton: If people are not prepared to pay for legal services or are unable to pay for them when they are advised to have them, there is an access-to-justice issue. Our position is that we would not stand in the way of individuals making an informed choice to use a non-advised service.

Michael Scanlan: Do not underestimate the complexities that can arise in will drafting. You referred to a wife and two children, but regularly in such situations the issue is the second wife and the four stepchildren, so matters are not quite as simple as might be thought. I have regular evidence in my practice of the issue to which Kenneth Swinton referred. People phone me and say that they have been in touch with a will writer and have been told that they must structure a will that will put money into trust or set up a tenancy in common, which is a concept that simply does not exist in Scotland. They end up with a nil-rate band discretionary trust will, where they perhaps have only a fraction of what is required before they meet inheritance tax liabilities. On one occasion someone was charged in excess of £1,200 for such a will.

The Convener: Before we move on, are there any further comments on this area?

Robert Pirrie: Our concern is that there should be a solicitor left in the vicinity to get redress for the person who has been missold the will. That is what I meant about safeguarding the protections that are there already.

Robert Sutherland: In general, there is a distinction between alternative business structures and the ethical issues that arise from them. If we are to have ABS, we agree that things can be put into regulations to ensure that ethical difficulties are minimised as far as possible. It is not correct to say, as the Law Society did, that there is no ethical difficulty here at all. It is clear that, even on the basis of the Law Society's evidence, there have been difficulties. The Law Society is looking to the regulations to sort out the ethical difficulties.

The other aspect of that, which is probably of prime concern to my group, is the consequences of alternative legal service providers coming into the marketplace and distorting the existing market and the existing provision of legal services.

Cathie Craigie: I have a small point specifically for Mr Scanlan. You have 1,600 members ranging from individual practitioners to small and larger firms. Twenty per cent of your members responded to the consultation that you carried out, which was just one question. I imagine that your members are also members of the Law Society, yet it received only a 1 per cent response to its consultation. Was that because your question was easier to answer?

Michael Scanlan: I would like to think so. We could have made it harder, but you must bear it in mind that we are a voluntary organisation that is dependent on member subscriptions, which must be pitched at a certain level. We do not have access to the sort of money that the Law Society does in determining what—if anything—we send out to our members. If we send something out to 1,600 members, we have to put stamps on 1,600 envelopes and everything that goes with that. Twenty per cent is quite a good response to what was a simple question and we are quite proud of that response. Frankly, I do not think that the 92 responses that the Law Society received to its consultation document add up to much at all.

The Convener: We need to move on.

James Kelly: Before we move on to the independence of the legal profession, I have a brief question on the survey. Can you clarify that it was a one member, one vote survey and that no proxies were involved?

Michael Scanlan: It was one member, one vote and no proxies were involved. It was a written response from our membership. However, our association is not against the use of proxies at Law Society AGMs and we have used them ourselves on occasion.

James Kelly: On the independence of the legal profession, what are your views on the powers in the bill that have been ascribed to Scottish ministers? How will they affect the independence of the legal profession in Scotland if the bill is passed?

Robert Pirrie: We say in our written submission that there are two clear issues: the regulation of the solicitors profession and its representation. We recognise that the proposed changes stem from a belief that there should be a more open market—we are not standing in the way of that—and that changes need to be made to the way in which the solicitors profession is regulated. However, we feel that some of the changes that are proposed in the bill will impact on the independence of the legal profession and tip the balance so that it will be even more difficult for the Law Society to regulate and represent a truly independent solicitors profession.

Robert Sutherland: We endorse those comments.

Kenneth Swinton: We are concerned about the threat to the independence of the legal profession, which is central to the rule of law. There is no point in having an independent judiciary if we do not have independently minded lawyers who are prepared to take cases in the first place. There is a closeness in the relationships in the bill whereby the Scottish ministers have to approve a regulatory scheme for a regulator. We are concerned that that regulatory scheme drills right down to the practice rules and so on, so that there is a possibility that direction could come from the Scottish ministers and prejudice the independence of the profession, although we do not suggest for a moment that that would happen under the current Administration.

We have heard about the Law Society's proposal to extend the role of the Lord President. There might be an argument that that would be a proportionate approach in Scotland. However, our preference—albeit with a cost attached—would be to distance that involvement through a legal services commission, which would create a definite distance. It is a matter of perception—the perception, not only domestically but internationally, that the legal profession has independence from the Executive. That is the crucial issue.

12:00

James Kelly: What are the views of the other two sets of witnesses on the panel on the Law Society's suggestion that there should be an enhanced role for the Lord President? Do they see any merit in going down the super-regulator route by having a legal services board?

The Convener: Ms Docherty has thus far been the silent partner. Would she like to lead on that?

Caroline Docherty (WS Society): We certainly endorse the view that there should be an enhanced role for the Lord President.

James Kelly: What is the witnesses' view on the Legal Services Board that has been set up in England and Wales? Would the establishment of such a board in Scotland be an appropriate way to protect the independence of the legal profession?

Robert Pirrie: If regulation is taken closer to Government—to some extent one can see that that is inevitable in the 21st century—it becomes increasingly important to separate that from representation. There are various ways of doing that. Setting up a legal services board is one way of making it clear that regulation is separate from representation, but we do not think that that is the only way. We understand the argument that, in a jurisdiction as small as Scotland, setting up a board is perhaps unnecessary. Although it may be understandable that people want a greater role for the state in the regulation of legal services, we want to ensure that that approach does not prejudice the independence of the legal profession from everything else.

Robert Sutherland: We have not actively consulted our members on the subject. We have concerns about the independence of the legal profession and what can be done to maintain it. In the Scottish Legal Action Group there is a natural scepticism about the idea of a super-regulator, but that is probably as far as I can go at the moment.

Stewart Maxwell: We have probably covered my first question, but, for clarity's sake, I will put it to Mr Pirrie. You talked a moment ago about separating the representative and regulatory functions, particularly with regard to the Law Society. The point is also covered in your written submission. Can you expand on that and explain why you believe that those two functions should be separated?

Robert Pirrie: The combination of regulation and representation has always been a very delicate balance. The position is reflected in section 1 of the 1980 act, which requires the Law Society to balance the interests of both the profession and the public. Everyone recognises that that is a very delicate mechanism, which I think has worked reasonably well. However, we feel that the proposed changes introduce the potential for greater prejudice, if I may put it that way, when the two roles are combined in one entity.

It is perhaps also worth saying—this is not a criticism; it is a statement of fact—that the representative role of the Law Society is quite problematic. Membership of the Law Society is effectively compulsory. It is a little unusual to have a representative body where those who are represented have no choice about whom they are represented by. Some of the issues have been reflected in this morning's discussion of the democratic process. Questions have been raised about the extent to which the Law Society's mechanisms properly represent a decision-making process for the Scottish solicitors profession. There are already problems. We feel that although certain changes that are being made through the bill are perhaps defensible in regulatory terms—particularly Scottish ministers' powers to increase lay representation on the council of the Law Society and to make other interventions by regulation as to how the Law Society operates—they make it very difficult for that organisation also to represent the profession. The backdrop is that solicitors' firms have only so much money to spend on representative functions—particularly as

we emerge from the credit crunch, which has focused minds—and all those functions are monopolised by the Law Society. I say that not pejoratively but factually.

Stewart Maxwell: I presume that you heard the Law Society's evidence that other professional bodies perform both functions. If other bodies can do that, why would the legal profession encounter difficulties in doing so?

Robert Pirrie: That is a question of degree. I do not believe that other bodies have the ability to intervene to the degree that the bill proposes. As I said, until now, the balance in the Law Society has worked reasonably well—perhaps as it does in other bodies. The principal question is whether the bill makes the crucial shift that tips the balance.

Stewart Maxwell: Do other panel members have a view?

Michael Scanlan: More than a balance is involved—the Law Society faces a dichotomy. I say that as a past president of the Law Society and as a member of its council for 12 years. I certainly feel that I have been well regulated by the Law Society. I do not say "well" in an encouraging way—I just mean that the Law Society has overregulated me in the past few years. I have certainly had little sense of representation, but that is not to say that I have not been represented—that is a question of what representation means, what I want the society to do for me and how successful what it has done for me has been.

One difficulty for the society is that, as the society advised the committee, it represents three elements of the profession—small firms, in-house lawyers and large firms. Such a gulf lies between what large and small firms do that it is difficult to see how the society can represent all its constituents evenly and effectively.

Stewart Maxwell: I understand and appreciate your argument, but what is the difference between the Law Society's situation and that of professional bodies such as those for surveyors or accountants, which represent single operators, small firms and large firms? The situations seem fairly similar.

Michael Scanlan: The situations may or may not be similar—I do not know. We would have to ask surveyors whether they are happy with how they are represented. For effective regulation and representation, we should really look to the doctors.

Stewart Maxwell: It is probably best not to comment on the doctors.

Robert Sutherland: The Law Society has a problem in how it undertakes its representative role. The society has probably been effective in regulating its members over the years, but there is no doubt that the bill will change matters. We said initially that we were waiting to see what the society came up with. We wanted wider public involvement in its structures, and the society is following that route. Given that many changes are going on, one is tempted to be cautious and to say, "Let's see how that works." The society has achieved a balance so far—can that balance continue to work?

However, another problem is public perception, because the public are not happy with the mix of roles, either. The big difference between lawyers and the other professions that Stewart Maxwell mentioned concerns the wider public interest. Lawyers fulfil a wider role in society than do surveyors, and the public interest in regulating lawyers is greater. Nobody has a perfect answer at the moment.

Stewart Maxwell: The Law Agents Society's submission expresses concern about the growth in execution-only services, which have been mentioned. Would the regulatory system in the bill—or, after amendment, some other regulatory regime in the bill—be the best way of dealing with the issues that have been raised in your written evidence? Does the bill adequately cover those problems?

Kenneth Swinton: The bill does not address the issue of execution-only services at all, and I think that the problem will become more widespread once we have external ownership. Things will be restricted immediately when the terms of business are agreed and, if those terms are quite lengthy, the consumer might well not be aware of what is going on.

Another problem with terms of business is that new providers might not have the same rules for conflicts of interest. Current rules bar solicitors from acting in any conflict of interest situation, although the Law Society can grant a waiver. In England, however, there is informed consent; the conflict of interest is disclosed to the client, who then waives their right to separate representation. I suspect that the terms and conditions of business will be manipulated to ensure that the waiver comes into effect automatically once a contract is entered into.

I certainly feel that there are dangers in not doing anything. We should take this opportunity to examine the regulated perimeter and state clearly where it applies and where it does not apply and to allow Scottish ministers to make regulations to provide for warnings about execution-only services.

Stewart Maxwell: You mentioned that earlier. Why do you think such waivers will almost automatically come into effect?

Kenneth Swinton: I suspect that the lawyers who draft the terms and conditions will put in that kind of thing.

The Convener: For self-preservation?

Kenneth Swinton: Yes.

Nigel Don: Returning to a subject on which I questioned the Law Society at some length, I note that, in its written submission, the SLAS clearly states that non-lawyers could well be part of these businesses, put money into them, be remunerated by them and so on. Do the SLAS witnesses have anything to add before I ask their colleagues on the panel for their opinion?

Michael Scanlan: I do not think so. The submission, which was particularly well drafted by Mr Swinton, clearly and cogently envisages a situation in which an ABS could be formulated without the need for all this legislation.

Nigel Don: I was impressed by the point. Has Mr Sutherland read the SLAS submission, and does he think that we actually need to change anything?

Robert Sutherland: I agree with the point; indeed, one of the points that I had intended to raise this morning was that there are plenty of ways in which existing law firms can take on people, reward them through pay or other mechanisms and provide the kind of services that it is suggested an ABS will be required to provide. We do not believe that the legislation is a necessity.

Robert Pirrie: I agree. I was once a partner in a multidisciplinary practice; back in 1997, Dundas and Wilson became part of Andersen Legal, which was a global professional services firm. Although the structure might have been complicated and although ways had to be found of adapting it to the regulatory scheme, we were able to do it and it worked. I believe that the same is true of the structuring of law firms and the way in which non-lawyers are incentivised or allowed to participate in the business.

Nigel Don: Of course things might change as we gather more evidence but, in the practical world as I see it, there seems little prospect of there being more than a couple of regulators in Scotland, even if the bill were to be passed with the amendments that you seek. Would it not be simpler to change the rules of the appropriate societies—which I presume would be ICAS and the Law Society of Scotland—to allow for the inclusion of other partners?

12:15

Michael Scanlan: Yes. I see the strength of that argument. As I said at the beginning, the whole debate is polarised around accountants and lawyers. Let us make no bones about it—that is what it is all about. The difficulty would be in persuading each to sign up to the other's rules and regulations. It is fair to say that although there will be similarities in the core values of both those professions, there will also be material differences. Perhaps you could legislate for that—I do not know, but in principle, I do not see why not. If the Institute of Chartered Accountants of Scotland were to sign up to the Law Society's rules and regulations and solicitors' core values, I am not too sure whether there would be much left over for solicitors to have to sign up to in relation to accountants' rules and regulations.

Kenneth Swinton: There is one area in which there would need to be legislation: accountants do not benefit from legal professional privilege or anything similar. If you had an interdisciplinary practice involving solicitors and accountants, any correspondence or communications with the accounting part would not be privileged, whereas communications with the legal part would be. That would have to be addressed by legislation.

Nigel Don: That is an issue that we will have to address in the bill anyway. I guess what I am asking is whether we really need an overarching system to be set up for anything and everything, when only two players are going to turn up. It might be rather easier if we just deal with those players and have done with it.

The Convener: Is that your view, Mr Swinton?

Kenneth Swinton: Yes.

Robert Sutherland: It is the anything and everything that causes us the biggest concern. The idea that solicitors could go into business with virtually anybody causes us considerable concern, because of the ethical conflicts involved. We are talking about identifying a group of people with whom you are likely to do business and with whom it would be acceptable to do business while maintaining the public interest. Given that this is going to be a financially driven process on the ground, accountants are the people with whom we would be most happy. However, the idea that any person who describes themselves as an independent financial adviser and who essentially does nothing more than sell financial products on commission could go into a business partnership of some sort with solicitors causes considerable ethical problems and is not in the public interest. If a very small group of people are considered acceptable, what do you need the legislation for? As the Law Society said, the professional practice rules could be worked at to see whether all the ethical conflicts are sorted out. It is clear from the Law Society's evidence that, even after all this time, there are still ethical issues to resolve.

Robert Pirrie: When there has been market demand from within the profession, such as in the example that I gave, when Andersen Legal joined up with what was Andersen's the accounting practice, the regulators of both professions demonstrated that they could adapt to allow such a thing to happen. However, much of the pressure that brought about the bill came from outside the profession. The profession has responded to that and seen opportunity, but the original push behind the bill came principally from Government and other interests—legitimate interests—in legal services.

James Kelly: On the point about professional privilege, the Scottish Law Agents Society's submission states that the bill as drafted is not compliant with the European convention on human rights. Will you spell that out for the committee?

Kenneth Swinton: Section 60 deals with professional privilege in respect of legal proceedings. In fact, there are two aspects to legal professional privilege: one is the litigation privilege and the other is the advice privilege. Recent case law suggests that the advice privilege is as important as the litigation privilege and that the advice might be given at any stage—it could even be in a conveyancing transaction. I refer to the Balabel case in England in 1987, where the conveyancing aspects were said to be confidential in a subsequent court case. As drafted, the bill deals only with the litigation privilege.

The Convener: Sorry, Mr Swinton. What was your authority there?

Kenneth Swinton: Balabel v Air India. It is in our written submission.

The Convener: Thank you.

Robert Brown: I do not have a question; I simply repeat the invitation that I gave the Law Society of Scotland. The groups that are represented on the panel might want to think about whether they can elaborate, just in terms of flavour, on some situations in which there is no particular issue if lawyers act with outside people of various kinds and other situations in which there manifestly are issues whether because of a conflict of interest or for other reasons. Any such elaboration would be helpful to the committee. I leave that with you by way of an open invitation.

The Convener: If your thoughts on that are not available at the moment, you can write to us. That would be perfectly acceptable.

There are no further questions on that area, so we turn to the vexed question of outside ownership, which, again, Cathie Craigie will pursue.

Cathie Craigie: Good afternoon, panel. Is there a danger that outside ownership will mean that law firms offer only profitable legal services? Will you highlight some of the less profitable services that might suffer?

Michael Scanlan: That is one of the points that I was trying to make at the beginning, although not very effectively. That is a danger, because there are profitable areas of law and non-profitable areas of law, and the latter are regularly subsidised by the former. Off the top of my head, I would say that the non-profitable areas include legal aid work and any work that involves the social welfare of the citizen—that is never going to be profitable. My firm has a branch office in Govan where, believe you me, I regularly see the halt, the lame, the infirm and the totally unprotected. Frankly, if it were not for the other work that comes through the door at that office, I would not be able to look after those people, certainly not on the legal aid rates that I am paid.

It is highly unlikely that I will be headhunted by a major firm of chartered accountants so that they can acquire my business in Govan, but that is the sort of thing that could happen in high streets, and it could affect the whole range of services that are provided by high street practitioners, including family law and legal aid work.

Robert Sutherland: The point was made earlier that that already happens. It is not new that legal firms cherry pick the kinds of work that they do. We have regularly tried to raise the problem that, in large parts of the country, people do not have access to legal services and the kind of legal work that they need because there is nobody around who will do it for legal aid rates.

We are concerned that the problem will become even more extensive, because we anticipate that the profitable areas of high street work will be taken away and the work that will be left for firms, particularly in rural areas, will be the more unprofitable work that will be insufficient in quantity or price to justify keeping their offices open. There will therefore be a reduction in competition for the provision of legal services and fewer legal services will be provided around the country. The bill will just exacerbate an existing trend.

Cathie Craigie: In the case of smaller high street firms, is it legal aid and family law things that will suffer, as Mr Scanlan suggested?

Robert Sutherland: Yes. The research working group on the legal services market in Scotland said that, generally speaking, legal services in Scotland are competitive, but it identified areas that are not competitive: family law, housing and debt—essentially, the social welfare judicial review type of work—and local sheriff court work. It is not just rural firms that will be affected, as a number of big solicitors firms in Glasgow and Edinburgh also take on that kind of work, although there are fewer

and fewer of them. They, too, will be affected by the more remunerative financial work being taken away. They will not be able to keep on solicitors and provide services for those solicitors in expensive city centre practices when their most profitable work is taken away by a super-firm that opens a one-stop shop.

Robert Pirrie: We can only speculate, but it is not difficult to imagine that, in a provincial town where a large dominant supermarket firm already exists to monopolise residential conveyancing, four or five high street solicitors will disappear simply because the work that has been referred to is being subsidised out of residential conveyancing.

Cathie Craigie: Moving on to regulation of third-party ownership, are you satisfied that the fitness-for-involvement test, which it is hoped will prevent criminal elements from investing in or taking control of law firms, will do just that?

Michael Scanlan: Notwithstanding our position on the bill, it is fair to say that we are generally satisfied with that test.

The Convener: Is anyone dissatisfied?

Robert Sutherland: The test looks good on paper, but our one concern is that, as we have seen in the past few years, the people who carry out underground criminal operations are not yet necessarily at the forefront of police attention. How do we stop those people investing their money before they are identified as Don Corleone or Don Corleone's wife? It is easy to say that that is an extreme circumstance in which the test will not work, but the concern is at the much lower level—how do we ensure in practice that we stop the wrong people from putting their money into such organisations?

Robert Pirrie: By its very nature, the bill is trying to increase the diversity of people involved in legal services businesses and there is no question but that that increases the risk. We will find out whether the regulation is up to the job.

Kenneth Swinton: The only concern might be in relation to money laundering regulations under the Proceeds of Crime (Scotland) Act 1995, which operate on the regulated perimeter on named professions. The identification of a client would come only when they did legal work with the legal professionals within that entity and not when they did any other work that did not fall within that regulated perimeter. There might be an issue there.

The Convener: We have one final question. I ask for succinct answers, please.

Angela Constance: My question is about the regulation of multidisciplinary practices. Mr Sutherland, you said earlier that ethical issues are still to be resolved. Will you say a bit more about what those ethical issues are?

Robert Sutherland: I was just picking up on the Law Society's comment in evidence earlier that it is still working on particular ethical problems, without having identified what they are—I am afraid that I do not know the details of what it has and has not resolved. I was just making an observation, really.

12:30

Angela Constance: Okay. Does the panel have anything to say about whether the bill provides the right framework for regulating different professionals who work to different codes of practice, particularly in relation to conflicts of interest?

Kenneth Swinton: As I think I have already said, the position on conflicts of interest is not clear. Different professions may have different standards, with the Law Society being the gatekeeper for solicitors and others allowing the client to make the decision, so there is still a difficulty as regards conflicts of interest.

I have already given an answer on confidentiality and our concerns about legal professional privilege.

Robert Pirrie: The devil is in the detail. As has been said, if the bill needs bolstering, the principle should be to ensure that there is a level playing field so that all MDPs, and all the professionals in them, are required to meet the same standards as single-discipline practices, but it is all down to the detail.

Angela Constance: Do you have anything to add, Mr Sutherland?

Robert Sutherland: No. I endorse that entirely.

The Convener: Thank you very much indeed for your evidence, which was most welcome, and for your attendance.

12:31

Meeting suspended.

12:32

On resuming—

The Convener: I welcome our final witnesses of the day, who are from the Scottish Legal Aid Board. Tom Murray is director of legal services and applications, and Colin Lancaster is director of policy and development. You are probably fortunate in that the evidence that you are required to give is factual, so we should be able to get fairly succinct answers from you, which would be welcome.

Bill Butler: Good afternoon, gentlemen. For the record and for the committee's benefit, what are the advantages for consumers of ABSs?

Colin Lancaster (Scottish Legal Aid Board): Good afternoon. It is worth saying that the board's main interest is access to justice, and it would probably be fair to say this is not the driving reason for the introduction of the bill. That said, whatever the other reasons may be for introducing ABSs, they offer some potential advantages for consumers in relation to access to justice. The point has already been made that increasing specialisation in the legal services market in recent years has resulted in concerns about supply of such services as have just been discussed in areas such as social welfare, housing, employment, mental health, immigration and family law.

We observe that those concerns have arisen under the current model, which has seen a great degree of specialisation, a reduction in the number of firms that do a bit of everything and, consequently, a reduction in the number of firms that provide legal aid services.

We do not think that large areas of the country suffer from shortages in service provision, but in some parts of the country, reductions in supply have been more significant and access to justice issues may have arisen or may still arise. Over the past two or three years, there have been several developments to try to address some of those issues. The committee may be aware of the board's employment of solicitors in a number of locations and the recent grant-funding programme—for example, in relation to the economic downturn—in which it has tried to fill gaps.

Alternative business structures will give opportunities for other types of provider to enter the market. Traditional law firms have served us well and will continue to be the predominant providers of legal services to people who cannot afford to pay. Other business models such as social enterprises, citizens advice bureaux and other advice agencies may want to enter the market—at the moment, they cannot employ solicitors and so are limited in the range of services that they can provide—and it would be an advantage if they were able to do so. I say that notwithstanding concerns about the drafting of provisions on "fee, gain or reward". There are opportunities for other providers to deliver services where firms that operate under the traditional model choose no longer to do so.

Bill Butler: Do you concur with that view, Mr Murray?

Tom Murray (Scottish Legal Aid Board): Yes, I do.

Bill Butler: Are there any disbenefits to the ABS?

Colin Lancaster: It would be disingenuous of me to pretend that the risks that other witnesses identified are not real risks. It is important to ensure that the bill has the flexibility to support the alternative models to which I have just referred in order to counteract some of those risks.

Bill Butler: In other words, you think the risks are manageable.

Colin Lancaster: On balance, yes.

Bill Butler: In your submission, you suggest that SLAB should be able to require bodies other than those that are listed in section 97 to provide it with specific information. Will you elaborate on that?

Tom Murray: The drafting of the bill makes it clear that there will be provision from people other than lawyers and counsel. I refer to citizens advice bureaux, Consumer Focus Scotland and so forth. Our view is that, if we are effectively to provide our function under the bill, we will need as much information as possible on the running of the system. We suggested that, instead of adding bodies to the list, we should have a general power to ask for information. Clearly, we hope to get the information. If we are effectively to provide advice to ministers, we will need to form a good picture of what is happening, so organisations will have to provide us with information in order for us to do that.

We welcome the sections where provision is made for the regulators to give us information. However, the split in provision between the legally and non-legally qualified means that we will need to have as much information as possible as quickly as possible.

Bill Butler: That is very clear.

Nigel Don: My question is for Mr Lancaster. You talked of CABx wanting to employ solicitors. You will have to forgive me, but what is the benefit to a CAB of employing a solicitor rather than simply engaging the services of one? The answer escapes me. Why do they not just take the advice of Mr X?

Colin Lancaster: Evidence from research that has been conducted not just in Scotland but around the world suggests that the risk in referring people from one source of advice to another is that they do not get to the other source of advice. Citizens advice bureaux tell us repeatedly that they have difficulty in finding solicitors who will take cases on referral. For a number of years, CABx have wanted some form of in-house provision.

About eight years ago, we started a pilot project in the north of Scotland with Citizens Advice

Scotland in which we employed a solicitor to provide advice to advisers—not to clients—in CABx in the Highlands and Islands. The current rules that govern the employment of solicitors do not allow Citizens Advice Scotland to provide such advice, but we can do that under our legislation, albeit that the provisions are a bit cumbersome. The board employed the solicitors and posted them in the community. We have done that for a number of projects. The advantage to CABx of having lawyers in-house is that the lawyers are on hand to see clients who require representation. The solicitor can also provide advice, training and general support to advisers.

Many solicitors across the country participate in clinics and rotas at CABx and take cases on referral. However, there are still difficulties in the relationship in some parts of the country and for some clients. In-house solicitors will be an advantage.

Nigel Don: I will take you at your word. However, given what you have just said, it is not obvious why a solicitor must be part of the organisation. They can choose to be available to the court or to a citizens advice bureau.

Colin Lancaster: Such solicitors are members of private practices, so are subject to other business pressures and have other clients with whom they must deal. They are not at the beck and call of citizens advice bureaux that wish to pass clients through immediately. As I said, there is a risk that clients who are passed from one place to another may fall through the net.

Tom Murray: The issue for me is the ambiguous wording of section 36, which refers to "fee, gain or reward". That could prevent a citizens advice bureau that wanted to become an entity in an ABS from doing so.

The Convener: You have anticipated a few of the questions that we intended to ask, but I am sure that there are other points that will need to be picked up.

Robert Brown: I recall that in the past there was a close relationship between the law centre and the citizens advice bureau in Castlemilk. That model would seem to be preferable. Is the rather more elaborate structure that the bill proposes required? The provisions relate to a different end of the market from the provisions relating to cross-border arrangements and partnerships with accountants. Is much more than a relatively minor alteration to the Law Society's powers required?

Colin Lancaster: History shows that it has been difficult for such relationships to be established. In the current funding round, we awarded grants to organisations to provide advice on repossession and so on. Of the 16 grants that we made, eight were for projects that employ solicitors. Most of the bids that we received were partnership bids. For example, a CAB may have found a law centre with which it can work in partnership. That arrangement is fine and can work in some places, but it carries with it some complexities, as multiple agencies will be involved in the provision of one project.

Robert Brown: I understand that. Regardless of the wider issues, is a legal services bill, rather than more minor adaptation of the Law Society's regulations, needed to allow such arrangements to happen? Could they be regulated by the Law Society in something like the normal way?

Colin Lancaster: I suspect that if there were not other drivers for the bill we would not be discussing its advantages in relation to access to justice.

Robert Brown: You have identified the areas of the law in which there are difficulties. Currently, we are going through a recession, not least in certain parts of the legal profession. From previous conversations with officers of the Scottish Legal Aid Board, I understand that that has led to a resurrection of interest in some areas of work that were under threat, not least family law. Can you give us a flavour of that?

Colin Lancaster: Members may be aware that, over the past 15 years or so, the number of applications for civil legal aid and the number of firms providing that service have declined. In the past 18 months, there has been a significant turnaround. In the year to date, there has been an increase of something like 35 per cent in the number of applications for civil legal aid, and we have seen the first increase in the number of firms on our register that provide civil legal assistance. The increase has occurred across the board.

The make-up of the civil legal aid business fluctuates from year to year, but in the year to date there has been a substantial increase in many areas, especially family law. As a result of the downturn, in one way or another, more firms are offering supply and more clients are expressing demand for the service.

Robert Brown: In relation to family law, in particular, how representative are the figures of the number of firms that are registered? I have heard from you or others that, rather than being regular suppliers, some firms keep their name on the list to do the odd case. Do you agree that the figures are slightly misleading in that connection?

12:45

Colin Lancaster: That is right. A large number of firms are registered just in case a client comes in, such as a previous client who has fallen on hard times. There is a split in the market. Over the

past few years, even with the decline in applications and in the number of firms, there has been growth at the top end of the market—the firms that provided most civil legal assistance were providing more—and that has continued through the downturn. A relatively small number of firms do a large amount of civil legal assistance, but a large number of firms do rather less.

Robert Brown: Am I right in saying that the answer to the areas of difficulty is not so much multidisciplinary practices as the use of citizens advice bureaux, social enterprises and so on? Differences in legal aid rates might be relevant as well.

Colin Lancaster: The board's view is that a mixed model is the best way of ensuring that we meet the needs of the 21st century. The legal aid model is more or less unchanged since the immediate post-war period. Needs have changed, and the profession has changed. A more pluralistic model, in which different types of provider can work alongside each other, is the way forward. That is certainly the way in which we have approached the direct employment of our solicitors. It is not in competition with private practice solicitors; instead it works alongside them, in recognition of the fact that they will wish to continue to provide some types of work but not others. Our offices will pick up the work that they are less inclined to do. The more different types of providers we can add to the mix, the more likely we are to meet the varied circumstances throughout the country.

Robert Brown: Does Mr Murray have something to add?

Tom Murray: For information, there are currently 619 registered civil firms. As well as a 35 per cent increase in civil legal aid, we have seen a corresponding lower increase in advice and assistance—about 6 per cent recently.

The Convener: Do the figures that you produced in respect of the legal aid applications not suggest that the solicitors in fact go where the money is?

Colin Lancaster: We would contrast the position in the past 18 months with the position in the past 15 years.

The Convener: We have dealt to some extent with the geographic availability. Does Cathie Craigie wish to pursue that?

Cathie Craigie: I am looking through the research working group's findings, and there seem to have been gaps in provision for a while. Is it a problem that you think will grow, Mr Lancaster?

Colin Lancaster: We continually monitor the provision of civil legal aid services in particular because the most concern has been about them. We look at different types of work within that, such as family law and housing. We have developed that work more over the past 18 months to two years so that we can identify not only where the firms are but where the clients are and whether there are parts of the country where clients have to travel to get help. We identified that there have been bigger reductions in some parts of the country than in others. We have been concerned about the Highlands and Islands for some time, and we are concerned about Aberdeen and Aberdeenshire. We have been concerned about parts of Argyll, and there are one or two areas of Strathclyde where we think that there are potential difficulties as the number of applications coming from those areas has reduced.

In a number of those areas, we have been able to intervene by employing solicitors or providing grant funding. There are still one or two pockets where there may be shortages, notwithstanding the growth in the past 18 months. Inverclyde is one such area, so we will discuss with providers in Inverclyde what it is about that area that has resulted in a bigger reduction than elsewhere.

James Kelly: Section 9(6) provides for the Scottish Legal Aid Board to monitor the accessibility and availability of legal services throughout Scotland. How will that be done?

Colin Lancaster: As I was saying a moment ago, we already monitor the availability of legal aid services, and the provision in the bill will allow us to extend that work. At present we map patterns of applications by client and by firm. As Tom Murray said earlier, we also engage with other agencies to see whether they have picked up changes over time. We did a survey of the advice sector, and we have worked with Women's Aid and advocacy groups to see whether their clients face difficulties in getting access to services. Although the bill broadens that monitoring role into other areas of legal service, and therefore necessitates others to provide us with information, we see it as an extension of the work that we already do.

The Convener: There are no further questions so I thank you, Mr Lancaster and Mr Murray, for your attendance this morning.

12:50

Meeting suspended.

12:51

On resuming—

Subordinate Legislation

Law Applicable to Contractual Obligations (Scotland) Regulations 2009 (SSI 2009/410)

The Convener: Item 2 is subordinate legislation. I draw members' attention to the cover note.

The Subordinate Legislation Committee sought clarification on the choice of procedure from the Scottish Government. Although that committee was satisfied with the response, it reported that, when an instrument affects primary legislation and it is for the Scottish Government to choose which procedure to use, it is also for the Government to explain and justify the use of the negative procedure.

As there are no comments, are members content to note the instrument?

Members *indicated agreement*.

12:52

Meeting continued in private until 13:18.

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