JUSTICE COMMITTEE

Tuesday 5 January 2010

Session 3

£5.00

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

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JUSTICE COMMITTEE
1st Meeting 2010, 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:

Gilbert M Anderson
Charlotte Barbour (Institute of Chartered Accountants of Scotland)
Fiona Farmer (Unite)
Vivienne Muir (Institute of Chartered Accountants of Scotland)
Sarah O'Neill (Consumer Focus Scotland)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 5 January 2010

[THE CONVENER *opened the meeting at 10:07*]

Legal Services (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I open the first parliamentary committee meeting of the new year by giving the compliments of the season to everyone who serves the Justice Committee and everyone who will give evidence today. I hope that the new year will be successful for them.

I remind everyone to switch off their mobile phones.

Under agenda item 1, the committee will continue to take oral evidence on the Legal Services (Scotland) Bill. The first panel consists of Vivienne Muir, executive director, regulation and compliance, and Charlotte Barbour, project director, regulation and compliance, from the Institute of Chartered Accountants of Scotland. I thank them very much for coming to the meeting and for their forbearance. As they know, they were to be the second panel, but they have filled the breach caused by the late arrival of a witness who was scheduled to give evidence before them. I am grateful for that.

I will open the questions. I thank you for your written submission, which suggests that an adapted version of the existing regulatory regime for accountants—you refer to ICAS's regulated non-member model—could be applied to the legal profession at a cost that would be lower than that of the current proposals. Will you explain how such a scheme would be established and how it would operate in practice?

Vivienne Muir (Institute of Chartered Accountants of Scotland): Good morning, and thank you very much for inviting ICAS to the meeting.

ICAS operates a fairly comprehensive regulatory approach for its members. Our chartered accountant firms comprise non-members as well as chartered accountants. In order to bring those non-members into the regulatory structure, they can become regulated non-members—there are contractual arrangements under which non-members come to the regulatory fore.

The advantage is that when we go out to a firm we can monitor the whole firm, as opposed to looking just at our members. We are therefore bringing non-members into the regulatory framework. It is a simple way of doing things and means that we can go out and assess the firm for quality and competence. The method has worked well for the accountancy profession.

The Convener: Have you anything to add, Ms Barbour?

Charlotte Barbour (Institute of Chartered Accountants of Scotland): Not really. The criteria for being a regulated non-member are that the person is a fit and proper person and agrees to be bound by all the ICAS rules and regulations. Of course, although such a person is not a chartered accountant, the system allows them to become a principal in a firm of chartered accountants. At least 50 per cent of the principals in such firms must be chartered accountants, but our rules would allow a lawyer to come in. I appreciate that, as yet, the Law Society of Scotland rules do not permit that. Ex-inspectors, members of the Chartered Institute of Taxation and so on are often regulated non-members.

The Convener: We will continue on the theme of regulation. Do you feel that further safeguards, such as an enhanced role for the Lord President of the Court of Session, or a consumer panel established by statute, would provide reassurance in relation to preserving the independence of the legal profession?

Vivienne Muir: I have no strong views on that. Obviously, in relation to the bill, ICAS's role is fairly limited, in terms of an interest in alternative business structures or confirmation services. However, I certainly would not be opposed to that type of arrangement.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): My question follows on from the convener's questions. Charlotte Barbour just told us that 50 per cent of partners in a regulated firm must be CAs. Can you expand a bit on the types of people who apply to be regulated non-members?

Charlotte Barbour: Yes. Chartered accountant firms consist mainly of chartered accountants, who might be from ICAS or from other institutes of chartered accountants. In the tax world, members of the Chartered Institute of Taxation or ex-tax inspectors might apply to be regulated non-members. Regulated non-members tend to be people who work in other professional fields that perhaps do not have the same regulatory structure and who want to be able to be a full partner in a firm of chartered accountants.

Cathie Craigie: Do regulated non-members tend to be people who work in accountancy in some way?

Charlotte Barbour: That is an interesting question. Accountancy firms are already almost multidisciplinary practices, because a chartered accountant might do accountancy, insolvency, tax or corporate finance. Audit is slightly different because it is in a regulated sector for which extra qualifications and licences are needed. A range of services is therefore provided already. In fact, one reason why the bill interests us is that our members already provide quite a lot of legal services—tax advice and that kind of thing.

Cathie Craigie: Why was it felt necessary to say that 50 per cent of partners in a firm must be CAs?

Charlotte Barbour: I think it is because we would want control.

Nigel Don (North East Scotland) (SNP): Can you elaborate on the kind of problems involved in lawyers doing law rather than doing tax, if I may use such simple terms? Surely that would cause regulatory problems, which I suggest your scheme simply does not cover.

Vivienne Muir: It would depend on how the whole regulatory approach works. Certainly, we are in favour of the bill. However, its success will depend on the regulatory approach. If we could build our existing processes into a regulatory approach for different types of licensed providers, that would be beneficial and cost effective.

We will have to enter some form of memorandum of understanding with the other professions so that we understand where we have to work together and share information, for example. However, all will depend on our obligations as an approved regulator and what regulation we have to carry out. If it is at a fairly high level—in some ways, we already carry out such regulation with our firms—it will not create difficulties to have lawyers within a regulated structure in one entity.

10:15

Nigel Don: There seem to be two approaches to your being regulators in the context of the bill. One is for you to modify your existing scheme to accommodate the requirements. The alternative is that you say, "Look, our existing scheme, with a few tweaks, will be good enough. We don't need the bill." What you have just said implies that you regard the former as the better route. You recognise that your scheme would not be compliant with the bill, particularly as it does not deal with the confidentiality issues or the conflict of interest issues that lawyers are going to meet. If I heard you aright, you are not suggesting that your scheme would be fine and that we do not need the bill. What you are suggesting is that your scheme would be a good one on which to build, given whatever framework the bill provides.

Vivienne Muir: Yes—that is absolutely what we are suggesting.

Nigel Don: Thank you.

The Convener: Just so that we can put the matter to bed, what test does ICAS apply with regard to non-accountant members in so far as the definition of a fit and proper person is concerned?

Vivienne Muir: We have a fairly rigorous application process. We can certainly leave the details with you. It covers financial integrity and reliability, previous convictions or civil liabilities, and reputation and character. There is also a requirement to obtain references.

The Convener: What are you reading from?

Vivienne Muir: It is the application for regulated non-members.

The Convener: It might be helpful if we had a copy of that.

Vivienne Muir: No problem.

The Convener: Thank you.

Cathie Craigie: I am sorry to keep coming back to you, Charlotte, but when I asked you why you believe it is important for partnerships to contain at least 50 per cent CAs, you said that it is because you want to keep control. The bill does not set any such level for solicitors firms. Is that appropriate?

Charlotte Barbour: I suppose that, when I look at what drives that bit of the rules, the important thing is whether the firm will be able to promote or designate itself as a firm of chartered accountants. We would not want a firm to do that if only one of its four principals was a CA. If a firm is to brand itself as a firm of chartered accountants, we would want to know that chartered accountants were in the majority or formed at least 50 per cent. That relates to the point in our submission about whether such a firm should be called a legal services provider. The bill is structured in such a way that a firm that comprised three chartered accountants and one lawyer would need to be called a legal services provider. I am not sure that that is necessarily what our members would want.

That is why we propose interaction with our regulated non-member model. If we tweak the two approaches, we might get closer to a situation in which a firm was either a legal services provider—such firms would have a majority of lawyers and an accountant or surveyor or whatever—or a firm of accountants. A change to the Law Society rules would arguably allow one or two solicitors to join our firms.

Cathie Craigie: Thank you.

Charlotte Barbour: Is that sensible?

Cathie Craigie: It is a point that we will bear in mind as we compile our report on the bill.

Your written submission states:

"We have traditionally favoured … moves to facilitate the creation of multi-disciplinary practices",

which

"could lead to operational efficiencies which might be passed on to consumers".

What evidence is there of demand for multidisciplinary practices, or one-stop shops, as some might call them?

Vivienne Muir: That is quite a difficult question to answer at the moment. We issued a survey to our members but unfortunately the response rate was only 8 per cent. The majority of those responses were in favour, but at this stage, members are not fully familiar with the likely regulatory impact or cost. They are seeking to keep their options open and waiting to see how the bill will proceed and what the regulatory impact will be.

Cathie Craigie: I appreciate that you are speaking on behalf of your members today and that you have not consulted widely with clients, for example, who might or might not think that it would be a good idea to go to a one-stop shop.

Charlotte Barbour: We have not taken it further than surveying member firms.

Cathie Craigie: You got an 8 per cent response rate. How many members do you have?

Charlotte Barbour: We surveyed almost 1,000 member firms.

Cathie Craigie: So it was member firms as opposed to members.

Charlotte Barbour: Yes.

Cathie Craigie: Professionals seem to have difficulty in getting their members to respond. There was a similarly low response rate to a consultation by the Law Society.

On the regulation of a multidisciplinary practice, does the bill provide a satisfactory framework for dealing with divergences and differences between respective professional standards and codes of conduct?

Vivienne Muir: The bill is very much an enabling bill, and we will have to wait and see how the detail works out. As I said, the bill meets those requirements. The obligations on the approved regulator will be critical and they will have to be at a fairly high level to allow individual professions to continue to regulate themselves. That will mean that conflicts will be dealt with quite easily because there will only be difficulties when there is a conflict between the approved regulator obligations and what the licensed provider has to do to satisfy the approved regulator. I am comfortable with the way in which the bill is structured at the moment, provided that the approved regulator's obligations are structured correctly.

Cathie Craigie: Do you believe that the application process for regulated non-members—you are going to supply a copy of the documentation to the committee—can deal with the conflicts that might arise between the different professionals, and that it can protect the integrity of the service that is being provided?

Vivienne Muir: It must be remembered that regulated non-members are still affiliated to and therefore overseen by their home institute. We are talking about a way of bringing in firms so that we can monitor them and look at different aspects of their work.

Cathie Craigie: How will the multidisciplinary practice reconcile the differences between solicitors and accountants?

Vivienne Muir: Conflict has to be dealt with by each of the institutes. We all have codes of practice and ethical guides that deal with our own conflicts of interest. The regulation of individual professions will continue. We have to sit down and see whether, from an entity and licensed provider perspective, there are any potential conflicts that we have to address, but that could be done by way of a memorandum of understanding. We have already had some discussions with the Law Society on that quite sensible approach.

James Kelly (Glasgow Rutherglen) (Lab): In previous evidence sessions, concerns have been raised about the potential for undesirable third parties to get involved in law firms as a result of the bill. In an answer to the convener, you cited elements of the application process that would provide some safeguards. Are you confident that, if ICAS were to become an approved regulator, its processes would be robust enough to prevent the involvement of undesirable third parties?

Vivienne Muir: Yes. Our current processes for assessing whether people are fit and proper to become regulated in whatever area—for example, if they are seeking to be audit registered—are already robust, and a similar approach could quite easily be taken to the proposed business set-up to ensure that all the necessary checks were in place. Indeed, we would be obliged to ensure that the provider had gone through a fit and proper process.

James Kelly: How would your checks flag up whether, for example, someone had been involved in criminal activity?

Vivienne Muir: That information would have to be declared on the application form.

James Kelly: If the applicant did not declare such information, would you be able to track it down? Are you essentially relying on people's honesty?

Vivienne Muir: We do rely on the applicant's honesty. However, it all very much depends on the nature of the applicant, and if we felt that we needed to carry out further checks we would certainly do so.

James Kelly: But is there not a potential problem in that respect? After all, undesirable elements who apply without honest intention might well not declare previous criminal convictions.

Vivienne Muir: That is a consideration, and we would have to think about how we might safeguard against such things.

James Kelly: In paragraphs 7 to 10 of your submission, you express concern about the branding of licensed legal services providers. Will you elaborate on that concern?

Charlotte Barbour: As I said earlier, I doubt that it serves the consumer interest well to call a firm primarily comprising chartered accountants with only one or two solicitors a legal services provider because one would assume that such a provider would be a firm of solicitors rather than a firm that primarily provided accountancy-related services as well as some legal services. As the bill is currently structured, it is a moot point whether under the separate regulatory vehicle the firm will be a "legal services provider" or whether that will just be a subtitle and we will still be able to refer to such a firm as a firm of chartered accountants and solicitors regulated as a legal services provider. However, I cannot imagine that a firm of chartered accountants that took in one solicitor would be interested in adopting such an approach at the moment, because it simply does not lend itself to allowing such firms to make it clear exactly what they do.

Nigel Don: I noted your earlier comments on that matter. With regard to the head of legal services's overriding control of, in particular, money, it makes great sense for someone in a legal business to be responsible for clients' money; of course, accountants routinely carry out such work, so I see where you are coming from. Can you give me some clues about how we might resolve the issue? Should the person responsible for the accounting mechanism for clients' money be a CA or a qualified lawyer?

Charlotte Barbour: I do not think that it matters whether they are a lawyer or a CA, just as long as a professional designated person is responsible.

Nigel Don: Yes—I think that that is about the size of it.

The Convener: As the committee has no further questions, I thank the witnesses for their clear evidence. I apologise for the late start, but I am sure that you will appreciate that the weather conditions are fairly exceptional.

I suspend the meeting briefly.

10:29

Meeting suspended.

10:30

On resuming—

The Convener: I welcome the second panel. Sarah O'Neill is head of policy for Consumer Focus Scotland, and Fiona Farmer is a regional industrial officer for the Unite trade union, Scottish region. Thank you very much, ladies, for coming to see us today.

We will proceed immediately with our questioning. What evidence is there that the Legal Services (Scotland) Bill is necessary and that the establishment of alternative business structures will benefit users of legal services in Scotland?

Fiona Farmer (Unite): We have concerns about the marketisation of legal services under the bill, which we have outlined in our written evidence. We are not opposed to change, but we are concerned that opening up the market will result in inequality in the justice that is available to the public and to our members in Scotland. When the national health service in England was opened up to privatisation, we saw evidence of the most lucrative parts of the service being creamed off and the less attractive parts being left, which has caused problems in the sections concerned.

There could also be conflicts of interest should the bill go ahead in its present form.

The Convener: Could you give examples of how the proposals might go wrong?

Fiona Farmer: If we consider the privatisation of the NHS in England, the lucrative and attractive sections have been hived off, including children's services, acute services and surgery. Other services, such as care for the elderly and mental health services, are being left and are suffering financially as a result. The same detriments could apply in legal services here if the bill were to proceed. Certain sorts of claims and areas of justice would be snapped up, whereas services in other areas would become very costly. It would become much more expensive for our members to access justice, and we do not believe that access

to justice should depend on affordability, or on the depth of people's pockets.

Sarah O'Neill (Consumer Focus Scotland): Consumer Focus Scotland and our predecessor body, the Scottish Consumer Council, have long argued that there is a need to open up competition in the market for legal services in Scotland, and that we should consider new ways to deliver those services—subject to adequate consumer protections being put in place. We believe that lifting the existing restrictions through implementing the bill will bring consumers a number of advantages, including an increased choice of services, reduced prices, greater convenience and more consumer-focused services. Most important, we see potential in the bill to increase access to justice for consumers.

We have been concerned that much of the debate on the bill so far has focused on the benefits to big legal firms, external ownership by businesses and issues to do with legal markets where there is already healthy competition, such as conveyancing. We view the bill, together with other proposed reforms such as those in Lord Gill's recent civil courts review, as important for achieving modern, consumer-focused legal services in Scotland.

The bill has the potential to lead to the development of entirely new structures in the voluntary, charity and advice sectors, not just in private practice and in services provided by solicitors and accountants, which we have been hearing about. Charitable and advice organisations should have flexibility in how they address unmet legal need, both in geographical areas and in areas of legal work where there is insufficient provision of legal services. In 2006, the legal markets research working group found that there are clear gaps in provision in areas of social welfare law such as debt, housing, employment and immigration. We would like to see the market opened up so that citizens advice bureaux, which we know want to have these powers, and other charities, can employ solicitors to work directly in those areas.

The Convener: You have slightly anticipated a question that I was going to ask but, to come back to the question that I did ask, what is your evidence that the bill is needed?

Sarah O'Neill: Our evidence is, first, the research working group report to which I have referred, which showed clearly that some legal markets are not competitive. As I have said, advice agencies and others expressed concern about a lack of supply in some markets. We also know from other research, such as "Paths to Justice Scotland", that people cannot always access the legal advice and assistance that they need.

Cathie Craigie: When did the research working group to which you refer carry out its research?

Sarah O'Neill: It reported in 2006.

Cathie Craigie: Was that not the working group that concluded that much more research work needed to be done on the issue?

Sarah O'Neill: Yes.

Cathie Craigie: I find it strange that you are using that group's report to back up your submission. What drive is there from consumers who believe that the bill will benefit them?

Sarah O'Neill: As others have said, it is very difficult to say what demand is out there from consumers. We know that consumers cannot always access the legal services that they need, so, although they may not know that they demand other ways of delivering services, we think that the bill brings the potential to consider other ways of delivering services that meet people's needs, particularly by enabling advice agencies to employ solicitors. You may recall that Ian Smart from the Law Society of Scotland gave an example of a partnership involving an employment solicitor, a human resources consultant and a management consultant. That solicitor cannot currently practise as a solicitor and so cannot represent clients in court, although they can do so in a tribunal. In employment law, the working group found that there is a dearth of provision for employees, so it makes sense to allow such structures to grow up. We will not know what other innovative structures might grow up until the bill is in place.

Cathie Craigie: That is exactly my point. The research working group was made up of highly experienced academics and practitioners from across Scotland. Would it not have been reasonable to follow up its main recommendation that more work and more research are required on whether this huge change to the way in which we deliver law services and solicitor services in Scotland should be made?

Sarah O'Neill: The Scottish Consumer Council was a member of the research working group and we were of the view that the current restrictions should be lifted. Most of the research that the working group recommended was on taxation and various other issues. Whether there are markets in which there is insufficient provision was not at issue; that was more or less agreed in the report and that is the evidence that I am using.

Cathie Craigie: I am sorry that I do not have the working group's recommendations to hand—I think that I have them somewhere on my desk, but I do not want to be rude and fumble through my papers as we hear your evidence. I do not think that you can pick and choose from the group's recommendations; it recommended that we should

conduct more research. It concerns me that the consumers of legal services have not been consulted in any great detail since that research working group, which involved your organisation, reported.

Sarah O'Neill: We know that there is unmet legal need. We have not explicitly asked people whether they would like to have these services, but we think that they would. We certainly know from the KPMG report that corporate clients are interested in having these services, because they can see the advantages for themselves. We think that individual consumers would also see the advantages if the services were available to them but, of course, they are not repeat players in the same way that businesses are. They do not necessarily use legal services very often, so they would not necessarily think about the issue until they knew what was available to them.

The Convener: In her first response, Ms Farmer expressed concerns, which were also contained in the Unite submission, about how the new system might operate, although the concerns seem to be about legal aid rather than the application of the bill. Would it be fair to suggest that Unite believes that the operation of the bill could result in a reduction in pro bono services, for example?

Fiona Farmer: I believe that it could. It is quite difficult to see how many aspects of the bill could be implemented. In general, we are not opposed to solicitors securing investment and expertise from outside sources; our major concern is mass privatisation and how external providers such as multinationals, banks and supermarkets would be regulated if they began to control the Scottish legal system in that way.

The Convener: We will now deal with the independence of the legal profession.

Stewart Maxwell (West of Scotland) (SNP): I have a small follow-up question before I move on to that issue. It is about Ms Farmer's analogy with the NHS. I am not sure that I understand the analogy between the provision of legal services that is envisaged in the bill and the privatisation of the NHS that has taken place in England. It seems to me that, in Scotland, it is possible to have multidisciplinary practices in the NHS but not to have multidisciplinary practices that involve legal services, accountants and so. Will you explain how your analogy works?

Fiona Farmer: My analogy was really just with the situation in England. We are a United Kingdom union and we have vast experience of the opening up of the NHS to privatisation, which has resulted in the attractive and money-spinning parts of the sector being creamed off and being taken up by private enterprise, social enterprise and outsourcing.

Stewart Maxwell: My point is that we seem to be creating a change in structures rather than a mirror image of the opening up of the NHS in England to privatisation. All firms of accountants and lawyers are in the private sector—they are not public sector firms. I am trying to understand how a bill that aims to break down the barriers between different professionals is analogous to the privatisation of the health service in England.

Fiona Farmer: It is about the fact that, as a trade union, we do not want to see legal services being wholly controlled by the private sector.

Stewart Maxwell: I am sorry to interrupt, but could you name a legal firm or a firm of accountants that is in the public sector?

Fiona Farmer: I am not saying that the legal system is run by the public sector, but there is Government input into it. At the moment, monitoring and accountability are part of Government activity. We do not want to see that being wholly controlled by the private sector.

Stewart Maxwell: I am interested in your use of the phrase

"wholly controlled by the private sector".

I fail to understand what that means. I think that you have accepted that the firms in question are private sector firms. I accept your point about the Government's role in the legal system, but it is clear from the bill and from evidence that we have received that monitoring by ministers—I would not use the phrase "Government control"—will continue if the bill is passed. Could you explain what you mean by

"wholly controlled by the private sector"?

Fiona Farmer: One of our concerns is that it is not clear from the bill what control, monitoring and accountability there will be in the future.

Stewart Maxwell: I will leave the issue just now, although other members may want to come in on it.

The Convener: Cathie Craigie has a follow-up.

Cathie Craigie: I have had a look at Unite's submission. Is it your concern that the passing of the bill would create an open door for people to provide legal services purely for profit rather than for other motives? Are you worried that they would be motivated by profit?

Fiona Farmer: Yes, our concern is that profit would be the motivation and that we would end up with a very unequal justice system that could be accessed only by those who could afford it, rather than by those who had the most demanding or pertinent cases.

10:45

Stewart Maxwell: I must come back on that point—I was going to leave it, but again I fail to understand your line of argument. The question was about whether legal firms would be out for profit. Under the current set-up, are legal firms—which are, as we have established, private enterprises—not already out for profit?

Fiona Farmer: I am not saying that legal firms are not out for profit; they are in the private sector. I am concerned that, by allowing in the multinationals—the banks and the supermarkets—we are opening the system up to something completely different. Issues of accountability and control are a concern for us, because, as I outlined earlier, we have seen the fallout from the opening up of the NHS to social enterprise and multinationals.

Stewart Maxwell: I fail to understand your argument, to be honest. I do not want to be rude, but I will be frank. At present, legal firms and accountancy firms—all the organisations that are involved in the bill, which range from small, one-person firms to very large organisations that are single service rather than multidisciplinary—are profit seeking. They are businesses that seek to survive and generate profit for their members. I do not understand the difference that you are trying to establish between what happens now and what may happen under the bill. The firms—either the same firms, or firms owned by different people—would still be out to make a profit. I cannot see the difference.

Fiona Farmer: We have outlined our position quite clearly in our submission, and I have outlined it a number of times today. I am not sure what else I can say to explain it further.

The Convener: We have the evidence, and it is up to us to assess it. I ask Stewart Maxwell to move on to the independence aspect.

Stewart Maxwell: Certainly, convener. We have briefly touched on the regulatory role for the Scottish ministers. Does either of you believe that that role is consistent with the independence of the legal profession?

Sarah O'Neill: We are keen on the idea of an advisory panel to advise ministers on the regulatory framework. Such a panel would deal with many of the concerns that have been raised.

Stewart Maxwell: In what way would it do that? How would the panel be selected, and who would be on it?

Sarah O'Neill: We do not yet know that. There is nothing in the bill about putting a requirement for a panel in legislation, which disappoints us, as the majority of respondents to the consultation wanted that to be the case. We know from the policy memorandum that the Scottish Government intends to establish such a panel, but it will not be on a statutory footing as we believe it should be. The composition of such a panel would need to be considered, but we would like it to feature strong consumer representation.

Fiona Farmer: We would be more supportive of a legal commission. We do not have any figures for that, nor have we put any meat on the bones in relation to how it would be structured, but we would like such a body to be set up.

Stewart Maxwell: For the sake of clarity, what would be the difference between a legal commission and the panel that we have just been discussing?

Fiona Farmer: The difference relates to accountability.

Stewart Maxwell: We have received evidence that suggests that an enhanced role for the Lord President could deal with the question of the perception of independence. Would that be sufficient?

Sarah O'Neill: It is entirely proper that the Lord President should be consulted on the issues, but we are concerned, for a number of reasons, about the suggestion that approval by the Lord President should be required. It is not clear how such a role would sit with the Lord President's other roles as a member of the Faculty of Advocates and as head of the Scottish Court Service.

We also have concerns about what happens when a body that is not a legal professional body applies to be an approved regulator. There may be an issue of public perception; people might ask why the Lord President is involved, as it is not only legal professional organisations that may apply to be a regulator.

Stewart Maxwell: Are you suggesting that there is a potential conflict of interest for the Lord President?

Sarah O'Neill: We are suggesting that public perception of a conflict of interest may be an issue.

Fiona Farmer: That is exactly the point that I would make. We would be concerned about a conflict of interest if the Lord President were to be the only individual involved.

Stewart Maxwell: You both agree that the Lord President should have a role but that he should not have an approval role. Are you talking about a halfway house whereby he would have an advisory role as opposed to the role that is being suggested?

Sarah O'Neill: We are happy with what is in the bill. The Lord President's role is clearly important, particularly in relation to legal issues.

Fiona Farmer: Yes, it should be a participatory but not a governing role.

The Convener: James Kelly will now pursue the area of regulation.

James Kelly: As we have just been discussing, the bill seeks to open up the legal profession, which would mean that we would have both traditional firms and licensed legal services providers. There would also be approved regulators and existing regulators. Does the bill do enough to provide a level playing field as regards regulatory burden between traditional firms and the proposed licensed legal services providers?

Sarah O'Neill: We are happy in principle with the regulatory scheme that is set out in the bill, but we have expressed concern that it will not apply to traditional firms. We think that it should because, from the consumer perspective, it should not matter how the business the consumer deals with is set up; they should be entitled to the same form of protection. For example, traditional firms are not necessarily required to comply with the regulatory objectives and adhere to the professional principles, but we think that the same principles should apply to both types of providers.

James Kelly: Do you therefore believe that the regulation of traditional firms will be less robust than that of licensed legal services providers?

Sarah O'Neill: We are not necessarily saying that it will be less robust. One of the clear issues for us is the changes that are to be made to the governance of the Law Society, which we very much support—we have said for a long time that that should happen, although we have an issue about the percentage of lay members on the Law Society's council. We are happy with the regulation, but if we are moving towards having a more modern legal system, all providers should be subject to the same requirements. As it stands, the regulatory objectives do not necessarily apply to traditional providers.

James Kelly: Does Ms Farmer have a comment about that?

Fiona Farmer: I do not have terribly much more to add, except to say that we would like exactly the same regulation to apply across the board, but we have no great criticism of the existing regulation.

James Kelly: When a user of legal services pursues a complaint, we want to ensure that the process is as simple as possible so that they can address their issues. Does the bill serve that purpose or is the regulation too complex?

Fiona Farmer: As it stands, the regulatory process is not terribly clear. The complaints process has to be simplified and made clearer.

Sarah O'Neill: It is essential that the process is as clear and simple as possible for those who use it. That is one of the reasons why it is important that we have the same regulation regardless of who provides the service. That is key for us.

We raised an issue about the addition of a new form of complaint—a regulatory complaint. There will now be an additional category of complaint for people to find their way through and we are concerned that that will make it more complicated. It is essential that information about what consumers should do is as clear as possible. It should not matter who provides the service that the consumer receives, but they need to know which road they should go down if they have a problem.

Nigel Don: Good morning, ladies. What benefits would there be in opening up legal services in such a way that allows advocates to participate in alternative business structures? The benefits of that are not at all clear to me.

Sarah O'Neill: It is difficult to see what the benefits would be without knowing what kind of structures will grow up. We know that there are advocates out there who would like to be able to form alternative ways of doing business. There is a strong argument for those restrictions to be lifted. The issue of advocates is less pressing for us than that of solicitors, because few members of the public deal with advocates. However, we think that the restrictions should be lifted, because we do not know what kind of structures could be formed.

Fiona Farmer: My answer is very much the same. It is unclear what is being proposed for advocates, apart from a lifting of the restrictions, and how that would be taken forward, so it is difficult for us to comment on the matter in detail.

Nigel Don: In paragraph 24 of her submission, Ms O'Neill states:

> "We believe that all restrictions on competition should be removed unless there are clear and justifiable reasons for retaining them. We are not convinced that there is sufficient justification for retaining the current restrictions on advocates participating in ABS."

Given that there are something like 440 advocates in Scotland and given that, in principle, they deal with every case that comes before them, it is completely unclear to me how we can improve the competitiveness of the market by changing the structure. I am looking for some help. I appreciate that advocates might want to work in partnerships, for business reasons, but even that would restrict competition.

Sarah O'Neill: We are not convinced that it would. It is important to make the point, as others have done, that the proposal is permissive—we are not saying that advocates must participate in

ABSs but that they should be allowed to do so, if they wish. We are not entirely convinced that that would lead to competition issues; if it did, the Office of Fair Trading would have a role to play. There seems to be an assumption, which I cannot quite understand, that advocates who are in the same area of work would band together. I am not sure why that would be the case, as it is not what generally happens with solicitors firms. The argument is often made that, if all advocates working in an area banded together, it would be difficult for the other side in a case to get representation. However, some advocates working in different areas might want to form practices with one another or with solicitors.

Nigel Don: I accept that, but how would such an approach work in the consumer's interests, given that it would reduce the number of parties who might be able to represent people? Surely that would reduce competition, by definition.

Sarah O'Neill: I am not sure that it would reduce the number of parties that could represent people. It might make it easier for consumers to get access to the advocate whom they need or lead to reduced prices for them. If advocates could have the structures that are proposed, it would lead to a more consumer-focused service.

Nigel Don: I will press you, because the issue is important and advocates want to know the reason for the proposal. I do not disagree with what you have said—many witnesses have made the same point to us. I have described it—perhaps slightly unfairly—as elementary economics. All of us understand the basic principle that competition may reduce prices. However, in the particular case of advocates—I am not talking about solicitors or accountants—I still struggle to see how any mechanism other than requiring practitioners to operate independently would increase competition.

Sarah O'Neill: I can only repeat what I have said. We do not know what the structures would be, because at the moment such arrangements are not allowed. We would like to see what might develop. If competition issues arise from that, the Office of Fair Trading will have a clear role to play.

The Convener: We move to issues of outside ownership and governance.

Cathie Craigie: My question is directed primarily at Consumer Focus Scotland. In its written submission, it reminds us that it

"works to secure a fair deal for consumers in both private markets and public services"

and states that

"While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not."

I agree with that point and with the organisation's aims. What risks and benefits are associated with opening up the legal services market in Scotland to banks, supermarkets and others that may want to invest in it?

11:00

Sarah O'Neill: I have outlined what we see as the benefits. I have focused on advice agencies, the voluntary sector and so on, but we see potential advantages in other providers coming into the market. I have talked about reducing prices and so on, but there are other considerations, such as greater convenience if services can be provided at times that suit people better and the fact that new providers may be consumer focused and concerned about consumers trusting their brands. As we have said, lots of things could happen.

There are risks but, whatever we have heard about the increasing marketisation of legal services, it is already happening. Indeed, one of the main reasons for introducing the bill is the fact that the legal services market is already changing, and we need to modernise the system so that we can keep up with that change. Alternative providers are coming into the market and that will continue to happen, particularly with the reforms that are taking place in England, Wales and elsewhere in Europe.

We know that consumers like supermarkets because they offer a much greater choice than existed in the past, including a much greater selection of goods and more convenient opening hours. However, whether supermarkets will want to offer legal services is another question. Tesco law is the phrase that is being bandied about, but we are not sure that lots of supermarkets will want to provide such services. The point has been made that supermarkets will do work that is profitable, but I question what that is. The research working group found conveyancing to be one of the most competitive markets. I am not convinced that there is a lot of potential profit in there for supermarkets, banks and others.

Cathie Craigie: Your written submission talks about the benefits of alternative business structures, such as increased choice, reduced prices, better access to justice, a more consumer-focused service, greater convenience and increased consumer confidence. That all sounds very upbeat, but people tell us that there would be risks to the consumer in smaller towns such as those in my constituency, for example, if supermarkets took over legal services. We have been told that many of the small legal firms that operate in the main streets would be at risk because their more profitable business would go if work such as conveyancing could be done online

or more cheaply at the stores. You have said that there will be some risks to the consumer—what are those risks?

Sarah O'Neill: Yes, there is a risk that access to justice could be decreased, but we do not believe that that will happen. As I have said, we believe that access to justice could be increased by the changes.

It is important to make it clear that we are still talking about solicitors providing legal services. In any licensed legal services provider, the head of legal services will have to be a solicitor, and they will be responsible for all the designated persons within that provider. People will have the same protections that they have at the moment regarding the legal services that are provided, the level to which those services should be provided, the quality of the services and what happens if things go wrong. In this debate, sight is sometimes lost of the fact that we are talking about solicitors providing the services. The only difference is that they will be employed by different entities from those that employ them at the moment.

Cathie Craigie: What is going wrong with legal services just now? Why is there a need for the legislation?

Sarah O'Neill: As I have said, there is insufficient supply in some markets. Some of that is in specific geographical areas, but we also know that there is a dearth of provision in particular areas of law. Access to social welfare law and family law is increasingly an issue in a lot of areas.

Cathie Craigie: Let us move on to governance, which you have touched on. Consumer Focus Scotland's written submission mentions the benefits of increased non-solicitor membership of the council of the Law Society. It wants to see that membership at 50 per cent, but the Government wants it to be around 20 per cent. Do you want to say any more than you have already said on that?

Sarah O'Neill: For us, that is absolutely key. The Scottish Consumer Council argued for that representation for many years, and we think that, if we are going down the road that it is proposed we go down, it is even more important that there is public confidence in the professional body and the regulatory body. We are pleased that the Law Society is moving towards 50 per cent lay representation on its regulatory committee, but we believe that 20 per cent lay representation on its council is insufficient. Given its dual role of promoting the profession's interest and the public interest, we think that there should be 50 per cent lay representation on the council as well.

The Convener: Do you have anything to add, Ms Farmer?

Fiona Farmer: No, I think that I have covered most of those points already.

The Convener: You have indeed. One thing occurred to me, though. Unite is a sizeable trade union and many of your members will ask for advice and assistance. What do you do about legal services for them?

Fiona Farmer: We deploy various firms of solicitors—depending on the region of the country and the nature of the legal query—to give legal advice and to represent our members in court and at tribunals. We also have our own legal department in the union. Normally, the solicitors whom we deploy are specialists in employment law, but that is not necessarily the case.

The Convener: You use them according to specialisation.

Fiona Farmer: Yes.

Nigel Don: Paragraph 27 of Consumer Focus Scotland's submission suggests that the body supports the self-regulation of advocates by the Faculty of Advocates but notes that

"the current governing arrangements could create confusion in the public's mind".

I am sure that that is true, because I am sure that the general public have not the slightest idea how advocates work or even, indeed, what they do.

Paragraph 27 ends by saying:

"However, we do not believe the current provisions within the Bill offer sufficient clarity to allay our fears about the lack of independent oversight of the Faculty."

What you would like to be done to change that?

Sarah O'Neill: Our position is clear. We think that the same arrangements should apply to the Faculty of Advocates as we think should apply to the Law Society. In other words, we think that there should be 50 per cent lay representation on the Faculty of Advocates's council and that there should be a lay chair. We feel that the faculty could be more transparent with regard to how it regulates advocates. Although we welcome the fact that the regulatory arrangements are being put in statute, it is still not entirely clear how they will operate and in what circumstances the Court of Session may delegate the powers to the Lord President and/or the Faculty of Advocates.

Nigel Don: Accepting your point that there is a lack of clarity, I should say that I suspect that there will be a lack of clarity around all of this until we have signed off the finished act.

Are we not in a position to accept that, fundamentally, advocates work for the courts and that, therefore, regulation by the Lord President—no doubt delegated on occasion—provides a pretty good way in which to operate in practice?

Sarah O'Neill: No, because advocates work on behalf of consumers, and it is important that that is recognised in their regulation. Yes, they work for the courts but, ultimately, their clients are consumers, who should be represented in the regulation.

Nigel Don: Do you not feel that, given that advocates respond only to solicitors—with a few exceptions, which we discussed a couple of weeks ago—the solicitors, in a sense, regulate the advocates on behalf of the client? After all, if solicitors are not happy with the service that they get, they know exactly where to complain.

Sarah O'Neill: Solicitors know where to complain, but we are contacted from time to time by consumers who are unhappy with advocates whom they have used and who are not entirely clear about how they make a complaint, what the process is or how any of the issues are governed or regulated. We see this bill as providing an opportunity to open up that process and clarify its operation.

Nigel Don: So is the issue more to do with having a transparent complaints system than it is to do with a regulation system?

Sarah O'Neill: We think that it is about regulation more broadly. We have done a lot of work in the past on complaints, particularly with regard to the solicitor branch of the profession, and we obviously now have the Scottish Legal Complaints Commission, which deals with complaints in both branches of the profession. However, other issues of regulation are also of interest to consumers, such as how advocates and solicitors are educated and trained, what their professional standards are and so on, and it is important that consumers' views should be represented in the governing body.

Robert Brown (Glasgow) (LD): I apologise for being late, convener. I had transport problems this morning.

The Convener: That has been a fairly consistent problem.

Robert Brown: My question relates to professional qualification. To what extent should will-writing services be regulated in Scotland? I am particularly interested in whether Sarah O'Neill has a view on that on behalf of Consumer Focus Scotland.

Sarah O'Neill: We do have a view. We are not aware of a particular issue with will-writing services in Scotland—although we understand that more such services are appearing—as traditionally there has been more of an issue in England. However, we certainly think that, if will writers provide services in Scotland, they should be regulated adequately. It might be okay for people to do it themselves or to use will writers in straightforward circumstances but, unfortunately, people often think that their circumstances are straightforward when in actuality they are not. Our view is that people should take legal advice before they prepare a will but that, as other providers are in the market, adequate protection should be in place for consumers who use them.

Robert Brown: Does that not raise the broader question that I think Fiona Farmer touched on about the balance between the cost of a product and the quality of the service that people get? As I understand from the explanation that we have had about will-writing services, they are do-it-yourself things with no guarantees, no professional indemnity and no legal advice on the implications. As you said, it is a complex area of the law. Are there not significant issues that have implications beyond will writing for other services in which strong professional quality is required?

Sarah O'Neill: We always say that a professional who provides a service should be appropriately qualified to do so, but they do not necessarily have to be a solicitor. For example, with money and housing advice, many non-solicitor advisers are much better informed and more experienced than some solicitors are. The issue depends on what is appropriate for the service that is provided. The legal profession has an opportunity to brand itself and say that people should come to solicitors rather than will writers because solicitors have legal expertise and, actually, do not charge that much for wills.

It is important that people have the information that they need to make an informed choice. They should be clear that solicitors often offer wills as a loss leader, as they hope to get executry business later. People should be aware of that when they consider such services.

Robert Brown: Is it appropriate for a do-it-yourself service for will writing to be available at all? I am thinking about what the exact extent of the regulation should be.

Sarah O'Neill: In general, a do-it-yourself will is probably better than nothing. Our predecessor organisation, the Scottish Consumer Council, carried out research in, I think, 2006, which found that only roughly a third of people have a will. That is a concern, because people have much more complicated family arrangements than in the past. We also asked people about their understanding of succession rights on intestacy. It was clear that many people did not understand what would happen if they died without a will. We urge people to have a will, and preferably to have legal advice, but in general having a will is better than not having one at all.

Robert Brown: Even if it is a bad will?

Sarah O'Neill: Well—a balance is needed.

Robert Brown: Does Unite have a view?

Fiona Farmer: We believe that will writing should be in the domain of the legal profession. It is a service that we offer our members—that is done through direct access to a lawyer and legal services. We do not want such services to be dumbed down, so to speak.

Robert Brown: Can either of the witnesses give examples of similar services that we should have concerns about because of either the complexity or the implications if advice is being given at too low a level?

Fiona Farmer: I do not have any specific examples but, if the bill goes ahead and the market drives the way forward for legal services, specific services will be dumbed down. If the market is opened up, the profitable services will be snapped up, which will be to the detriment of the less trendy legal services.

Cathie Craigie: I have a question for Sarah O'Neill. In evidence to the research working group on the legal services market, Consumer Focus's predecessor organisation—the Scottish Consumer Council—highlighted the areas of wills, trusts and executries and employment law, particularly as it affects employees, as ones that should be prioritised for future work. Do you have any suggestions about how your organisation's policy could be taken forward by improving the bill?

11:15

Sarah O'Neill: The will writer issue came up at a later stage. I understand that the Scottish Government issued a consultation on it just before Christmas, and we have not had time to consider it in any detail. There are other issues about claims management companies and others, but we do not have any evidence that they are a particular issue in Scotland. If there is such evidence, this is an opportunity to look at and include those issues in the bill.

Cathie Craigie: You said that you do not have any evidence to allow you to comment in detail on the issue. Was there any evidence from consumers in particular that the changes that are proposed in the bill are needed? I have asked that question before. Did your organisation consult, or have any involvement with, consumers of legal services?

Sarah O'Neill: No.

The Convener: Ms Farmer and Ms O'Neill, thank you for attending and for giving your evidence so clearly. We are much obliged to you.

11:16

Meeting suspended.

11:24

On resuming—

The Convener: I welcome our third panel—or rather, Gilbert M Anderson, solicitor, who is sitting in splendid isolation. Thank you for coming, Mr Anderson; your presence is much appreciated. We read your submission with interest and will proceed directly to questions.

Bill Butler (Glasgow Anniesland) (Lab): I apologise for arriving late to committee. I had the same travel problems as my colleague Robert Brown had this morning.

Mr Anderson, you will be aware that only about 100 solicitors out of 10,400 responded to the Law Society of Scotland's consultation paper. Does that suggest that solicitors are not unduly troubled by the bill?

Gilbert M Anderson: Good morning, convener, deputy convener and all committee members. I wish you a happy new year. I thank you most sincerely for the opportunity to give evidence this morning.

The short answer to your question, Mr Butler, is that there has been—sadly—a considerable amount of apathy on the part of the legal profession, particularly solicitors. I say that in my submission. Given that everyone is so terribly busy, perhaps the apathy could be said to be mitigatory or justified. However, the bill has the potential to have a massive impact on all the people of Scotland. I am therefore personally disappointed by the profession's response to the consultation. Of course, it is not too late to do something about that.

Bill Butler: Yes, it is never too late. I accept that you are personally disappointed at the level of response. Did solicitors have sufficient opportunities to contribute to the development of the bill or were they simply too busy to respond? If the legal profession understood the unintended consequences and dangers of the bill, would its support for the bill be less overwhelming than it appears? When the Law Society of Scotland gave evidence, we heard that large firms were

"very strongly in favour of the proposals and the rest of the profession was essentially neutral."—[*Official Report*, *Justice Committee*, 15 December 2009; c 2482.]

Is the position of the majority of the profession dangerously misguided?

Gilbert Anderson: Absolutely, particularly given that we have now had greater publicity about the bill. I accept entirely your point about the number of responses to the consultation. When the Law

Society of Scotland first issued its consultation paper—I think it was in October or November 2007—it sought responses by the end of January 2008. As dean of the Royal Faculty of Procurators in Glasgow, I was keen to be seen not to be taking a view on the bill but to be trying to stimulate informed and responsible debate on the hugely important issues that are involved.

In January 2008, we managed to organise a seminar on the bill about a week to 10 days prior to the deadline for responses. Before the seminar, I understand that the number of responses could be counted on the fingers of both hands. The seminar was very well attended by participants from across the spectrum of practitioners, including the Faculty of Advocates, large commercial firms and Govan Law Centre. We had an excellent debate. Although I have never seen the breakdown of the responses, in the short period of time after the debate, I am pretty certain that 92 or 94 responses were generated.

I return to the question. As the committee heard in evidence from the Scottish Law Agents Society, there is now a much wider appreciation of the issues that are involved.

As I think I say in my submission, the real push for ABSs in Scotland came from the large firms. That is acknowledged by the Law Society. The policy paper was approved at the Law Society annual general meeting in May 2008—on which I note that evidence has already been given—but, as I see it, that approval was, essentially, obtained via the large firms.

11:30

Bill Butler: Are you saying that the large firms exerted a disproportionate influence and that the real matters of concern were put to one side? Although attendance at the AGM was low, the proxy votes were there in the hands of the large firms. Is it fair to say that that is your view?

Gilbert Anderson: That is a fair comment. I read the evidence to the committee prior to Christmas and noted what Ian Smart said about the turnout. There was an attempt to get a breakdown of the proxy votes, but that evidence did not materialise. I seconded an amendment to the Law Society's motion at the meeting. Unfortunately, I have been unable to get the official figures from the Law Society—I inquired about that earlier this morning. To put matters into perspective, the vote in the hall was 49 to 18, which reflects the number of people who attended. The proxy vote was 801 to 132, but by my reckoning around 600 votes may have come from four firms. Although that does not excuse apathy on the part of the silent majority, it clearly illustrates that the vote was pushed through by the large firms.

Bill Butler: You are saying that the vote was organised in such a way that the volte face by the Law Society was not due to the argument becoming clearer and changing people's minds; the reason was simply organisation. In other words, the votes were gathered, the proxies were used and—

Gilbert Anderson: I have no evidence to substantiate that.

Bill Butler: Do you suspect, though, that that might have been the case?

Gilbert Anderson: I do not. I would not put it that way at all. As someone once said, one vote is enough.

Bill Butler: It was Churchill.

Gilbert Anderson: Indeed. I am not suggesting that there was any underhand collusion or anything like that.

Bill Butler: Neither am I; I am suggesting only organisation. That is never underhand—it is just organisation. However, I take your point, Mr Anderson. I do not want to press you further on that.

The Convener: You said that of those present at the AGM there was a majority of 49 to 18. Is that the case?

Gilbert Anderson: That is certainly what I noted.

The Convener: So even allowing for the organisational abilities of some concerned, there was still a majority.

Gilbert Anderson: What I do not know, because I have never been able to check, is the breakdown of those who attended: how many were from large firms and how many represented firms from right across Scotland. However, that information should be available to the committee; I cannot believe that it would not be.

The Convener: We turn to the issue of independence.

James Kelly: Mr Anderson, your submission says that there will be "dire consequences" if legal services are opened up to unqualified persons who would provide a "low cost substitute". It is obvious that you have serious reservations about the bill, but the view has been put to us in a number of our evidence-taking sessions that the bill provides an opportunity to open up legal services to provide a greater range of services and therefore to drive down costs. Might not the bill result in better and lower-cost services for the consumer?

Gilbert Anderson: My whole approach in my submission is about the consumer and the public interest. My whole approach as a professional is to serve the public and constantly to seek ways to improve the quality of services for those consumers—if you like—who use them. The key issue or challenge for all of us in Scotland is to improve the quality of the legal services that are provided and the access to justice through high-quality legal services. I am not in favour of diluting the quality of services, and I have serious misgivings that that will happen if we open up or liberalise—whatever word one might use—the market. We can have a market for anything, I suppose.

At the heart of my concern—it is a very grave concern—is the fact that the legal profession is unlike any other profession. Just as it is essential for a free democratic society that subscribes to the rule of law to have, in the public interest, a clear divide between the judiciary and Government, it is equally important, I believe, that we have a genuinely and truly independent legal profession. My reason for saying that is that judges do not come from just anywhere; we are all part of the same profession. The legal profession consists of judges and practitioners: judges obviously include senators of the College of Justice, sheriffs and lay magistrates; practitioners include members of the bar—members of the Faculty of Advocates—solicitors and solicitor-advocates. We are all part of the same family. We are all officers of the court. When we speak about the need for an independent judiciary, it seems to me to follow—as night follows day—that equally we need a strong, robust, independent legal profession.

The relationship between a lawyer and his client is a unique relationship that does not exist in other professions. Only that relationship confers on the client the right to legal professional privilege, which one should remember is a right that belongs to the client rather than to the lawyer. That is a fundamental right of the client. I have severe concerns about where it might lead us if we start to dilute that right. We might not see the signs or know where that might take us—the outcome may be unforeseen at the moment—but that would be the start of a slippery slide.

My other major concern about the lack of independence is about the need for a strong, highly qualified, disciplined and educated legal profession. There is a danger in allowing what the bill terms "designated persons" to come into the market to provide legal services without any requirement for training. As I read the bill, I cannot see any provision that would require designated legal services providers to undergo strict training, or indeed any training. All that seems to be required is a head of legal services or a head of legal practice, and everything will be all right. That head could be responsible for 100 providers, but nothing in the bill requires those designated providers to undergo strict training, or indeed any training. That is a massive and obvious concern.

James Kelly: You are saying that opening up the market in such a way and allowing in people who do not, in your view, have the appropriate training will lead to a decline in the service that is given to the public. Can you give more details about what led you to that conclusion? Obviously, you think that people who are currently qualified to practise law provide particular services and that opening up the market in such a way will let in people who might not have the same expertise and might not be able to give the same advice. Will you elaborate on that?

Gilbert Anderson: I will do my best.

Let us take a simple element of a transaction—a conveyancing transaction is the obvious example. If providers of legal services do a particular bit of the transaction—it may be the title aspect—and they are not qualified, they will not be in a position to give the client additional protection in respect of the consequences of entering into the transaction. There are grave dangers in simply doing the mechanical bit of a transaction in isolation. If the person who does the mechanical bit—I am using a basic expression—does not understand the law of insolvency, the law of contract and all the other qualifications, the consumer or the public may be completely ignorant about the dangers and the tightropes that may be being walked in blissful ignorance. Someone who has a full professional qualification can give an all-embracing service and be attentive to the comprehensive needs of the client. Does that answer your question?

James Kelly: Yes, it does. Thanks.

You have elaborated on the importance of the independence of the legal profession. Some have suggested that one way of addressing concerns about the bill is to give the Lord President an enhanced role. Would that address your concerns in any way?

Gilbert Anderson: I have recently thought further about regulation, and what I am about to say is germane to your question. The short answer to the question is yes. I believe that the legal profession and other professions exist to serve the public, and that, in the main, the legal profession ought to be self-regulating, pretty well along the lines of the Faculty of Advocates. However, because the law embraces every aspect of life, I fully accept that there should be lay participation in regulation from across the spectrum of society, although such participation should not be in the majority. For example, all the rules of conduct that are passed or recommended by the council of the Law Society of Scotland require the Lord

President's approval, for obvious reasons. The short answer to your question is undoubtedly in the affirmative.

James Kelly: Okay.

Finally, in your written submission and in the evidence that you have given today, you have outlined your serious concerns about the bill. Can those concerns be addressed at stage 2 or are your disagreements with the proposals more fundamental? Do you think that the bill is not fit for purpose?

11:45

Gilbert Anderson: I made the point in my submission that it is always easy to be negative, whatever the subject. I would like to think that I am not that type of person, by nature. I recall from the policy memorandum that a stated objective of the bill is to allow for external investment so that there can be innovation and growth. I would have no difficulty with anything that improved the legal profession in Scotland to make it compete more effectively internationally, as long as it did not detract from practices being fundamentally law firms, be they partnerships, sole traders, limited liability partnerships or incorporated practices.

I could be persuaded to support minority investment that would help to improve the management of practices, for example through more effective utilisation of technology—we live in a technological world—or perhaps through something that was incidental to a practice's main work. I would have no difficulty with such minority investment, provided that the nature of the beast did not change—in other words, that the entity was and always would be a law firm. Such an approach would avoid the pitfalls of and enormous problems to do with conflictory regulatory matters and, much more fundamental, would overcome the serious problem in relation to the client's right to legal privilege. In other words, the firm would be a firm of lawyers, even though someone who was not a lawyer had a stake in the business and was doing work that was incidental to the law firm's work, so all the rules that concern legal professional privilege would stick to the firm.

Robert Brown: You made a considerable plea about the importance of professional qualifications and standards. To what extent will conflict of interest be an issue in situations in which there is greater facility for involvement with accountants, surveyors, mediation experts and so on?

Gilbert Anderson: Common sense suggests that there must be increased potential for conflict of interest if more professionals are involved in a situation and are providing a variety of services to clients. That is a concern, because the avoidance of conflict of interest is a core value of our profession.

Robert Brown: Conflict of interest is already an issue for the legal profession, for example when a solicitor acts for a buyer and for a seller, providing conveyancing services for one and estate agency services for the other. I suppose that there are also issues to do with the single surveys that we now have. Such matters are dealt with under existing rules of practice; can they be dealt with in the wider context that is proposed, through regulatory rules that will be easy to understand and to enforce?

Gilbert Anderson: The short answer is that I do not know. I will not know until there has been informed debate among the various professions, who have different professional codes. The issue is another example of a difficulty that would not arise if we did not go down the route of having MDPs.

Robert Brown: I have a question about language. We normally talk about solicitors and clients, but the bill talks much more about consumers. What distinction do you, as a legal professional, perceive there to be between "client" and "consumer"?

Gilbert Anderson: I think that the two terms are synonymous in the context of the relationship between the lawyer and his client. The word "client" pops up everywhere, and I have noticed that insurance companies seem to talk about customers nowadays—I always thought they were policyholders. It is semantics. I do not think that there is a difference between the terms; if a consumer is receiving legal advice from a lawyer, he or she is a client.

The Convener: You expressed the view, which I know is held unanimously around the table, that there must be a certain level of professionalism and expertise in Scots law. You highlighted the fact—no doubt for the simple-minded, such as me—that the obvious way in which most people will have contact with solicitors is through conveyancing transactions. You went on to say that the technicalities that attach to a search on a title require it to be carried out by someone with the appropriate legal qualification. In my limited experience in that respect, a great many jobs of that type are carried out by a paralegal, or by someone who is not legally qualified—subject to the transaction being signed off by a partner, of course. Is that not the case?

Gilbert Anderson: I was trying to say that the title aspect of the transaction is an awful lot less complex now than it used to be. However, there is an issue around just leaving that to a paralegal, to use your word, without adequate supervision, which would be provided in the case of a firm of

solicitors whose future livelihood depends on their reputation and on their not making mistakes. A wider knowledge is required of the ramifications of not registering the title, for example, or of not concluding the contract leading to the title. I am old enough to remember when all the work on conveyancing transactions was done on the title, and missives were concluded in a day or two. Now, the real work—often difficult work—tends to lie in concluding the contract. To divorce one bit of the process from the other would lead to danger.

I have no difficulty with firms where solicitors properly supervise a paralegal, who has undertaken a proper course, and who is subject to day-to-day supervision. I do have a difficulty, however, with the fact that, according to the bill as I read it, it would be possible for anyone—there could be many similar people in the one licensed legal services provider—to do that bit of the transaction, perhaps with just one lawyer involved, and they might not even be in the same building. There are obvious, grave concerns about that—it is of concern to me and, I am sure, to everyone around the table.

The Convener: But the client would have a remedy.

Gilbert Anderson: That is another question. The client would certainly have a remedy against a firm of solicitors, as the standard of care would be that of the ordinary, competent solicitor acting with reasonable care. One of the questions that I raise in my written submission is: what standard of care is incumbent on a licensed provider? I do not know.

The Convener: That is a matter that we might pursue to our potential advantage with the minister.

We will now pass on to the matter of outside ownership, with a question from Cathie Craigie.

Cathie Craigie: With your permission, convener, before we move on to that, I wish to raise an issue arising from Mr Anderson's submission.

The Convener: Yes, please do.

Cathie Craigie: Good morning, Mr Anderson. I take your submission very seriously, given your 34 years' experience as a practising solicitor. In paragraph 16, you make a point about Lord Gill's proposals. You cite the "urgent need" to enact his recommendations, in particular on conducting

"a thorough review of the funding of dispute resolution."

You suggest that, until we move forward with some of the Gill recommendations, the bill should be put on hold. Could you say a wee bit more about why you make that suggestion?

Gilbert Anderson: Thank you for the opportunity to say more; this is a very important point. As I might have mentioned in my earlier comments, the big issue in this debate is access to justice. I believe that we can improve the efficiency and effectiveness of the civil courts structure without massive expense but, as Lord Gill acknowledged, there is little point in doing that if it is only those at the margins of society who can use the system effectively—those who quite properly qualify for legal aid and those at the other extreme who do not require such aid. I refer to the super-rich, if I may use that phrase. In such a situation, the 98 per cent of us in the middle will struggle.

Lord Gill focused on the area of the law that deals with dispute resolution. There is a fundamental need to create something that was mentioned this morning in another context—a level playing field. Equality of arms is a phrase that I have often used. When people who are in dispute require advice, each side should be able to access a lawyer of their choice to get the meaningful, professional advice that solicitors and advocates provide.

Because of the lack of time and resource, and given the fundamental importance of the issue, Lord Gill strongly recommended that the Government set up as a matter of urgency a working group or perhaps a civil justice council to address the issue quickly. As I am sure that many of you around the table know, in the past year or so there has been a massive, root-and-branch review of litigation costs in England and Wales, which is a different environment to the one in Scotland. It would be interesting to see what comes out of that before we start—forgive me—dabbling and seeking to make fundamental changes to the very fabric or framework within which legal services are provided. It seems to me that we are putting the cart before the horse.

The past two years have probably seen the biggest amounts of work ever in relation to the civil courts structure in Scotland, and we must consider the way in which legal services will be delivered under the bill. To my mind, those two areas alone have the potential to make the biggest change in our legal system and legal profession for 100 years. We must consider the huge amount of work that was done by the Gill review, which had 23 people involved in it, and the detail in the report, which is 500 or 600 pages long.

Incidentally, I understand that the Parliament debated the report within a week or so of its publication. Given that it took Lord Gill and his colleagues a couple of years to compile it—I have not got to all the issues in the report—I cannot believe that there could have been a meaningful debate.

The Convener: You seriously underestimate our capacity to absorb evidence. [*Laughter.*]

Gilbert Anderson: I am sure that I do, so please forgive me, but it seems to me that a reasonable amount of time should be taken to study the report, have a balanced view of it and see what can be implemented now, before we rush off and make changes that I believe, as I state in my submission, could have a deleterious impact on our legal system. I have grave concerns about what will happen if we rush into making changes. I think that I used the word "sleepwalking" during the Law Society debate, and I believe that there has already been an element of sleepwalking. Maybe we need a good dose of insomnia to wake us all up. Perhaps the current debate will do that. As I think Mr Butler said, it would be better late than never.

The Gill review touches on welfare law. I heard questions this morning about those areas of the law that places such as Govan Law Centre can deal with. Those are hugely important areas. How can we resolve disputes proportionately? How can we have specialist advice available to help needy people? Lord Gill has some suggestions, including the concept of a district judge for cases involving sums up to £5,000. I urge the Justice Committee and the Parliament to digest Gill before rushing off and making other fundamental changes, because I have grave concerns about where that might take us.

12:00

Cathie Craigie: Thank you for that response. Contrary to what the convener might have implied, many of us who took part in the debate on Lord Gill's report in the chamber admitted to not having got much further—if even that far—than the executive summary of the report. Members from all parties admitted that, including—I think—the minister. I sympathise with your point.

I do not know whether you were a member of the research working group on competition. It made a number of recommendations, with which I assume you are familiar. Again, should we have taken note of the experience of the professionals in the working group before rushing to legislate?

Gilbert Anderson: I was not involved in the working group, so it would be wrong of me to read too much into what it said. I reiterate the point that I hope I made clear in my introductory comments, which is that the legal profession is different. I think that the public interest in that regard outweighs what might be seen as the competition interest. However, I would need to know more about the particular point that you have highlighted.

Cathie Craigie: As I understand it, the research working group made a number of recommendations for small changes. One of its main recommendations was that there should be further research before introducing legislation, but we have moved more quickly.

Gilbert Anderson: It would be sensible to do further research. Ultimately we must make decisions—we cannot go on researching forever—but when dealing with the kind of issues that we are dealing with today, any meaningful research is worth while. I believe that the only way in which we can test issues is to take an extreme example. One of my concerns is about the extreme example in the Law Society's policy paper, which was an excellent paper in many ways, with a wonderful analysis of various models. However, the extreme example was that of a law firm that was owned and therefore controlled by non-lawyers. What was passed at the Law Society's AGM was that there was no objection to any of the models, including the extreme one, provided the core values of the legal profession were preserved. That just did not add up for me, because at the top of the list of core values is independence. If a law firm is owned and controlled by someone else, it cannot be independent, even on a commonsense basis.

The Convener: We need to move on now.

Cathie Craigie: We discussed this issue briefly earlier. Your submission suggests that a fallback, compromise position would be that there could be minority investment by non-lawyers in a law firm, up to a maximum of 25 per cent. How would that work in practice? Would it protect the public by preventing big companies and organisations from down south from swallowing up smaller firms that provide legal services in our small towns and communities?

Gilbert Anderson: That is an important point. I think that the protection would be that there would be only minority investment, which would mean that there could not be a special resolution to wind up a business, for example. There would be legal protections, but they would not prevent one of the objectives of the policy memorandum, which is to try to get further investment in law firms in Scotland to enable them to compete better in the international marketplace. I would say amen to that—I am very happy with that.

The point that I was trying to make earlier is that all the difficulties that we have with conflicting regulatory codes would fly off with my model. We would not have that difficulty, because, in effect, the practice would still be a law firm. We could achieve the further investment to innovate and be more competitive—we are seeking in particular to attract international dispute resolution to Scotland—but we would still be a law firm.

Therefore, the problems that I have highlighted with legal professional privilege would not arise.

Cathie Craigie: You might have heard the evidence that we took earlier from the Institute of Chartered Accountants of Scotland. Its regulatory framework allows non-members up to a 50 per cent stake. Do you have any comments on that?

Gilbert Anderson: Without going into all the legal reasons for it, I believe that the right figure is 25 per cent, to avoid the winding up of the business.

Cathie Craigie: The convener touched on this issue earlier. Should paralegals be permitted to be part-owners of law firms?

Gilbert Anderson: That is not something that I had in mind. In our firm we have a chartered accountant who is involved in management—it is almost a chief executive role. I will have to be careful what I say here, but I could envisage that kind of model, which would involve someone with a professional ability who might be able to take a stake in and help the development of the business. However the nature of the business would not change from being a law firm. I do not think that a paralegal would fall into that category. However, I have not given that great thought. My firm does a lot of work on reparation, invariably through insurers. A service that is incidental to insurance and which would be incidental to the work that our firm does, such as loss adjusting, could be another example. I am sure that other practices could come up with many other examples.

Cathie Craigie: I will move on swiftly, because I am conscious that the clock is ticking. I do not want to get on the wrong side of the convener on our first day back in 2010.

The Law Society gave evidence to the committee on 15 December. It suggested that if the bill is not enacted, big Scottish legal firms could choose to be regulated in England and Wales under the Legal Services Act 2007 and that English firms could take over Scottish firms using external capital. You talk about that in your submission. How would you respond to the concerns that the Law Society has raised?

Gilbert Anderson: I read that evidence and I saw Ian Smart's comments—I think that Professor Alan Paterson made the same comments—and I must say that they puzzled me. Let us take the example of a large Scottish firm, such as one of the big four firms—let us not mention names—whose roots and fundamental client base are in Scotland but which has opened elsewhere and has sought to compete in the English market with so-called magic circle firms. There is nothing to stop those Scottish firms setting up down south or electing to be regulated under the 2007 act, which governs England and Wales but, to be blunt—and as I believe I say in my submission—I cannot see such firms upping sticks and moving south. What would be the point? If they wanted to compete in that area, that would be wonderful—after all, we have some wonderful Scottish firms—and no one would stop them from doing so. They can choose to be regulated down south for that bit of their business. I have to say though that, for the reasons that I have given in my submission, I disagree with the suggestion that that will happen.

I am concerned, however, that a much greater danger of introducing ABSs in Scotland is that some of the very large organisations down south might come and, as I have heard people say, just hoover up. Indeed, as someone said earlier, they might well focus on profitable areas; commoditise—another word that I have heard regularly—the way in which work is carried out; reduce costs; and start to use English terms and conditions. Before we know it, Scots law will be on a slippery slide.

Cathie Craigie: In your submission and in your evidence this morning, you have highlighted the importance of the public interest, public access to justice and the independence of legal services providers. Will the public interest be well served if the bill is enacted in its current form?

Gilbert Anderson: Unequivocally no, and I hope that I have made that clear in my submission. Independence will be lost; quality of service will be diluted; and there is a risk that Scots law might be diminished. Moreover, the opportunity of attracting work to these shores, which is a laudable aim, will be lessened if we damage our system's integrity and independence. I feel very strongly about that.

Angela Constance (Livingston) (SNP): You have touched on a number of issues and concerns about multidisciplinary practices. In light of your comment that in the context of regulating such practices the bill "creates considerable uncertainty" with regard to the principle of legal professional privilege, do you feel that the bill provides a satisfactory framework for dealing with different codes of practice and professional codes of conduct?

Gilbert Anderson: I believe that many, many difficulties will arise; I have heard it said that they can be resolved, but I cannot really say until I see precise examples of the specific conflicts in question. The conflicting regulatory codes are a bit of a jungle and, indeed, another reason why going down this route is not in the public interest.

A lot of time is spent on coming up with these codes, but the fact is that the Scottish legal system is based on principle. To my simple mind, solutions should arise from applying the principle

to the circumstances; we should not try to find solutions for every set of different circumstances that might arise. This is simply an unnecessary attempt to resolve things that we might well not be able to resolve unless we allow for the compromise model that I have suggested. I am not saying that the model itself is a panacea, but I believe that it is a genuine attempt to find a way forward and encourage further investment without compromising independence or getting involved with conflictory disciplinary codes.

12:15

Angela Constance: Is there anything that could be learned from other professionals? Members of many other professional groups have to work with one another to do their job. I speak as a former social worker who had to work with medical practitioners on a daily basis. There was a conflict in the code of conduct, particularly when it came to child protection versus patient confidentiality, but that could be addressed and overcome. It might be unfair to ask you, but is it the case that the issue is insurmountable? Are there not things that could be learned from elsewhere?

Gilbert Anderson: At the risk of repeating myself, all kinds of professionals have duties of confidentiality. Only lawyers have legal professional privilege—that is what makes them different.

How do we resolve the existence of different codes? Lawyers work with different professions day and daily, but we do so on an arm's-length basis because, ultimately, even a solicitor who does conveyancing work—that sounds terrible—is still an officer of the court. That is what makes us different from other professionals. It would be a massive task to resolve the conflicts that exist in the various codes of conduct for different professions. In my humble opinion, if getting into relationships with other professional bodies would cloud or weaken the client's right to legal professional privilege, that is a no-go area.

Robert Brown: I revert to the issue of will writing, which I raised with the first panel. You have emphasised the importance of professional services. What are the dangers of allowing execution-only legal services to be provided by non-lawyers in areas such as will writing?

Gilbert Anderson: I am very conscious of time; the short answer is that the Scottish Law Agents Society's submission covered that extremely well, in graphic detail. Will writing is another illustration of an area in which, to take an oversimplified view of matters, if a mistake is made, a mess is created; when someone is dead, they do not have a second bite at the cherry, to the best of my knowledge and belief—

The Convener: Not without overturning a degree of precedent.

Gilbert Anderson: Indeed. Will writing is an excellent example of an area in which a simple mistake can have huge consequences. Earlier, someone—I am sorry, but I cannot remember who—raised the issue of whether it was better to have a duff will than no will at all. I thought, "I am not so sure that it is." It might be better to have the law of intestate succession.

Will writing is a highly specialised area of work. Wills that are mass produced and available on the internet contain disclaimers, either in bold or in print that cannot be read. The submission from the Scottish Law Agents Society made the point that some of the documents that are available refer to the law of England. That is a nightmare, and the public deserve better. People should not be allowed to do that. I do not mean to suggest that anyone who drafts a will and who is not a lawyer is no good, but I return to the point about there being a duty of care. If a lawyer writes a will and makes a mistake, the public have protection.

Robert Brown: I was surprised to find that a relatively small number of areas of work are reserved specifically to solicitors or to lawyers in general. Does that need closer examination?

Gilbert Anderson: You are referring to the drafting of writs in court. There has been discussion of advocacy and McKenzie friends. Only a solicitor is allowed to do work such as registration for property writs, writs in court, petitions for confirmation and inventories. It is an offence to do something that only a solicitor is allowed to do, and perhaps wills should be added to that list, for the obvious reasons that we have discussed.

Robert Brown: My point is that that is a relatively small section of the total corpus of legal work.

Gilbert Anderson: Yes, but it covers a huge amount of legal work. If court writs and property transactions are covered, I would be in favour of adding will writing to the list. I do not see a problem with that at all; I think that it would be in the public interest so to do. Therein was the problem with the Which? super-complaint—why should lawyers have a monopoly on that work? Why do brain surgeons have a monopoly on brain surgery? I rest my case.

The Convener: We will have a final question from Nigel Don.

Nigel Don: Paragraph 12 of your submission is about the rule of law—an issue of statute that has concerned me for a while. As drafted, section 1(a) states the objective of

"supporting the constitutional principle of the rule of law".

As we are well aware, that is an extended principle that could run to several chapters. In paragraph 12 of your submission, you give us a formulation that I do not want to discuss here. Would you like to see some such formulation in the bill, or do you feel that the rule of law is sufficiently well understood that section 1(a) is okay as it stands?

Gilbert Anderson: Is it well understood by the public at large? Education about our constitution and the law generally is a massive issue, and I would encourage such education even at primary school. I think that lawyers know what we mean, but, for all that I know, people could be at cross-purposes when they talk about the rule of law. I do not think that it would be a bad thing to have a formulation, but the key to that would be an independent legal profession.

Nigel Don: I guess that the only people who interpret statutes are lawyers at the sharp end.

Gilbert Anderson: Yes.

Nigel Don: As long as lawyers know what it means, that is fine. What bothers me is that it means several different things, as you have suggested. I wonder whether it would be worth enshrining the principle at some point. Should we be thinking about what we should enshrine?

Gilbert Anderson: The wording in my submission was my attempt at a formulation—on a Sunday night, I think—in my response to the committee. I repeat that I am grateful for the opportunity to give evidence. However, as I have said, many erudite scholars have written many volumes on the doctrine. Enshrining it may not be a bad thing. My view is that it is more an issue about the wider education that is required to enable citizens to understand why we need an independent legal profession.

Cathie Craigie: Convener, may I ask one further question?

The Convener: Briefly.

Cathie Craigie: Paragraph 25 of Mr Anderson's submission is about professional privilege. It raises the concern that the bill would create "considerable uncertainty", pointing out that such uncertainty does not exist in an independent law firm that is owned solely or in major part by lawyers. That is an important point, which has alerted me to that area. Can you say a wee bit more on it?

Gilbert Anderson: If I speak to a lawyer about something very important, the lawyer must take that to the grave unless he or she is ordered by a court to do otherwise. In my view, anything that dilutes the fundamental right to that legal professional privilege is not in the public interest. I have tried to illustrate the point with an example rather than simply talk about the theory.

Let us suppose that, in a multidisciplinary practice, two out of 20 professionals—or two out of 12, or whatever—are lawyers. If a client goes to see someone who is a partner in the business, but not a lawyer, about a legal issue and says something that is of immense importance and which might be prejudicial to them if it came out in subsequent litigation, can they insist on the right to legal professional privilege? I have asked that question a number of times, and there is severe doubt. Why create doubt about such a fundamental right? That is another argument against MDPs.

The Convener: The issue can be raised with the minister. We are grateful to you for giving up your morning to come here. Your attendance is greatly appreciated and we have thoroughly enjoyed your contribution.

12:25

Meeting continued in private until 13:44.

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