JUSTICE COMMITTEE

Tuesday 12 January 2010

Session 3

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CONTENTS

Tuesday 12 January 2010

JUSTICE COMMITTEE
2nd 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:

Fergus Ewing (Minister for Community Safety)
Andrew Mackenzie (Scottish Government Constitution, Law and Courts Directorate)
Colin McKay (Scottish Government Constitution, Law and Courts Directorate)

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 12 January 2010

[THE CONVENER *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I formally open the meeting with the usual reminder for everyone to switch off mobile phones. Item 1 relates to a decision on whether to take in private the committee's consideration of an options paper and then of a draft stage 1 report on the Legal Services (Scotland) Bill at future meetings. Do members agree to take those items in private?

Members *indicated agreement*.

Legal Services (Scotland) Bill: Stage 1

10:01

The Convener: Item 2 also relates to the Legal Services (Scotland) Bill and is the main item of business this morning. I welcome Fergus Ewing, the Minister for Community Safety; Colin McKay, the deputy director of the legal system division of the Scottish Government; Andrew Mackenzie, the bill team leader; and Leigh-Anne Clarke, a principal legal officer with the Scottish Government. Good morning, Mr Ewing. I invite you to make an opening statement.

The Minister for Community Safety (Fergus Ewing): Good morning, convener and committee members. I begin by declaring that I am a Scottish solicitor, but I am not in practice.

At the heart of the bill is the removal of the current restrictions on how solicitors can organise their businesses. The bill will allow solicitors to form partnerships with non-solicitors, to create businesses offering a range of legal and non-legal services and to seek investment from outside the profession. However, the bill is enabling rather than prescriptive; therefore, traditional business models will remain an option.

As the committee has heard over the past month or so, there have been demands from within the legal profession for the flexibility that the new business structures will allow. After extensive consultation and debate, the profession voted overwhelmingly in favour of alternative business structures at the Law Society of Scotland's annual general meeting in 2008. The view that was taken by the majority of the profession who voted was that those structures would make it possible for law firms to develop new ways to deliver more effective and efficient services in the interests of their clients and the continued success of the Scottish legal system. Furthermore, our public consultation found a majority in favour of the reforms.

Solicitors in England and Wales will soon be able to operate in alternative business structures and access external investment under the Legal Services Act 2007. That will put Scottish firms at a competitive disadvantage and will threaten the long-term sustainability of the Scottish legal profession unless Scottish firms are able to operate on a level playing field.

The bill will create a tiered regulatory framework in which the Scottish Government will be responsible for approving and licensing regulators that, in turn, will regulate licensed legal services providers. The bill also includes measures to

reflect changes in the governance of the Law Society of Scotland; statutory codification of the framework for the regulation of the Faculty of Advocates; provisions to enable the Scottish Legal Aid Board to monitor the availability and accessibility of legal services; and provisions to allow non-lawyers to apply for rights to obtain confirmation to the estates of deceased persons.

I am aware, however, that not everyone shares the view that the bill will have a positive impact. Over the past month, I have met some of those who have expressed reservations about the proposed reforms and have listened to the evidence that has been given to the committee, and I have found those meetings very helpful. Although I believe that some of the concerns that have been expressed are unfounded, I fully understand why the proposed changes have provoked apprehension and why there is concern about preserving access to justice as well as the effectiveness and independence of the Scottish legal profession. Indeed, the very first section of the bill emphasises the importance that we attach to those matters. However, if there are suggestions as to how we can strengthen that commitment still further without undermining the aims of the bill, we will consider them extremely carefully.

Third-party ownership is understandably viewed with some trepidation. Some believe that allowing non-solicitors to own a stake in legal firms is a threat to the independence of the legal profession and the core principles that have been at the heart of the practice of law in Scotland for centuries. We have spent considerable time developing safeguards against those potential threats, such as the introduction of regulatory objectives in section 1, as I mentioned, and professional principles in section 2, and robust provision has been made to ensure that only fit and proper persons are allowed to own firms that provide legal services. It has also been suggested that outside ownership could threaten Scots law by allowing those with little knowledge or understanding of our legal system to become involved in it. I repeat that the continuation of a strong, independent Scottish legal system is something that the Scottish Government supports strongly, and the bill does not jeopardise that.

In most areas of legal work, including conveyancing, litigation, succession and family law, anyone who wishes to offer a legal service in Scotland will need to do so using Scots law. There are, of course, areas such as commercial work in which there is a choice of jurisdiction to a degree. However, in those areas, Scottish solicitors already face competition from English firms and, potentially, from new entrants licensed under the legislation in England and Wales. Widening the options for Scottish law firms is the best way to ensure that they remain independent and able to compete effectively.

Some have questioned the level of support for the reforms from the legal profession and have suggested that changes are simply being imposed from above. With respect, that is not the case. Despite some points that have been raised in previous evidence-taking sessions, support for the proposals was expressed by the Law Society's membership in a vote that took place in accordance with its established democratic processes. In addition, we remain keen to have constructive discussions with those who might have concerns about the bill, as I have done recently.

A few questions have been raised about the training and qualifications that are required by those who provide legal services, with suggestions that the bill will allow unqualified individuals to practise law. I stress that the bill makes no changes to the areas of work that are reserved to solicitors under the Solicitors (Scotland) Act 1980. As regards non-solicitor employees of legal practices, such as paralegals, the present position is that they are able to work in those reserved areas under section 32 of the 1980 act. The bill simply provides that such individuals will be able to do so in the new entities as designated persons. A further safeguard in the bill is the requirement for a head of legal services. He or she must be a solicitor and is to manage designated persons with a view to ensuring that they comply with the regulatory objectives and professional principles.

A final point that has been put to me is that increased competition from large firms entering the legal services market will put small and rural firms out of business. As a former self-employed solicitor and partner in a small business, I can definitely understand that fear, particularly in the current economic climate. However, I can also see the opportunities that the bill presents for such firms. Where small practices might struggle to survive in towns and rural areas, a one-stop shop offering a variety of professional services might present a solution that allows lower overheads and the combination of business experience and expertise. That could give small professional practices, whether legal or not, an opportunity to flourish and continue to provide key services in communities throughout Scotland.

As the committee might be aware, we are considering introducing to the bill a number of areas at stage 2. In brief, those are McKenzie friends, which have been the subject of much discussion and debate in recent months; possible amendments to rights of audience in the supreme courts, subject to the recommendations of the on-going Thomson review; various technical amendments to the 1980 act; and the regulation of

will writers. We are consulting on that last point, but we are extremely sympathetic to the view that non-solicitors who are involved in preparing wills should be regulated.

I am more than happy to expand on any point that I have mentioned. To the best of my ability, together with my officials, I will answer the committee's questions on the bill in general.

The Convener: Thank you for your useful introduction. I certainly do not think that we want to do anything about rights of audience until the Thomson report, which follows the outcome of the Woodside appeal, is received.

I will open the questioning. You referred to the evidence that the committee has taken in the past few weeks, which suggests that the legal profession is—shall we say—lukewarm towards, although generally in favour of, the proposed reforms. There is little evidence that consumers of legal services demand alternative business structures. What has driven the case for reform?

Fergus Ewing: Several factors have driven the case for reform. The committee is aware of the history, which is fully canvassed in the policy memorandum to the bill. In England, the Clementi review was undertaken, the Office of Fair Trading was involved through the super-complaint and the Legal Services Bill was introduced. In Scotland, a debate has taken place in the profession—in the Law Society of Scotland. Accompanied by other witnesses on 15 December, Ian Smart—the Law Society's president—described that debate and the process in which the Law Society is engaged. No one has suggested that that process has been other than inclusive and extensive; it has involved consultation at just about every stage.

You are right to say that there is no groundswell of overwhelming acclamation and support for the bill among all 10,000 or so solicitors in Scotland, but one would not expect that, because the bill will not in all likelihood affect every solicitor. In his evidence, Ian Smart suggested that solicitors are divided into three broad groups: employees of local authorities, companies and other organisations; those who are in large firms; and those who are in small and medium-sized firms. It is plain that the main opportunities that the bill will provide—certainly financially—will probably rest with large firms, so one sees immediately that one third of the profession is most obviously in a position to benefit from the reforms.

The circumstances of the Law Society's mandate to support the reforms—the overwhelming majority of members who voted supported them—were canvassed at length by Ian Smart, Michael Clancy, Lorna Jack and Katie Hay, who were the Law Society's witnesses. I read their evidence, which was convincing. One might argue that the proxy votes that were cast when the vote was carried by 801 to 132 were largely from large firms but, even if the large firms' votes were discounted, one would still be left with a substantial majority, which, as a proportion, I might be so bold as to suggest many MSPs might be happy to possess.

Criticisms can be made and I am fully aware of the points from the Scottish Law Agents Society, whose representatives I have met at length. Nonetheless, there is no doubt that the procedures have resulted in a mandate. I am convinced that the bill will create invaluable opportunities, which I have no doubt that I will discuss with you and your colleagues and which mean that it is essential to support the bill and to see it become law.

The Convener: Given that the Westminster Government introduced the financial services act south of the border some years ago, what would be the impact of our not passing analogous legislation?

Fergus Ewing: I presume that you are referring to the Legal Services Act 2007, not the financial services act.

The Convener: Sorry—yes.

10:15

Fergus Ewing: One facet that has emerged from almost all the evidence is that not passing the bill presents some very real risks for the Scottish legal profession. If we do not pass the bill, solicitors in England and Wales will, through the Legal Services Act 2007, be entitled to enter into alternative business structures. Solicitors in Scotland will not, which I think will tie one hand behind the back of many Scottish legal firms. Let me tell the committee why.

We have had evidence from the president of the Law Society of Scotland and the dean of the Faculty of Advocates, who are extremely concerned that that will be the case. In their view, the bill is essential because without it, the Scottish legal profession will be disadvantaged. The reason that they gave for holding that view—by Ian Smart, in particular—is that if Scottish firms do not have the opportunity to avail themselves of the business opportunities created by the bill, some of them will, in order to get those opportunities, register as solicitors in England and Wales. They will remove themselves from regulation in Scotland and move to England and Wales. That clear suggestion has been made in evidence by those at the top of our legal profession in Scotland. I am sure that the committee agrees with me that that is a serious warning indeed. Furthermore, even among those who oppose the bill, there is general recognition that that is a real risk.

However, let me be positive—I want to put a positive case for the bill to receive the support of the committee and the Parliament. There are many aspects, which concern not just large but small firms. As is stated in paragraph 39 of the policy memorandum, much of the work that the largest firms in Scotland do is in areas that are not reserved to Scots law. Many of those top firms compete not simply in Edinburgh and Glasgow, but in London and internationally. They will probably be competing not in domestic conveyancing or family law, important though those topics are—we will come on to them—but in commercial law, aviation law, mercantile law, the law of shipping, the law of telecommunications, the law of telegraphy, the law of patents and copyrights, arbitration or construction law. All those areas of law and many others that I could mention are areas in which law firms that seek business from the largest commercial concerns by offering a specialist service may well wish to enter into business relationships with experts. They might wish to enter into such relationships with experts in aviation or shipping law, for example. They would certainly wish to do so with experts in construction, if one thinks of the scope in arbitration work for complicated commercial construction disputes. They might also wish to have experts in taxation or pension law.

All those areas are highly lucrative and each has massive markets and huge potential. Unless we pass the bill, our Scottish solicitors will not be able to avail themselves of the opportunities that exist in areas of law that, unlike the framing of writs, litigation and conveyancing, are not reserved to Scottish solicitors but in which activities can be carried out by all solicitors in the United Kingdom. Unless we avoid a situation in which our firms have one hand tied behind their backs, they may well be disadvantaged.

As the policy memorandum states, the value to the Scottish economy of the turnover of the Scottish legal profession is estimated to be more than £1 billion. That shows the scale of the opportunities that exist, even if the recession has predated that sum. There are massive opportunities for Scottish lawyers and the Scottish legal system. Over the past decades, we have perhaps been held back, with even our largest public limited companies choosing to use law firms in London for various reasons, which we are seeking to address in the bill and in other ways, such as through the extremely important work of Lord Gill.

The opportunities are there. I am not sure that the committee has heard the case that is being expounded by the large firms. I am not offering to step into the breach, because I am not qualified to speak for any of them, but it is fairly obvious that there are immense opportunities, which I have tried to expound in brief. If we stick with the restrictions in the 1980 act, none of the opportunities that I have described will exist.

The Convener: You may think that it is strange that I am raising this issue at this stage in the proceedings, bearing it in mind that the bill has been certified by both the Government and the Presiding Officer, but I do so against the background of recent representations. Are you totally satisfied that the bill is compliant with European Union law?

Fergus Ewing: I am pleased that you have raised that issue with me. The answer is that I am satisfied. A number of issues have been raised relating to possible problems with EU law, which supports member states' ability to put restrictions on regulated professions where necessary to ensure independence, impartiality and compliance with relevant principles. I am aware that specific arguments have been put by those who have taken the trouble to make submissions to the committee—submissions that we also value. I understand that Walter Semple, for example, who is a solicitor who has taken a profound and deep interest in all these matters, has made particular arguments. We considered such arguments most carefully prior to submitting the bill to the Presiding Officer. As you know, various in-house checks are carried out by our legal team, with the law officers, at a meeting on the bill. The bill is then submitted first to the First Minister and secondly to the Presiding Officer. At each and every stage, we have to be satisfied that the bill is compliant with EU law, and we are so satisfied. However, if it would be helpful to the committee—it might save committee members time today—we would be more than happy to assist members by setting out in a letter responses to some of the specific and fairly detailed, not to say arcane, arguments that have been made. Alternatively, I could invite Leigh-Anne Clarke to provide more information, should the committee so wish.

The Convener: It would be useful if you could give us a written representation on that heading.

Fergus Ewing: Thank you.

The Convener: We now turn to questions surrounding access to justice, which will be led by Stewart Maxwell.

Stewart Maxwell (West of Scotland) (SNP): Good morning, minister. You said in your opening remarks that a number of witnesses have submitted evidence to the committee in which they express concern about the opening up of legal services to non-lawyers, such as banks, supermarkets and others. Do you believe that some of those concerns are justified, in that such businesses may well cherry pick—if I may use that phrase—some of the work, so we will end up with

reduced access to legal services for many people who do not seek legal services in the profitable areas of the law and that, therefore, non-profitable services will effectively be forced out? One of the areas on which we have received evidence relates to family law practitioners. Access to those practitioners would be, at the very least, restricted. What is your response to the concerns that have been expressed to the committee?

Fergus Ewing: My response is on a number of levels. First, to ensure that access is available to those who are perhaps most vulnerable and those whose problems may involve areas of law that are least likely to be regarded as profitable—such as welfare law, debt law and family law—we have obviously taken steps to make legal aid available, as appropriate and as far as we can reasonably afford in Scotland today. I note that Tom Murray's evidence on 15 December was that 619 firms are registered to do legal aid work, which is a fair number, that civil legal aid has increased by 35 per cent and that legal advice and assistance has increased by 6 per cent. In addition, as the member and the committee will know, we have provided reasonable increases to legal aid rates, and around half the people in Scotland are now financially eligible for civil legal aid. That general backdrop covers part of the question, but not all of it.

Secondly, the bill provides a specific legal duty on the Scottish Legal Aid Board to assess and monitor the extent to which legal aid is available. That is an important duty. Such monitoring already happens. In Inverness in my constituency, in addition to the public defender, a civil legal aid service was set up after advice was received from Lindsay Montgomery and others at SLAB that there was a gap in legal aid services. I have visited that service and seen for myself how effectively it appears to operate. Therefore, the bill caters for ensuring the availability of legal aid throughout Scotland, particularly in rural areas where availability can be a concern.

There are already pressures on local solicitors from increasing specialisation. Those pressures would exist irrespective of the bill and have been on-going for a long time. With that increasing specialisation—as Robert Brown will well know—many solicitors take the view that it is too risky to practise, for example, employment law before employment tribunals or debt law and family law, where statutory overlay has made the law fairly complex. The risk is that one cannot offer the standard of knowledge and expertise that makes one properly able to assist clients. Those trends will continue, and the legislation in itself cannot offer a solution to them.

Finally, the member mentioned the scenario in which large concerns—I believe that he mentioned supermarkets—might seek to cherry pick business. Precisely because we share some of the general concerns that have been expressed by those such as the Scottish Law Agents Society, to which I alluded earlier, we have set out the most robust regulatory framework. If I may say so, the bill provides a Scottish solution to a Scottish problem, without involving a hugely expensive new quango, by providing a pretty smart and, I believe, effective way of regulating the new system. I am happy to go on, if I have the opportunity to do so, to explain why I believe that the solution that we offer is a good one.

The Convener: You will have that opportunity shortly.

Stewart Maxwell: We will come on to the issue of regulation in more detail shortly.

The minister mentioned that the amount of legal aid work has increased. It has been expressed to us that that increase is not so much because legal aid is an attractive or profitable area of work but because of the current economic circumstances. When times are tough, lawyers will look for work that is available. Legal aid work has become more attractive at the moment for that reason rather than because of any particular desire on the part of lawyers and legal firms to be involved in it.

The minister also mentioned that 619 firms are involved in legal aid work. Am I wrong in thinking that, given that there are more than 10,000 solicitors, that figure represents about 6 per cent of the solicitors in Scotland? Although 619 might seem a sizeable number, it is actually a small proportion of the solicitors who are currently working in Scotland. Therefore, do not Scottish Women's Aid and others have a point in saying that that small pool could be further reduced by the effects of the bill?

Fergus Ewing: Arithmetically, the argument is correct, because 600 divided by 10,000 is 6 per cent—I am no mathematician, but I think that that is correct. I said earlier that about one third of the profession is engaged in small to medium-sized firms so, if that is the correct proportion, it would be fairer to say that 600 of the perhaps 3,000 solicitors who provide legal services in small and medium-sized firms—around 20 per cent—provide legal aid. However, the point is well made that that is not a majority of firms and, although a fairly substantial number of firms provide legal aid, I do not discount the concerns that have been expressed.

10:30

I accept the general point that more people might present with debt problems, for example, during times of recession. We know that to be the case. However, I do not accept the premise that

the bill will lead to a sort of predation of that number. If it is the case, as the member argues, that in the recession, solicitors are now doing legal aid work in order to maintain their income, they will carry on doing that work in order to continue deriving income from it. Although modest, that income is not unreasonable and should allow a reasonable living to be had if one is operating a legal aid practice efficiently with a busy court schedule and client list. In my view, the bill is not likely to exacerbate the problem. On the contrary, it is likely to lead to improved possibilities.

Many witnesses, including those from the consumer lobby, but also those from the Law Society of Scotland, have argued that to cater for those who need access to justice and who have difficult family law, debt law, labour law or employment law problems, the bill might open up the possibility of new opportunities, whether through private concerns, citizens advice bureaux, law centres or legal aid solicitors. The restrictions that the bill is removing will allow those opportunities to be explored.

A point was made by Citizens Advice Scotland that the provision that the services have to be provided for a "fee, gain or reward" might cause restrictions and limitations. Without giving any undertaking today, I can say that we will look at that. Having seen that evidence, we have decided to go away and consider whether we need to amend that provision.

Stewart Maxwell: I hear what the minister is saying, but I have a final question. Although the legal services market is not directly comparable to many other areas of life in which where there has been an opening up of markets and "privatisation", to use the word that the Unite witness used last week—I do not accept their argument—in effect, firms move into the profitable bits of those markets. For example, bus operators do not want to operate non-profitable bus routes, such as the community service routes, unless they have to. Other organisations in other areas of life want to operate in the profitable bits of their market and, if possible, ignore the non-profitable bits, for obvious reasons. Is such an outcome to opening up the legal services market not inevitable?

Fergus Ewing: I do not think so. I really do not think that the areas of law that we are talking about are likely to be of great interest to supermarkets. As the member envisages, they are likely to be interested in areas of work that they perceive to be more profitable. The bill could help to sustain local services. In the example that I gave, which others have also given, a solicitor in a small town in Scotland will be free to enter into business arrangements with other professionals, to share overheads and to take advantage of business opportunities. It seems to me a very Scottish, very sensible step to remove a barrier in order to allow people in business to engage most effectively with others in the best interests of their clients and to allow them to operate more efficiently. If such arrangements were not allowed under the bill, that would be a barrier to success and would be more likely to lead to the problems of the sort that the member is right to ask about.

Colin McKay has further information to offer.

Colin McKay (Scottish Government Constitution, Courts and Law Directorate): I was not sure whether the 600 to which Mr Maxwell referred were 600 individuals or 600 firms.

Stewart Maxwell: I think that the minister used the figure 619.

Colin McKay: If it was 600 firms, that would not be comparable with 10,000 individual solicitors, because firms would have more than one—

Fergus Ewing: I was quoting Tom Murray, who referred to 619 registered civil firms.

Colin McKay: So it is not quite such a fragile—

The Convener: It could be much higher.

Colin McKay: Absolutely.

More generally, a lot of access to justice issues were looked at in a fairly major review that was undertaken a few years ago. One of the review's conclusions, and one of the things that informs the Scottish Legal Aid Board's evidence, is that it would be a very limited strategy if the only egg in the basket for seeking to secure access to justice for poorer people is simply to hope that high street solicitors will deliver a service to them through cross-subsidy from their other work. The work that was done concluded that, while it is obviously great that solicitors are sometimes prepared to do certain work for a lower level of profit—I put it no higher than that—that does not necessarily deliver access to justice in all the areas in which it might be required. For example, a family solicitor might do some family law work for less than they would normally charge, but they would not necessarily do immigration, mental health or children's hearings work, or be advised to do so, because such work is not their area of expertise. If we are looking to secure access to justice, we must therefore take a broader approach than just hoping that the existing model of the high street firm will deliver that.

Robert Brown (Glasgow) (LD): I am intrigued by the suggestion that the bill will have advantages in social welfare law. To be frank, it seems to me that if, for example, one were to consider lack of access to debt advice or whatever as the specific problem, that would not be addressed by the bill. Do you agree that, although there may or may not be advantages in tackling

social welfare problems in that way, the bill is not the most obvious way of doing that and the problem is more to do with, for example, funding of CABx and other bodies? Rather than the bill's mechanisms, perhaps there could be a technical amendment that would allow solicitors to be employed by CABx.

Fergus Ewing: The bill's primary purpose is not to tackle that problem, as I have already said. I hope that members agree that the provisions in the bill that directly apply to the Scottish Legal Aid Board to create a duty to monitor gaps in service provision are—as I previously mentioned—a very useful step. The Scottish Legal Aid Board is very keen to ensure that the public has access to legal services. I know that because of the approach that SLAB takes. I am sure that Robert Brown is also aware of that.

The bill's principal purpose, and the reason why we are here, are not in the section that will create a duty to monitor gaps. However, because of our concern to ensure access to justice, which is shared by Mr Brown and other members, we felt that SLAB, which sees who does and does not get legal aid, is best placed to take on that duty. That is why we asked SLAB to do that. It has a good track record, and it is likely that the bill will lead us to more proactive consideration of where gaps in access to justice may be. However, I agree with Robert Brown and with the thrust of Stewart Maxwell's question that the problems of access to justice are dealt with in a number of ways that are largely outwith the bill. That will continue to be the case.

Robert Brown: I would like to avoid doubt about the motivation for the bill and its general purpose and direction. You have given a clear view of the position that would apply to legal firms that deal with matters at international or corporate levels, but it is not terribly obvious that there will be advantages to consumers or, indeed, to solicitors who operate in the general market. I will use the analogy of a corner shop. The corner shop has a number of streams of business, including the sale of food, newspapers, cigarettes, alcohol and so on, each of which contributes to the shop's profits. However, none by itself enables the shop to be profitable; that is achieved when they are added together. It is in that context that the market issue that Stewart Maxwell touched on seems to me to have relevance. Do you agree that it is a bit of a risk to allow certain parts of the overall profitable mix to be taken away by outside providers, leaving only the bits and pieces that do not provide for a viable presence in, for example, a rural town?

Fergus Ewing: There are many components to that scenario, and I am not sure that I share Mr Brown's view. I will state what the bill seeks to do: it seeks to offer opportunities that are not compulsory or mandatory. It may well be that the majority of traditional small or medium-sized firms will choose to remain as they are. First, we do not envisage that all solicitors will take up the bill's opportunities. Secondly, by removing the restrictions against ownership by, and partnership with, non-solicitors, the bill will open up opportunities.

I well remember that, as a legal adviser in a small firm, I provided an advantage to two clients from a particular business. I had better not name the big firm from which they previously received legal advice. They had gone to that firm one morning in their yard boots—they were both pretty wealthy, if not millionaires—and were kept waiting for 45 minutes. They did not fancy that much, so they came to me and I gave them legal advice and I went out to their business. I mentioned that because that is the sort of service that small and medium-sized legal firms routinely offer their clients—an attractive client-based and client-focused service.

The bill will allow such firms to go further and to say, for example, "Look, when you come and see me every six months, you can also see this excellent accountant, who is my new partner. You can do your books at the same time so that you don't need to spend more time away from the yard." Many businesspeople loathe having to go to professional people and to be away from their businesses for longer than they want. As a direct result of the bill, small and medium-sized companies will be able to access new business opportunities.

In conclusion, I remind members that the model in the bill is alternative business structures. We did not go down the route of specifying what those business models must be. Because of the Law Society of Scotland's approach, which we endorse, it is for businesses to determine how they will form structures with individuals who are not solicitors. They will have freedom and flexibility to do that—subject to their complying with an extremely robust regulatory regime.

The Convener: I call Cathie Craigie.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Thank you, convener. I nearly promoted you to Presiding Officer there.

Good morning, minister. You have partly answered some of my questions on multidisciplinary practices. However, will you advise the committee what evidence exists that there is a demand for multidisciplinary practices or one-stop shops, as some people call them?

Fergus Ewing: The evidence comes in many forms. First, we have the evidence of the vote within the profession, which showed that an overwhelming majority is in favour of the proposal.

We have clear evidence that a number of the largest firms in Scotland believe that the business opportunities are necessary for them to expand and provide opportunities for young Scots who seek work in the interesting fields in which those firms operate. We also have evidence from the Office of Fair Trading and from consumer lobbyists.

We do not have a queue of members of the public standing outside Parliament in the morning saying, "Please, minister, stop tackling crime. I want you to create this new opportunity so that I have a better chance of being charged lower fees." However, consumers do not focus much on the sorts of models that are operated. They look at the end product, which has to be competitive, fair and which must charge reasonable fees. To be fair to the Scottish legal profession, it has over the years taken many measures to address that. In conveyancing, for example, that has been done by scrapping the scale fees that used to exist and by allowing advertising: fees in that area have come down considerably. Some people argue that they have come down too far, but that is another story. Consumer interest is important.

I accept that, in assessing consumer demand, we have not had the voluminous evidence that we might like. I think that we are unlikely to obtain any further evidence. Mr McKay has more information.

Colin McKay: I do. If it is not too cheeky, I will refer to comments that Professor Stephen made at the time of the research working group. He said that

"the benefits and costs of MDPs remained hypothetical",

and added that

"Where they were permitted, however, they seemed to emerge with a significant market share, particularly in markets serving major business clients".

Basically, the argument at paragraph 8.76 of the research working group's report is that, if people do not want MDPs, they will not make any money, therefore they will not exist. Essentially, the purpose of the bill is to allow them to happen. If consumers want them, they will thrive. If consumers do not want them, they will not thrive. That will have to be tested once they are available.

10:45

Cathie Craigie: My concern is that, if people move elsewhere, the test might throw out of business some smaller firms that serve communities. You mentioned the public consultation. I agree that the issue is not keeping our constituents awake at night and that they are not rushing to members' surgeries about it, but it is important that we have accessible legal service provision. Stewart Maxwell compared the issue with the deregulation of buses. Politicians told us that that would be great for the public, but now we find that it is a great only on lucrative routes whereas, in other areas, it is impossible for people to get a bus out of their community.

In written and oral evidence, the Scottish Law Agents Society tells us that it

"is the largest voluntary national organisation of solicitors in Scotland",

with some 1,600 members in high street practices. It consulted on the bill and received 400 responses, 85 per cent of which were against the proposals in the bill. In its written evidence, the society tells us that the bill

"pays no attention to the interests of consumers which is the only reason which justifies regulation in the first place."

How do you respond to that evidence?

Fergus Ewing: I have met representatives of the Scottish Law Agents Society and I respect its views and the work that it has done on this topic. It has a smaller membership—by a considerable margin—than the Law Society of Scotland. According to the figures from which you have quoted, it appears that a fairly large majority of its members did not participate in the survey, although I am not sure that the figures are final. Be that as it may, we take and have taken seriously the concerns that the society has expressed; I addressed some of them in my opening statement.

Cathie Craigie's question gives me the opportunity to make the point that the regulatory regime that we have set out states that the objectives that must be pursued, and to which regard must be had in respect of the application to be a regulator and a licensed provider, are

"protecting and promoting—

(i) the interests of consumers,

(ii) the public interest generally,"

as well as

"promoting an independent, strong, varied and effective legal profession"

and

"promoting and maintaining adherence to the professional principles."

Section 2 of the bill describes the professional principles, which include a requirement that solicitors

"act in the best interests of their clients"

and

"maintain good standards of work".

Those principles apply to all solicitors, regardless of whether they enter alternative business structures. They are a codified version of what

every Scottish solicitor holds dear and of what is to be expected of them in their work: the highest standards, probity, honesty and integrity. Duty to the client is absolute. We believe that the duty to

"act in the best interests of … clients"

includes and implies a duty of confidentiality, which is why such a duty is not spelled out specifically in the bill.

I will finish by addressing another matter that has not been mentioned in evidence from witnesses, and which will be a significant safeguard for any supermarket or bank that wants to enter the market. I refer members to section 51, which is entitled—intriguingly—"Behaving properly". It states that an outside investor, such as a bank or supermarket,

"in a licensed provider must not ... interfere in the provision of legal or other professional services by the licensed provider".

If a supermarket tells the legal providers in a firm that it owns that it wants them to stop the complicated stuff of sending out letters, to do things far more quickly and cheaply and to cut costs, it will be in clear breach of the law. Moreover, the head of legal services and the practice committee that the company must have under the bill will have to report the matter to the regulator. Those safeguards illustrate that we have thought through the points that Cathie Craigie and Stewart Maxwell rightly made about the risk of outside ownership, by ensuring that a series of protections with which everyone must comply is clearly written into the bill.

There is also procedure for complaints about actions, which will be dealt with by the appropriate authorities and which will provide further protection for the consumer.

The Convener: We have strayed slightly off the path. Perhaps Cathie Craigie can get us back on to the route that we want to take.

Cathie Craigie: What will happen if the licensed provider tells people to stop writing so many letters and to do the work more cheaply? How long will it take for that to surface? If an individual is motivated more by profit than by the desire to deliver legal services, what will happen if the people who are employed by that person do not speak up because they might lose their jobs as a result of their doing so?

Fergus Ewing: Such a scenario is not at all likely. Let me explain why. It is absolutely clear that an outside investor will have to comply with the regulatory objectives and professional principles, which will impose the same standards on licensed providers—the new business entities—as exist for solicitors. That is no accident; it is deliberate. It is plain that the provisions to which I have referred will apply to outside investors. The head of legal practice will have a duty to warn. Under section 40, which sets out the head of practice regulations,

"If it appears to a Head of Practice that—

(a) the licensed provider is failing (or has failed) to fulfil any of its duties under this Part or another enactment ... the Head is to report that fact to the licensed provider's approved regulator."

Failure to comply with that duty would be a serious matter. There are provisions in the bill for rescission of the licence, as Cathie Craigie would expect.

The regulator will not only consider applications, but will have a duty to monitor the operation of licensed providers. Activities will be monitored regularly, as solicitors are monitored by the Law Society of Scotland, which comes in and inspects lawyers' books and files—rightly so—in order to protect the public. The regime of inspection, monitoring, reporting and checks and balances that currently exists in the legal profession will, in effect, be transposed by the provisions in the bill.

I cannot say that there will be no bad apples in the barrel—no one can ever say that, including, sadly, about the legal profession, as we note from the newspapers from time to time. However, I am confident that the system that we will have in place will be robust and is likely to prove to be effective in the vast majority of cases. I would be surprised if there were any instances of the type that Cathie Craigie described.

Cathie Craigie: Does the bill allow for swift action to be taken, for example to suspend a licence, if it is brought to the regulator's attention that all is not well in an organisation?

Fergus Ewing: I am pretty sure that it does. I will ask the officials to give you the copperplate answer.

Colin McKay: The schedules to the bill set out a range of sanctions. Some measures might be pre-emptive, such as performance targets, but schedules also make provision on censure, financial penalties, directions and so on. The regulatory regime would have to set out the ways in which firms could intervene. If there was evidence of serious misconduct, I envisage that action could be taken very quickly.

Fergus Ewing: The fourth tier of protection in the bill is that any solicitor who carries out work for a licensed provider will also be subject to regulation by the Law Society of Scotland. Therefore, any impropriety will be dealt with as it is currently, with the provision for complaints to be made to the Scottish Legal Complaints Commission and for instances of fraud to be dealt with as currently happens.

In parallel with the bill, solicitors will be subject to the existing fairly robust regime. As Mr McKay has said, the bill, which contains 102 sections and nine schedules, sets out provisions for censure and for financial penalties or breaches of the duties that are contained in the bill. I hope that that answers the question generally. However, if there are more specific points that we have not answered, I would be happy to write to the committee before it finalises its report.

The Convener: The committee will discuss all aspects of that later, and if there are matters upon which we require further information, we will write to you.

Cathie Craigie: Clearly, the minister believes that benefits will flow to consumers if the bill becomes an act. What categories of users of legal services are likely to benefit most from the MDPs?

Fergus Ewing: That will depend on the extent to which the alternative business structures are taken up. In the short term, it is likely that clients of legal firms will carry on as they do at the moment in respect of how they seek advice from legal firms. In the longer term, we hope that by removing barriers to how solicitors can carry out business, there will be reductions in fees. I concede that the greatest scope for that happening is at the top end—in other words, the larger firms. However, I have alluded to opportunities that exist for smaller firms operating in towns. I am conscious that the committee has previously heard examples, from Ian Smart and others, of how small-town based solicitors could avail themselves of the opportunities in the bill.

The Convener: You mentioned that earlier.

Fergus Ewing: Indeed. Perhaps I should not repeat myself.

Cathie Craigie: I was thinking about the benefits to users that would flow from the bill rather than the benefits to firms.

Fergus Ewing: The benefit to users would be that the bill will allow lower fees to emerge from more effective and efficient business structures.

The Convener: We strayed slightly from the intended path, so when members are asking questions I ask them to reflect on whether the minister has already answered their question. We will go to the question on outside ownership.

Bill Butler (Glasgow Anniesland) (Lab): What consideration has the Scottish Government given to alternative means of allowing non-lawyer participation in the ownership of firms that provide legal services, such as, for example, the Institute of Chartered Accountants of Scotland's regulated non-member model of regulation?

Fergus Ewing: We have considered ICAS's model and I met two representatives of ICAS and discussed that with them. The model that we espouse, and which is in the bill, has emerged from lengthy discussion and consultation, principally with the legal profession. The legal profession sought the model and we have provided it with it. We believe that it offers slightly more flexibility than the ICAS model. I say that because my understanding of the ICAS model is that under it accountants can enter into arrangements with non-accountants, but there must be 50 per cent ownership by accountants. We do not think that that restriction makes sense, so we do not support the ICAS model. However, we very much support ICAS's general view that the regulatory approach should be robust but not overly expensive, that it should be in due proportion to the size of the market in Scotland and the number of solicitors, and that it should be commensurate.

Bill Butler: You see the model that is espoused in the bill as being more flexible, and therefore superior.

11:00

Fergus Ewing: I think so. The bill does not prescribe the form of business structure, which can be determined by the people who wish to enter into business. That is sensible—provided that they comply with the regulatory framework.

Bill Butler: Thank you, minister. That was clear. In your initial comments, you said that the bill includes robust provision to allow only fit and proper persons to own law firms—the fit and proper person test. Are you confident that that provision will prevent undesirable third parties from taking over law firms?

Fergus Ewing: Yes. We are confident that the provisions and protections that we have put in place should secure that objective. A "Fitness for involvement", or fitness to own, test is set out in section 49. Section 50—"Factors as to fitness"—defines what fitness to own or "Fitness for involvement" means. It gives examples of relevant things to take into account in respect of

"an outside investor's fitness",

including his

"financial position and business record ... probity and character (including associations)".

The inclusion of that last word encompasses associations with people who have a criminal record, for example.

There will be a requirement on the head of legal services or head of practice to report any actions, as appropriate. There are further provisions whereby people who have been convicted of

crimes of dishonesty, people who have been fined at level 3 of the standard scale and people who have served a sentence of up to two years will be disqualified from involvement. Mr Clancy gave evidence on that. He said that it might be possible to tighten up that provision by reducing the disqualification point to level 2 fines. He pointed out that it is open to any MSP to argue for that.

The series of tests, including fitness for involvement, the requirement to behave in a proper way—as set out in section 51—and the requirement to have a head of legal services and a head of practice will provide that protection. Those come on top of the professional obligations to which all solicitors in an ABS will still be subject, as regulated by the Law Society of Scotland. When an outside investor makes an application, I expect it to be open to the regulator, in assessing that application, to check whether the person has a criminal record.

Subject to Parliament's approval in due course—and to the necessary Scottish statutory instruments, I expect—the provisions will form a sensible measure for the regulator to work out who it is that is seeking to become an investor in a law practice, and they should prevent the risk of Mr Bigs—inadvertently or otherwise—becoming the owners of law firms in this country.

Bill Butler: That was very clear. You mentioned level 2. What would the Government's view be if a member lodged an amendment at stage 2 to tighten up the requirements? Does the Government have a view on that?

Fergus Ewing: We are open to arguments. We want the most effective and stringent test that is consistent with the bill's overall approach. We have not formed a view on that point. I have read through the evidence, and I noticed Mr Clancy's suggestion, which is worthy of consideration.

Section 52 provides the Scottish ministers with a power to make regulations on the matter, if required, so there is a backstop.

Finally, there has been widespread agreement, I think, that the provisions are robust. Even the Scottish Law Agents Society, which objects to many other measures in the bill, has accepted that the measures are adequate and said so in its oral evidence on 15 December.

Bill Butler: I have a final question. How would the Government respond to the suggestion that the extent of outside ownership of a law firm should be limited? You will be aware that Mr Gilbert Anderson suggested that outside ownership of law firms should not exceed 25 per cent. What is the Government's view on that?

Fergus Ewing: I noted that suggestion, which Mr Anderson put forward in some very interesting evidence. We believe that we should not specify what the business model should be—we should set the regulatory framework but not limits that might be regarded as arbitrary in relation to the extent of outside ownership. For that reason, we would not support such a measure.

Bill Butler: That is clear. Thank you.

The Convener: Minister, in following that up I refer you to section 36, which states that a licensed legal services provider must have one solicitor with the appropriate practising certificate. If an organisation is required to have only one solicitor, will it really be entitled to brand itself as a provider of legal services? That contrasts starkly with the requirements for accountants. Under the ICAS system of regulation, at least 50 per cent of the principals of an accountancy firm must be chartered accountants if it is to be called a chartered accountancy firm.

Fergus Ewing: I am sorry, but I do not quite understand the question relating to chartered accountants. I have section 36 before me, which I will come on to talk about.

The Convener: I am drawing a contrast. Under the ICAS system of regulation, in any organisation that is defined as a chartered accountancy firm, 50 per cent of the principals must be chartered accountants. Under the proposals for legal services, there need be only one fully qualified legal practitioner in a firm. There could be four partners—one lawyer, one accountant, one surveyor and one financial services specialist. There is therefore an inconsistency.

Fergus Ewing: With respect, I am not sure that I understand what that inconsistency is. Perhaps that is a failing on my part. The provision that an entity must have at least one solicitor who holds a practising certificate if it is to be eligible to be a licensed provider, as set out in section 36, is plainly a minimum requirement. That provision would operate for a sole practitioner, for example, who wanted to enter into a partnership with an accountant under the scenario that I mentioned earlier. We would not want—indeed, it would be wrong of us—to prevent that from happening.

Perhaps you are suggesting that there should be a more sophisticated system that would ensure that large concerns faced some greater hurdle and were required to contain a greater proportion of partners or owners who were solicitors. Our general view is that the regulatory regime is so robust that it can ensure compliance with the public interest, protection of the clients and all the other regulatory objectives that I have mentioned. We believe that it is better not to fetter the ability of businesses to develop and devise new formats that they adjudge to be necessary and to avail themselves of opportunities to succeed in

business and to represent their clients effectively, perhaps charging lower fees as well. We do not want to impose new restrictions that would replace the ones that we seek to remove.

Cathie Craigie: How would you respond if the legal professionals themselves wanted a system similar to that of the accountancy professionals, whereby 50 per cent or 25 per cent—we will not argue about what the percentage should be at the moment—of the principals in a firm should be solicitors.

Fergus Ewing: With respect, that is a hypothesis. We would address that situation were it to arise, but it has not arisen thus far. The Law Society has had an opportunity to formulate its policy, and it has done so. I noted Mr Anderson's interesting suggestion, which is worthy of discussion, but as far as I can see it has not found favour with the profession as a whole. If there is evidence that that is incorrect and events paint a different picture, of course we will consider the situation as and when it arises, but we do not believe that it is likely to arise for the reasons that I canvassed in my earlier answers. Mr McKay might have some more information, if he may provide it.

Colin McKay: To clarify the point, the bill sets out the regulatory framework. Within it, anyone who seeks to be an approved regulator will have to come up with a regulatory scheme that contains rules and procedures. It is entirely possible that a body such as ICAS could come up with a scheme similar to the ICAS scheme, or indeed that the Law Society could—if it seeks to be an approved regulator, as it indicated it would—restrict how licensed legal services providers that seek to be regulated by the Law Society operate. There is room for further refinement of the regulatory scheme, but in the bill we have left it up to the bodies that seek to be regulators to work out exactly what the best model is for the kind of businesses that they seek to regulate.

Cathie Craigie: A major change is proposed to the way in which lawyers and legal firms operate. Are you saying that if we had more than one regulator, we could have different sets of regulations? For example, one regulator might have the power to say, "There must be 50 per cent solicitors," whereas another regulator might apply no such cap, other than the one in the bill.

Colin McKay: It would depend on the kind of businesses that they were seeking to regulate. The bill makes it possible for solicitors to be involved in several different kinds of businesses. As has been said before, we do not anticipate that a flood of people will seek to be approved regulators; there might be a small number of them. However, they might propose a particular business model and say, "Our members can deliver a particular kind of service involving solicitors and other people. We will regulate in this way. That is the only kind of business that we seek to regulate, because that is where our area of expertise lies." Several safeguards in the bill will ensure that even if there is more than one regulator, those regulators must be competent to do the job properly and effectively.

Ultimately, ministers will have to sign off on that—they will have to sanction that such people know what they are about, have devised a regulatory scheme that is fit for purpose and will regulate the businesses properly. That will happen after consultation with the Lord President. As was said, some people have suggested that the Lord President's role could be beefed up. There is a fairly robust framework in the bill for ensuring that whoever comes forward to be a regulator has thought through the issues and identified how to regulate the businesses properly.

Cathie Craigie: Just so that I am clear, it is unlikely that there will be a flood of people wanting to take on the role of regulator, but there could be more than one regulator applying different regulations.

Fergus Ewing: That is quite possible and the bill envisages it. In the financial memorandum, we look at there being between one and six approved regulators, although I think that the number will be nearer one than six. However, time will tell. Cathie Craigie is right to raise that point. It is unlikely that the consumer would benefit from there being more than one regulator, but it might be of advantage to businesses to be able to choose which regulator is most applicable to them. All regulators will be subject to providing the same level of protection to the public and the same standards before they are authorised as regulators.

The Convener: We now move on to questions about the independence of the legal profession.

Angela Constance (Livingston) (SNP): Minister, you stated in your opening remarks your support for the independence of the legal profession. How do you respond to concerns that the enhanced regulatory role that the bill creates for the Scottish ministers is not consistent with the independence of the legal profession?

11:15

Fergus Ewing: I think that we all support the independence of the Scottish legal profession in the sense of independence from interference by Government. It is correct that the legal profession should be independent—that is necessary for clients to be sure that they will receive advice that is in no way linked to any outside or vested interest or to the powers that be.

It is of paramount importance that the profession remains independent. We do not believe that the bill will undermine the profession's independence. Section 1 states that the regulatory objective is, inter alia,

"promoting an independent ... legal profession".

I have referred to section 51, "Behaving properly", which provides that outside investors must not interfere in how legal services are provided. That, too, is a bulwark.

Angela Constance refers to the provisions that concern the Law Society. Section 92 and subsequent sections set out a system that changes the regulation of the Law Society. As the committee knows, the Law Society is subject to regulation as a statutory body. The bill amends the 1980 act to establish a regulatory committee, 50 per cent of the members of which will be laypersons. That committee, which will assume all the regulatory functions, will therefore involve an outside element.

It is envisaged that the Lord President will be consulted on the approval of regulators. We are considering further whether the Lord President's role should be beefed up in the way that some witnesses have suggested.

The Convener: That is the nub of Miss Constance's question.

Angela Constance: Will the minister respond in more detail to the calls for further safeguards to protect the legal profession's independence, such as a greater role for the Lord President, and for a statutory consumer panel, which Consumer Focus Scotland suggested?

Fergus Ewing: We are considering whether the Lord President should have a greater role. We do not believe that establishing a statutory panel is necessary, but perhaps a non-statutory panel could be established, and might be preferable. Of course, we have provided for lay membership of the regulatory committee, which will provide a safeguard.

Angela Constance: Would the non-statutory panel that is being considered advise ministers on applications for authorisation and on how best to review the regulatory framework?

Fergus Ewing: The body would help with and play a part in discharging all the Law Society's regulatory functions—[*Interruption*.] I am sorry—were you asking about a consumer panel?

Angela Constance: Yes. How would such a panel interact with and advise the Scottish ministers, as opposed to the Law Society?

Fergus Ewing: Mr McKay will tell you how we envisage such a committee performing its role.

Colin McKay: We are slightly at cross-purposes in talking about the regulatory committee that relates to the Law Society. Angela Constance refers to the suggested advisory panel for ministers, which some organisations have said should be statutory. The short answer to her question is yes—we are considering the possibility of a non-statutory advisory panel, whose function would be as she described. It would advise ministers on applications to be an approved regulator and on any other functions that they must discharge under the bill, to ensure that they have access to the widest possible range of expert advice.

Although it would be possible to make that panel statutory, that would inevitably constrain flexibility in relation to who is on the panel and how it should operate. The preference at the moment, in line with Government policy around the simplification of the public sector, is not to create yet another public body, as it were, although I am not sure whether such a panel would count as a public body. We think that we can secure the benefits through non-statutory means.

Angela Constance: Thank you. Can you say anything more about your consideration of giving the Lord President a greater role and what that might entail?

Fergus Ewing: At the moment, we envisage that the Lord President will be consulted. Certain evidence has suggested that he should have a greater role than that. We are therefore considering whether that should be the case, and we are meeting the Lord President.

It might be helpful to point out, as I have been reminded, that, under section 6, "Approval of regulators", approved regulators must exercise their regulatory functions

"independently of any other person or interest".

That safeguard is set out in the bill. We will come back to the committee at stage 2, if not before, on the role of the Lord President, which is under active consideration.

Colin McKay: The subject was discussed at the bill reference group, which involves the Law Society of Scotland, Consumer Focus Scotland and a number of the bodies that have given evidence. Those deliberations will be made available to the committee—if they are not already on the internet—so that you can see some of the discussions that we have had.

Angela Constance: Thank you for that.

Does the Government envisage that the role of the Lord President will be more of a consultative role than an approval role?

Fergus Ewing: It is consultative at the moment. The bill states:

"Before deciding whether or not to approve the applicant ... the Scottish Ministers must consult … the Lord President … the OFT, and … such other person or body as they consider appropriate."

At the moment, the bill envisages that we would consult the Lord President. The question is whether he should have a sort of dispositive role, a co-decision-making role or a consultative role, and whether that would be necessary further to protect the independence of the legal profession. We are considering that issue further.

The Convener: Of course, we are all signed up to the independence of the legal profession, but there is perhaps an inconsistency in that, under the bill, there is an enhanced role for the Government. Some members might not be terribly relaxed about the legal profession being truly independent when the Government has that enhanced regulatory role. Cathie Craigie has a brief point to make on that.

Cathie Craigie: The committee received written evidence from Douglas Mill, a former chief executive of the Law Society and the director of professional legal practice at the University of Glasgow's law school, in which he raised concerns about the independence of the legal profession and said that there is a worrying trend in that regard and that the bill is flawed. He stated:

"The potential for direct Governmental control of the legal profession contained in for instance section 35 could reduce Scotland to the type of legal profession seldom seem outside South America and Equatorial Africa."

How do you respond to that?

Fergus Ewing: There are many respectable, reputable and successful countries in those parts of the globe, on which I would certainly not wish to cast any aspersions—I am sure that that was not the intention.

On the independence of the Scottish legal profession, which is more within my area of potential responsibility and interest, we are satisfied that the bill sets out a regime whereby the role that the Scottish ministers play does not interfere with that independence. Indeed, that is made clear in section 4, "Ministerial oversight", which delimits the role that the Scottish ministers will play. The Scottish ministers will not pick businesses and say, "Right, you have permission to be a licensed provider," although they will have a role in dealing with regulator applications. Under the proposed tiered protection, the first tier is that the regulators will be appointed by the Scottish ministers, but that will happen only after consultation, as we have described. The regulators, who must be independent, will make the decisions about who does or does not meet the stringent tests to become licensed providers. In addition, all of us will be subject to the regulatory principles that enshrine the independence of the legal profession in statute.

Cathie Craigie: On section 35, "Step-in by Ministers", for the benefit of the committee and anyone who might be listening in, can you give examples of when ministers might step in?

Fergus Ewing: I ask Andrew Mackenzie to clarify the technical aspects of that point before I respond.

Andrew Mackenzie (Scottish Government Constitution, Law and Courts Directorate): The section makes provision for a worst-case scenario in which there is no other approved regulator. The provision is a last resort or safeguard to ensure that there will always be somebody to deal with the role of an approved regulator.

Fergus Ewing: Yes. I think that the provision envisages the case where an approved regulator, for whatever reason, either ceases to act as the regulator or is struck off from being the regulator, for which provisions exist. Section 35 is a fall-back or last-resort provision and is intended as such.

The Convener: We have a fair amount still to go through so, in the circumstances, I suspend the meeting briefly for about five minutes.

11:26

Meeting suspended.

11:35

On resuming—

The Convener: We have a fair amount to get through, so I ask members to be as brief as possible in questioning and not to go over old ground. Questions on regulation will be led by James Kelly.

James Kelly (Glasgow Rutherglen) (Lab): Minister, earlier you were enthusiastic about the way in which regulation is outlined in the bill, but in some evidence sessions it has been criticised as too complex. Why, for example, are we adopting the approach of having multiple regulators, rather than a single regulator?

Fergus Ewing: Overall, the regime is designed to be robust, not light touch—to use a phrase that was fashionable some years ago, before the collapse of certain banking institutions. However, it is designed not to set up new, expensive quangos but to set out a framework that will apply to anyone who wishes to establish new business structures. You asked why there is provision for more than one regulator. As I said in response to questions from Cathie Craigie, although having

more than one regulator is unlikely to benefit consumers, it may be of benefit to licensed providers.

I will give the member a hypothetical example, although my hypothesis may be no more valid than anyone else's. If a business entity is orientated primarily towards accountancy and taxation and is regulated by ICAS, it may, as an alternative business structure, want to continue to be regulated by ICAS, rather than by ICAS and, perhaps, the Law Society of Scotland. On the other hand, if an ABS is largely a solicitors practice with some accountants, it may prefer to deal with the Law Society of Scotland, with which it deals anyway. That is one scenario that I can paint to assist the member.

In her evidence, Lorna Jack said that, south of the border, where a Legal Services Board has been established, there is a fairly sizeable staff and cost element. The board and the Legal Services Commission down south cost £39 million. Lorna Jack mentioned that solicitors in England and Wales have faced an initial hike in their fees of 20 per cent, in addition to the fees for their practising certificates. I do not think that many solicitors in Scotland would welcome a 20 per cent hike in their fees. One must take account of the smaller jurisdiction and market in Scotland and the proportionality of the regulatory vehicle that we have provided. I think that we have got it right.

James Kelly: If you take a multiregulator approach, how will you ensure that there is a level playing field between licensed legal services providers and traditional firms, and between existing and new regulators? In its evidence, Shepherd and Wedderburn pointed out that, in its view, it will be at a competitive disadvantage to licensed legal services providers, which will be able to choose between regulators.

Fergus Ewing: First, it is a matter of choice. Any firm can choose to enter or not to enter into an alternative business structure.

Secondly, the regulatory objectives and professional principles that are set out in the bill will apply to all solicitors, so there will be a level playing field in that regard.

Finally, I am aware of the point that Shepherd and Wedderburn made in its submission about the possibility of traditional firms being placed at a disadvantage if there were licensed legal services providers. At the most obvious level, a legal services provider's first requirement would be to pay a fee, estimates of which we have set out in our financial memorandum. It is not possible to be absolutely certain about how much that fee will be, but it is plain that it will not be payable by traditional legal practices that decide not to become ABSs. Under the proposed new system, there will be an extra cost—albeit that it might be a modest one—attached to being an ABS.

James Kelly: There are those who feel that the current system of complaints handling is already complex for users of legal services and that by introducing a system of multiple regulators, the Government will make it more difficult for people to make complaints when they have issues with the legal services that they have been provided with.

Fergus Ewing: The bill introduces a new type of complaint—a regulatory complaint—which would be a complaint that provisions of the bill had been breached. However, the existing complaints structure for solicitors and accountants will remain in place. As far as solicitors are concerned, there is a clear, established procedure for matters of professional negligence and fraud. I do not think that any client who has a complaint to make about a solicitor will find it difficult to find out to whom that complaint should be addressed.

Colin McKay: It is important to remember that the bill retains the provisions of the Legal Profession and Legal Aid (Scotland) Act 2007, whereby the Scottish Legal Complaints Commission will be the initial gateway for all complaints. Regardless of whether the firm concerned was an ABS or a traditional practice, the first place that someone who had a complaint would go would be the Scottish Legal Complaints Commission, which would help them work out where to go next and how to proceed with the complaint.

James Kelly: There is some discussion in the submissions of the gap in the regulation of claims companies, which have been the subject of discussion in recent weeks because of the weather difficulties that we have had. Is that not an area that should have been taken forward in the bill?

Fergus Ewing: We gave some consideration to that, alongside the proposal on the regulation of will writers. As far as claims management companies are concerned, little evidence has been presented to us of malpractice. In Scotland, legal aid is still available—rightly, in my view—to those who wish to pursue a claim for compensation for personal injury, which, as members will know, are often among the most serious cases in Scotland. Legal aid is still available for such matters, especially in the most serious cases.

We also considered the introduction of contingency fees. After various deliberations, including with the committee, we decided that it would be premature to do that. It seems to me that it might be appropriate to consider the regulation of claims management companies in tandem with the issue of contingency fees—no-win, no-fee—

because consideration of such a scheme would, by definition, involve an analysis of how claims are managed and pursued in Scotland at the moment. We decided that, on balance, the bill is not the correct vehicle for addressing that issue, but we will be happy to give it further consideration in future.

The Convener: That might be appropriate, given that, historically—as you know—there have been certain concerns in that direction.

Bill Butler: The committee has had evidence from Mr Gilbert Anderson that section 60 of the bill creates considerable uncertainty in regard to a client's right to legal professional privilege. How do you respond to that concern?

Fergus Ewing: The issue of the appropriate way in which legal business is carried out is essentially covered by the professional principles that are described in section 2. I think that I may have remarked earlier—

Bill Butler: Perhaps I misled the minister. I should have said "section 60"—I thought that I had done so—rather than "section 6".

11:45

Fergus Ewing: I was going on to say that there is an argument that the bill should say that licensed legal services providers will be subject to the same provisions about confidentiality to which solicitors are subject. That is not in the bill because we took the view—it was the view of our expert parliamentary draftsmen—that the matter is covered in section 2, on the professional principles to which all licensed providers will be subject, which says:

"persons providing legal services should ... act in the best interests of their clients".

The advice that I have is that that includes and encompasses the duty of confidentiality. However, given that the matter has been raised in the committee and in evidence, I will seek further advice. I am a great believer in the principle, "if there's doubt, spell it out". Therefore we should consider whether there is a way in which we can make it absolutely clear, as is consistent with our overall policy objective, that we want to ensure that licensed providers are under at least an equal standard of care and duty to their clients as ordinary solicitors are under. I thank Bill Butler for raising the issue; we will consider specifically whether we are covered on that point.

Bill Butler: I am grateful for that assurance. I noted that you said that section 2 includes and implies a duty of confidentiality. In this instance it might be better if the bill were explicit.

The Convener: The minister's offer is helpful.

Robert Brown: Before the meeting was suspended we were talking about section 35, "Step-in by Ministers". I think that the minister said that the provision in section 35 is a long stop, but—with the greatest respect—it does not look like that. The wording seems to allow the Scottish Government to be proactive, for example, in setting up an approved regulator if no potential regulators come along, to push forward the competitive agenda. Was that the intention?

Fergus Ewing: Section 35 is not intended to be anything other than a long-stop provision—that is manifestly the case. I am not sure what part of section 35 gives rise to your fears, but it is pretty clear from the policy memorandum that the provision should be used only if necessary and as a matter of last resort. We are confident that applications to be regulators will be made. The Law Society of Scotland and ICAS have regulated their members for a long time, and if those organisations were to come forward and be approved as regulators I would expect them to continue to carry out such work in a professional, thorough and competent way.

Robert Brown: Are you saying in effect that if nobody came forward—although you do not expect that to happen—you would not propose to use section 35 to fill any deficiency?

Fergus Ewing: I do not envisage that the hypothesis that nobody will come forward will arise. You are entitled to put the hypothesis and to challenge our evidence—it is a member's right and perhaps the committee's duty to do so. However, that is simply not a scenario that we envisage will arise.

Robert Brown: I will move on to section 47, "Designated persons". I think that you have seen Gilbert Anderson's written evidence, in which he expressed concern that the bill does not require a designated person—that is, someone who is designated by a licensed provider to carry out legal work—to undergo training or have relevant qualifications. I think that Mr Anderson's concern was echoed in the evidence from the committee of heads of Scottish law schools. The question of training and education for legal providers seems to me to be important. Can you comment on that aspect? It does not seem to be covered by the bill at present.

Fergus Ewing: The bill does not amend those provisions of the Solicitors (Scotland) Act 1980 that changed the nature of the work that solicitors do in Scotland. The bill makes no change to the areas of work that are reserved to solicitors in the 1980 act. The position on training for all solicitors is as it is now, no more and no less. The existing provisions that apply to the standard of training, education and qualification required by Scottish solicitors will apply, as they say, mutatis mutandis

to solicitors operating in licensed legal services providers.

Robert Brown: With great respect, section 47, if I understand it right, does not apply specifically to solicitors but to people who are, according to section 47(3)(b), "eligible for designation". They are defined in sections 47(3)(b)(i) and (ii) as

"an employer or manager of the licensed provider ... or ... an investor in it".

The inclusion of an investor seems a slightly odd arrangement. However, they seem to be different categories of people from solicitors, do they not?

Fergus Ewing: Yes—that is a fair point. Plainly, in licensed legal services providers, a range of people will operate as principals in the business, but the bill makes no change to the law on the way in which work is carried out. Those areas of law that require specific training are reserved to Scottish solicitors; no one who is not a Scottish solicitor can carry out, for fee or gain, work such as litigation, conveyancing or the preparation of writs, excepting wills. If a non-solicitor does such work, they commit an offence. At present, as Robert Brown knows, there are certain provisions for paralegals, who are subject to a specific training regime. Paralegals, of course, will continue to require to do the training that they currently have to do in order to operate. The bill therefore makes no changes to the reserved areas. I take Robert Brown's point that that is not explicitly stated in the bill, but that is because it is explicitly stated, in effect, in the 1980 act. I am sure that all members would want to ensure that education and training are at least to the same standard as currently required. I have set out the correct response, but I undertake to look specifically at this issue again.

My attention has been drawn to section 47(4), which somehow momentarily escaped my notice. It states:

"Nothing in this Part affects the operation of any other enactment, or any rule of professional practice, conduct or discipline, which properly requires that a particular sort of legal work be carried out by an individual of a particular description."

That aims to deal with the situation that we have been discussing, but Mr Brown has raised an important point—his colleagues have raised important points in other areas—so we will look again at the position to see whether further provision needs to be made.

Robert Brown: I am grateful for that. I think that the point remains, so I want to be clear that the minister is with me on it. I understand the position as regards solicitors in legal firms, but what we are talking about is people who are not solicitors and are perhaps not in legal firms in the way that they have traditionally been talked about. That includes, among others, investors. It seems to me that there are issues there about the nature of the work that people will do. Frankly, I am not quite sure why an investor is designated as a person to carry out legal work. I may have misunderstood the reasoning on that. Can the minister come back to us specifically on that aspect and give us some understanding of why an investor in a legal practice is required to be eligible for designation?

Fergus Ewing: First, I direct the committee's attention to section 51, which provides protection in relation to outside investors, to which I alluded earlier. Section 51(2)(a) states that outside investors may not

"interfere in the provision of legal or other professional services by the licensed provider".

I did not refer earlier to section 51(2)(b), which states that the outside investor must not

"(i) exert undue influence,

(ii) solicit unlawful or unethical conduct, or

(iii) otherwise behave improperly."

There are therefore those further protections that are designed to apply to outside investors. I think that Robert Brown is perhaps looking at an earlier section of the bill, so I ask Mr Mackenzie to give more information on this question.

Andrew Mackenzie: The purpose of section 47 is to enable people such as paralegals to work in the new entities. At the moment, unqualified persons can work in reserved areas when they are working for solicitors. For the new entities, there are further safeguards in the bill to allow the head of legal practice to be responsible for those persons. It mirrors what we have at present in firms of solicitors, and in incorporated practices, which are also exempt from prosecution when they work in reserved areas.

Colin McKay: It may be an issue of definition. Section 47(3)(b)(ii) talks about an investor, and section 52(4) defines an investor as a

"person who has ... ownership or control".

A partner in the firm could fit that definition. It is not intended to refer to an outside investor; those are defined differently. The idea is that a person who is effectively a partner in the business might be carrying out some form of legal work in the business.

Robert Brown: That should perhaps be subject to an amendment. It is confusing at the moment—it appears to be contradictory.

A more general issue that arises out of that is conflict of interest. You may have noticed that the committee has asked questions about the position of solicitors in partnership with surveyors, and the issue of single surveys and so on. Minister, you

talked earlier about arbitration in building contracts. It is difficult to see how that could be offered as an internal service because, by definition, an arbiter would be an independent person in that connection. Will you give us an overview of the conflict of interest, which will clearly be greater under these arrangements than it is at the moment under the well-understood arrangements for solicitors? How is that to be tackled and to what extent is there a risk of undermining the professional standard?

Fergus Ewing: I am not clear how the conflict of interest could prevent solicitors from availing themselves of the opportunities for arbitration work, which is a growing area of involvement for many Scottish solicitors; we have the Arbitration (Scotland) Bill.

Robert Brown: My point was that if you had a firm that was partly a legal entity and partly something that offers arbitration services, how could it offer independent arbitration services to the client, who, by definition, is one side of an arbitration process? Perhaps I am missing something.

Fergus Ewing: Perhaps we are talking at cross-purposes. I am envisaging solicitors who are already involved in arbitration and mediation work planning out that work using their expertise and skills, and doing it throughout the world, rather than necessarily carrying it out for clients of the firm.

I move to the major point, about conflict of interest. As Robert Brown will know, the rules that apply to solicitors with regard to conflict of interest are fairly detailed and the result of a long history, not all of it unchequered, of serious problems arising from conflict of interest. We envisage that the new regime of licensed legal services providers should be subject to at least the same standard in relation to conflict of interest. In other words, there would be no loss of the standards that we see in place in that regard. In principle, that is the approach that we think should be taken in that matter.

Robert Brown: Would that come down through the regulator, for example the Law Society, or would it occur in some other way?

Fergus Ewing: To use a phrase used by the dean of the Faculty of Advocates, the regulatory objectives are the pillar of the bill. Those objectives, in part 1, include the professional principles set out in section 2 that require licensed legal services providers to display the high standards that are expected of solicitors. We seek to ensure parity of standards. That is the principled approach. However, I draw the committee's attention to section 9, which is one of those—I was about to say "the few", but that would not be right, because there are many more to choose from—that we have not yet considered. The section is on reconciling different rules and deals with regulatory conflict in more detail. We have considered the issue. I hope that I have set out in response to Mr Brown's question the general principle that we will pursue.

12:00

Robert Brown: Thank you, Minister. Convener, may I ask the question about wills now?

The Convener: I ask you to keep that until later.

Have Nigel Don's concerns about regulatory conflict been resolved?

Nigel Don (North East Scotland) (SNP): My questions have been answered.

The Convener: I ask you to pursue questions about advocates.

Nigel Don: Good afternoon, minister and colleagues. Advocates appear in the bill fairly extensively, but in concentrated form. The bill proposes that non-solicitors should be substantially involved in regulating solicitors, but no comparable conditions are set out for the Faculty of Advocates. Why does the minister feel that that is appropriate?

Fergus Ewing: Whether the Faculty of Advocates should be included in the bill's overall purpose of allowing alternative business structures was of course considered. The conclusion was that the faculty did not demand that at this stage, so it was decided on balance that we should not impose the arrangement on the faculty. However, the faculty has expressed its willingness to embrace change. Richard Keen—he was accompanied by Iain Armstrong, who I do not think said anything—gave evidence about the faculty's position, which we understand and support. Scotland has a smaller bar—of more than 400 advocates—than that in England, which has more than 10,000 barristers. It is plain that the situation here is entirely different from that south of the border.

It was decided not to impose on the faculty the opportunity to participate in alternative business structures, but we nonetheless decided that it would help and be advantageous to set out the framework in which the members of the Faculty of Advocates operate. The regulatory framework is therefore set out in sections 87 to 89—chapter 2 of part 4. I understand that those sections codify the existing position on such matters as the discipline of faculty members. The Court of Session is responsible for admitting people to the office of advocate and for regulating the professional practice, conduct and discipline of advocates.

The bill does not require the faculty to allow advocates to participate in alternative business structures, but it is so drafted that advocates will be able to participate in licensed providers, should the faculty rescind in the future its rule that prevents them from so doing.

Colin McKay: In giving evidence, the faculty made the point—it relates to the earlier question about the independence of the legal profession—that, historically, advocates have been members of the College of Justice and regulated by the Lord President. It would not be impossible for Parliament to impose on the Lord President rules on how the faculty should be regulated, but that would be a significant change to the faculty's historical regulatory relationship with the Court of Session and the Lord President.

Nigel Don: I understand that point and I entirely see the difference, but the consumer in me advocates that the world has moved on and that no matter how many centuries for which the Lord President and the courts have directly influenced and regulated advocates, perhaps a case exists for independent oversight in the 21st century. If that is appropriate for solicitors, why, at this point, is it deemed to be inappropriate for advocates?

Fergus Ewing: That is because the approach that we took was not to impose anything on solicitors; we waited for solicitors to debate and decide themselves what approach they wished to take, albeit with the caveat that the status quo did not appear to us to be an option. They came back and said that they wanted to go forward with ABS, but the faculty decided that it did not. That governed our approach.

To be fair to the faculty, Richard Keen canvassed in some detail the procedures for how complaints are dealt with in his evidence on 8 December. As far as I recall, Tom Marshall said that it perhaps does not feel right that there should be self-regulation in this day when most regulators are independent of the body whose members are subject to the complaint. That is undoubtedly correct, but we are dealing with a bar of 400 or so advocates—a small bar—so we have to be mindful of their views and perhaps not impose a particular option on them. We decided to take that approach for those reasons, with the caveat that should advocates rescind the rule in future, the framework exists—or will exist, if the bill becomes law—for them to follow the example of solicitors and be involved with licensed providers.

Nigel Don: There is a case, some of which has been made to us in writing, that, currently, it is difficult in some areas to find the services of an advocate, even by going through a solicitor. Given that evidence, there is an argument from the consumer lobby that direct access to advocates would aid them, in principle. How do you respond to that argument?

Fergus Ewing: That is a perfectly fair question. I am not quite aware of what evidence there is about that. It is always dangerous to rely on one's own experience, because, by definition, it is anecdotal. However, I must admit that I always managed to find an advocate who could provide advice, albeit that one did not always receive the advice the next day. Nonetheless, obtaining the advice did not seem to be a problem. However, if there is evidence that that is becoming a serious problem, we will look at it. I expect that the faculty would look at that and discuss it with us if it perceived there to be a problem.

The second strand to my answer is the evidence that Richard Keen gave, which is that we are talking about a referral bar. He was absolutely correct to point out that advocates are not equipped to, and cannot, get involved in the investigatory work that a solicitor would do. Solicitors prepare the case for the advocates. They do the precognitions, visit the scene of the crime to inspect the locus if they are dealing with a criminal matter and present their brief to the advocate, who uses his time to apply his skill and expertise to the facts that have been prepared and amassed by the solicitor—hopefully doing his job properly. There is limited scope for other non-solicitors to refer matters to advocates, which Richard Keen covered. That is an area that might well merit further discussion—I think that accountants were a group of potential referrers, as were patent and copyright agents, which is being considered. That is an area for further consideration. However, I think that a lay person might find it difficult to provide a clear, sufficient, comprehensive and adequate set of instructions to an advocate. I know that many advocates say that solicitors find it hard to do that as it is. That is a serious practical aspect of the answer to Mr Don's question.

Colin McKay: It is important to remember that advocates no longer have any monopoly over any particular service, in that solicitor advocates can offer the same services as advocates in relation to pleading in the higher courts. If a consumer wished to avail themselves of direct access to a pleader in the higher courts, they could use a solicitor advocate. Presumably, if that took away too much business from the faculty, the faculty would consider changing its rules.

Fergus Ewing: I should of course have mentioned the cab rank rule, in case someone outwith this place criticises me for not doing so. Plainly, advocates are subject to the cab rank rule principle, which prevents them from refusing cases that come within their field.

Nigel Don: I will pursue this point to the end and then drop it. Are you confident that no substantial economies are to be gained by allowing advocates to join solicitors or solicitor advocates in alternative business structures—on the basis that those economies would be passed on to the consumer?

Fergus Ewing: I have not formed a view on that; I have not looked at the question. In theory, it could be argued that if advantages are to be gained in other types of business, there might well be advantages to be gained by advocates joining up with other businesses. Some large commercial concerns will retain in-house lawyers qualified at the top level, who might otherwise have been Queen's counsels practising as advocates or barristers. The view that has guided our policy formation and approach to the bill is that we did not wish to impose measures on branches of the profession. In responding to the profession, we decided that our approach to the bill would be to set out a framework to pave the way for advocates to follow the example of solicitors should they so choose in the fullness of time.

Nigel Don: Thank you.

Looking at the wider legislative landscape, you mentioned Lord Gill's review. The question arises, at least in principle, of why you are introducing this legislation now when we have two substantial volumes from Lord Gill on how we might revise the civil justice system.

Fergus Ewing: As the member knows, we debated Lord Gill's report. The Government values that report and recognises that it contains a large number of recommendations for improving our civil justice system, particularly to get the best deal from the client's point of view. I think that I used the phrase "delay, worry and expense" in the course of my remarks in that debate.

A lot of work is to be done in considering how we take forward Lord Gill's report. That work is being done by officials and Parliament will be fully involved in it; it indicated its willingness so to do in that debate. However, we estimate that it will take some time to introduce reforms of the scale and radical nature that Lord Gill contemplates—a lot of debate will be needed about that. It is clear that it will not be possible to do that in 2010 and perhaps not in 2011, but that remains to be seen.

Were we to say, as I think that Gilbert Anderson or one of the other witnesses suggested, that we should wait until Lord Gill's report has been implemented, we would be waiting for a gey long time. Meanwhile, most of the witnesses have argued that if we do not act now, we might find that some solicitors will simply go down to England and regulate there.

The answer is that we want to take forward Lord Gill's report and Parliament wishes so to do. A lot is to be discussed; many of the details will involve the most controversial issues and will be hotly debated without doubt. However, we should not wait until that work, which might take some years, is done before we tackle the current problem that requires to be dealt with now rather than some years hence.

Cathie Craigie: I have a question about section 92 in chapter 3—this is the most appropriate point at which to raise it. Paragraph 202 of the explanatory notes states that section 92, on membership of the council, gives

"the Scottish Ministers a power to specify, by regulations, additional criteria which must be met by non-solicitors (or a proportion of them) in order to be eligible for appointment to the Council. This may be used if, for example, it is felt that the non-solicitor members appointed are too closely aligned with the legal profession. The Scottish Ministers are also given a power to prescribe, by regulations, a minimum number or proportion of non-solicitor members on the Council."

I am concerned that that would mean too much Government control in the council. I would be interested to hear your comments.

Fergus Ewing: Scottish ministers will not seek to obtain powers to control what happens in the council. Section 92 simply gives Scottish ministers the power to specify criteria that must be met by non-solicitors, or a proportion of them, in order to be eligible for appointment to the council. The section does not therefore exist simply for us to interfere with or take decisions that are rightly in the domain and province of the Law Society of Scotland; far from it—the section deals with provisions for the appointment of non-solicitor members. I think that that provision is welcomed across the board.

12:15

Cathie Craigie: This is quite an important point, so I will pursue it further. As I said, paragraph 202 of the explanatory notes states that section 92 amends the 1980 act to give

"Scottish Ministers a power to specify, by regulations, additional criteria which must be met by non-solicitors".

It goes on to say:

"This may be used if, for example, it is felt that the non-solicitor members appointed are too closely aligned with the legal profession. The Scottish Ministers are also given a power to prescribe, by regulations, a minimum number or proportion of non-solicitor members on the Council."

That seems a wide-ranging power to give to any Government minister; if ministers did not particularly like the way in which an organisation was going, they could find a reason to change its personnel. Am I reading that paragraph wrongly?

Fergus Ewing: It is a hypothesis, I suppose, although I could not imagine Jim Wallace, Cathy

Jamieson or Kenny MacAskill, for example, wishing to take control of the Law Society.

From the point of view of the bill, we do not consider it necessary for the Law Society to become a purely regulatory body. Much of the debate in the evidence that was submitted to the Justice Committee was about the Law Society's role, which is primarily a question for the Law Society and its members to discuss. For as long as I can remember, there has been a debate within the Law Society and its membership on that matter. However, the bill provides for the separation of regulatory and representative functions for all approved regulators, and it makes specific provision for the Law Society to have a regulatory committee with 50 per cent non-lawyer membership to regulate licensed providers, independently of any representative function of the Law Society. Our provisions in the bill are therefore designed entirely to ensure that the regulatory framework and functions are set out appropriately and properly; they are not intended in any way to interfere with the non-regulatory, representative functions of the Law Society, which are entirely its domain.

The Convener: We now revert to Robert Brown, on regulation of will writers.

Robert Brown: There is, perhaps, in some aspects of the bill an element of tension between cost and quality, and between competition and professional standards. We have read written evidence from SLAS and heard its oral evidence about the scary situation with regard to wills in the context of complex changes to what was once regarded as the standard family unit. I know that, depending on the outcome of the consultation on wills, the Scottish Government is considering lodging stage 2 amendments. Is further discussion or regulation needed? Have you any preliminary views on the issue?

Fergus Ewing: Yes. I have discussed the matter with SLAS representatives. I also noted the wide-ranging evidence from Kyla Brand, Ian Smart, SLAS representatives and others, who expressed various concerns about wills. As Robert Brown will know, the starting point is that the Solicitors (Scotland) Act 1980 sets out the reserved functions for Scottish solicitors, which include the framing of writs, but exclude wills, which are therefore currently not reserved or regulated. That has led to an awful lot of concerns, which the committee has heard about. Michael Scanlan gave a pretty scary example of a fee of £1,200 being applied for what he said was a clearly inappropriate will. My recollection of charging for wills is that the fee was nearer to £30, £40 or £50 than to £1,200; that is perhaps where I went wrong.

Many witnesses have said that making a will can have serious consequences. When a non-nuclear family is involved, such as Robert Brown mentioned, or when someone who makes a will has children by different partners, there is immense scope for difficulties and problems. Instinctively, I feel as a solicitor that it is important that wills be written by people who are properly qualified, and that there should be an element of regulation.

We will lodge amendments at stage 2 in the spring, one of which could concern the introduction of a regulatory framework for non-lawyer will writers. That idea is being considered following representations to us during consultation on the bill and, subsequently, by various bodies. I note that many members of the committee have pursued this line of questioning with various witnesses. It is not our intention to regulate individuals who prepare their own wills: the aim is not to place restrictions on informal or death-bed wills. I do not think that it would be right—although this is a matter for consultation and debate—to outlaw people making their own wills, perhaps in their last moments on this earth. That might run contrary to the European convention on human rights. The aim is to produce regulations on non-lawyer will writers, which might, in practice, include entities such as supermarkets that provide pro forma wills.

A particular point of concern about which evidence has been led is the prevalence or development of execution-only wills, whereby a will is offered by a non-lawyer business—say, a supermarket—on the proviso that it takes no responsibility for the consequences of it. Many of us have deep misgivings about the probity of that practice and question whether it should be permissible and legal in Scotland. I just wanted to outline that matter.

If committee members want more information, Andrew Mackenzie can talk about the consultation paper that we have issued. For the benefit of committee members and people who might read the *Official Report* of the meeting, I remind members that the consultation will conclude on 19 February. That is, as a result of the timetabling of the bill, less than the usual 12-week minimum period for consultation responses. Responses to the consultation that are submitted by that deadline will be very much appreciated.

The Convener: I take it that the terms of the consultation are on the website, Mr Mackenzie.

Andrew Mackenzie: Yes, that is correct.

The Convener: Therefore, it might be redundant for us to go into that matter this morning.

Andrew Mackenzie: Correct.

Robert Brown: I have one more general question on wills. The minister talked earlier about the problems that arose from light regulation of banking. I do not think that anybody would dispute that there were issues with that, but some people might allege that part of the difficulty was that people who did not have backgrounds in banking came into banking with different traditions and a different ethos. In the context of the bill and the possibility of having outside investors and people who are not qualified solicitors entering the profession, does the minister feel that the long-standing tradition and ethos of the Scottish legal profession could be changed and taken in an undesirable direction, irrespective of regulation, by bringing in the new forms of organisation that we are discussing? That is a more general question, which is illustrated by the difficulties that have been experienced in relation to wills and the quality-against-cost argument.

Fergus Ewing: I would agree with Mr Brown, were it not for the fact that the bill specifically requires non-lawyers who will be involved with licensed service providers to uphold the high standards that solicitors must meet, whereas execution-only wills are provided by people who are subject to no such standards. In that respect, although Mr Brown makes an interesting point, it is not one with which I entirely agree.

On regulation of will writers, I very much hope that we can work with the committee to introduce legislation that tackles the problems that have been identified by many of the witnesses who have given evidence—subject, of course, to our conducting a thorough and careful analysis of the responses that we receive to the consultation paper.

Robert Brown: My point was about whether the issues to do with provision of inadequate service, as were thrown into stark relief in relation to wills, are risked by the general ethos of the bill because—as we know from banking—imposing obligations on people in statute is not quite the same as building in with the bricks the ethos and other things that go with traditional legal practice.

Fergus Ewing: I do not agree. The bill imposes an extremely high regulatory standard, to which those who will be involved must subscribe. If they fail to do so, they may be committing an offence. That is not the case with wills.

I take the general point that to allow non-solicitors to carry out work that has traditionally been carried out by solicitors will bring about a new situation, but that is precisely why we have devised a regulatory framework that I believe is preferable to the one that has been introduced south of the border. It will not involve such huge costs and will protect the public, the consumer and—as far as possible—access to justice. For those reasons, I respectfully disagree with Mr Brown's contention.

The Convener: At the same time, there are specific issues that must be dealt with, which we hope can be dealt with prior to stage 2, if necessary.

Fergus Ewing: As time permits.

The Convener: Finally, we turn to questions on the financial memorandum, which will be asked by James Kelly.

James Kelly: Do you accept that if the bill is passed as it stands, the solicitors guarantee fund will not be able to continue in its present form, which will undermine the protection that it provides to users of legal services in Scotland?

Fergus Ewing: The bill has the policy aim of requiring people who will operate in alternative business structures to provide to clients the same standards of protection that would be provided if the status quo were maintained. That applies to the arrangements under the indemnity insurance scheme against professional negligence. There are provisions in the bill explicitly to cater for that.

In addition—to respond to Mr Kelly's question—we believe that there should also be protection against fraud. My understanding is that the current regime operates through the solicitors guarantee fund, which protects the public against fraud by solicitors. It is our intention that the bill will include provisions on compensation in cases of fraud, so we are currently looking at various options. It is a question of precisely which options are appropriate. For the benefit of members, I can reveal that the options that we are considering include a compensation fund and fidelity insurance. We anticipate the bill being amended in that regard at stage 2.

I think that James Kelly asked whether what we are doing will impact on current arrangements. Plainly, the paramount interest is protection of the public, so nothing will be done that would adversely impact on the protection that rightly exists for people who deal with solicitors.

The Convener: We find that encouraging, although I am surprised and slightly concerned that the issue was not identified a little further back down the road.

12:30

Fergus Ewing: I may say that my involvement with the bill has been fairly recent, but the matter did form part of our early discussions. That said, it is self-evidently the case that there must be proper protection against fraud. There is slightly more to it than that, in that it might be argued that the matter

is implicit in the bill. I think that Mr McKay is going to give us some more information about that.

Colin McKay: The question is one that we recognise. One of the difficulties has been that concerns have been expressed within the solicitor profession about the sustainability of the current guarantee fund, regardless of the bill, so there might have been a difficulty in simply importing the same requirements for other providers. We have been working with the Law Society on the detail of how that might work best. We are certainly well aware that the issue needs to be addressed.

James Kelly: Douglas Mill states in his written submission to the committee that the financial resources for the bill are totally inadequate. Will you respond to that comment? For example, paragraph 227 of the financial memorandum states that only £13,000 will be allocated to monitoring, which seems to be on the low side, to say the least. Perhaps that backs up Mr Mill's concerns.

Fergus Ewing: I am aware of Mr Mill's criticism, which we take seriously, given his experience. We considered the matter carefully on the basis of our consideration of applications by bodies that wish to regulate under the provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Although the figures that we produced have come in for criticism, I am not aware that any other individual or group has sat down to work out what the costs would be and presented their findings. We are in discussions with the Law Society on the figures.

I think that Mr Mill goes on to state that we should fund a legal services board, as is done in England and Wales. For the reasons that I mentioned earlier, we do not consider that it would be appropriate or wise to spend several million pounds on that, particularly in the current economic recession. Our doing so would impose on Scottish solicitors a substantial financial burden that we could not justify.

I reread the financial memorandum earlier this morning. Plainly, the way in which it goes about its business is to envisage that the work that will be done on considering the approval of the regulator mechanism and then monitoring the regulator will be done in-house. It estimates the number of civil servants who will be required to carry out the work. The estimates are set out explicitly in the financial memorandum. The figures vary. Paragraph 219 contains different figures depending upon the number of applications. I think that I alluded earlier to the fact that we expect between one and six applications. Different figures are set out for three scenarios, depending upon the number of applicants who come forward to be approved as regulators.

The costs are fairly modest, but the estimates are based on the rationale that we will do the work in-house. We will not, during an economic recession, create a quango with more costs to the public and more burdens that we cannot begin to justify. That means that officials will work even more effectively than they do at the moment and, perhaps, that they will carry out more work than they do at the moment, which might not be such a bad thing. I have every confidence that my officials will discharge that job properly and efficiently, as they do the rest of their duties. Although I am aware of the criticism from Mr Mill, which we take seriously, we do not accept it.

We do not know how many people will apply to be a regulator, so it would be difficult to take any approach to the financial memorandum other than the one that we have chosen. I am pleased to be presenting a bill that has relatively modest implications for the public purse at a time when it is so important that we devote taxpayers' money to front-line public services in our hospitals, schools and so on.

James Kelly: It is one thing to comment on the costs of the bill's provisions being modest, but it is important that the costs are accurate.

In the earlier discussion about the ease of complaint handling, Mr McKay mentioned the Scottish Legal Complaints Commission. The Law Society of Scotland said in written evidence that the bill will mean additional work for the commission that is not properly taken into account in the financial memorandum.

Fergus Ewing: It is correct to say that the bill makes provision for the making of a new type of complaint called a regulatory complaint, for which we have not included an estimate of the cost. We do not really think that the cost will be hugely significant, which is why it is currently not included. However, as Mr Kelly has raised the issue in the committee, I will go back and check whether any provision needs to be made.

Given the likelihood that a relatively small number of firms will apply to be licensed providers—the financial memorandum estimates no more than 200 and then goes on to consider what the licence fee might be for those individual firms—and given that the number of complaints made per solicitor in Scotland is not huge, I personally would be surprised if there were a significant number of regulatory complaints. I might, as ministers do, live to regret those words—I have not yet, I guess, reached that stage of being a minister—but I personally would be surprised if that were a significant issue. However, as Mr Kelly has raised the matter, I will double-check in case we have failed to make some, albeit modest, provision.

Colin McKay: It is important to remember that the Scottish Legal Complaints Commission is funded by a levy on the profession rather than from the public purse. If the existence of ABSs led to more complaints to, and costs on, the Scottish Legal Complaints Commission, the ABSs would bear that in their subscriptions to the commission.

The Convener: One point that we missed earlier, which was probably my fault, is that we have had some contradictory evidence about the impact that the bill might have on the ability of charitable organisations and advice organisations to deliver legal services. Does Mr Ewing have any comments on that aspect?

Fergus Ewing: The bill was drafted so as to ensure that organisations in the voluntary sector are not burdened by unnecessary regulation and cost. As I may have indicated earlier, we will discuss with Citizens Advice Scotland its concern that the requirement on licensed providers to operate for gain would be restrictive for the purposes of citizens advice bureaux. We will consider with CAS whether the voluntary sector might be disadvantaged by the proposals, which is certainly not what we seek to happen. If that results in our being persuaded of the need to make provision for that matter, I hope that we can look at that at stage 2.

Robert Brown: A general point about the enforcement of duties occurred to me when the minister was talking about some aspects of the regulatory system. Does the bill provide for, for example, the ability to suspend licensed legal service providers, either temporarily or long term? Does it provide for any criminal sanctions for things such as failure to keep a client's account, which is dealt with in a general way under section 18? Does the bill provide adequate sanctions, or do those perhaps require to be spelled out to a greater degree? Do they include criminal sanctions? I cannot honestly say whether criminal sanctions can currently be applied to solicitors, but it seems to me that some matters might not adequately be dealt with by financial sanctions. For example, if someone makes off with a client's money, I am not sure that that should be dealt with in the context of failure to deal with the rules properly.

Fergus Ewing: Section 14 provides for practice rules. Mr Brown and I are familiar with practice rules, because we were subject to them as solicitors in practice. Such rules deal with breach of regulations. Section 14(1)(f) states that practice rules are about

"the measures that may be taken by the approved regulator, in relation to a licensed provider, if—

(i) there is a breach of the regulatory scheme, or

(ii) a complaint referred to in paragraph (e) is upheld."

Paragraph (e) concerns

"the making and handling of any complaint about ... a licensed provider".

Section 16(1) deals with sanctions and enforcement of duties. It states:

"Practice rules must include provision that it is a breach of the regulatory scheme for a licensed provider to—

(a) fail to comply with section 38, or

(b) fail to comply with its—

(i) other duties under this Part, or

(ii) duties under any other enactment."

My recollection is that there are other provisions later in the bill relating to offences. I do not have those references to hand—I feel as if I have come to the end of a long multiple-choice examination. I am advised that the general criminal law, rather than statutory offences, applies in this regard. The general criminal law has served us pretty well.

Robert Brown: Is that adequate? Does it match what is available in the instance of a breach of professional conduct by a solicitor? You are right to say that section 16 refers to breaches of the regulatory scheme, but it is not immediately obvious to me that it deals with sanctions for those. I was raising the general issue—I do not have a particular agenda—of whether the financial sanctions that are mentioned in section 15 are enough to give proper public control of bodies operating in this area. I am not necessarily looking for an answer today, as the matter would bear a bit of consideration. I invite you to come back to us on the point later.

Fergus Ewing: The answer will be that the sanctions are contained in the general law that applies to solicitors, which is imported into the bill. Mr McKay will provide more detail.

Colin McKay: You alluded to the fact that section 18, on accounts rules, imports into the bill sections 35 to 37 of the 1980 act, which contain provisions on maintaining proper accounts, keeping clients' funds separate, having proper accountants' certificates and so on. The sanctions in such cases are that failure to comply with the provisions will be professional misconduct. As you said, section 15 of the bill allows the regulator to impose financial penalties. That is comparable with, and possibly even stricter than, some of the penalties that would be imposed on solicitors. We can set out the matter in detail in writing.

Robert Brown: That would be helpful.

Cathie Craigie: At the moment, a solicitor can be struck off if they have done something that merits that. Will there be a penalty as strong as that for non-solicitors?

Fergus Ewing: Non-solicitors cannot be struck off the roll of solicitors, as they are not on it.

Cathie Craigie: No, but could they be debarred from acting as a non-lawyer proprietor of a legal services firm?

Fergus Ewing: Plainly, solicitors are subject to the existing regime. Mr McKay will now regale us with the contents of section 68.

Colin McKay: Apologies for darting about, but I refer members to sections 44 and 68. Section 44 allows the approved regulator to disqualify people from certain conditions, including from being a designated person—basically, the approved regulator can tell someone that they can no longer provide legal services in an LLSP. Regulators must keep lists of people who have been disqualified, so that such people do not try to join another practice. In effect, that is equivalent to being struck off.

The Convener: Members have no further questions. I thank the minister for his performance at a fairly lengthy evidence session this morning and the officials for their helpful contributions.

12:45

Meeting continued in private until 13:04.

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