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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 8 June 2010

Session 3

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JUSTICE COMMITTEE
19th Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Dr Richard Simpson (Mid Scotland and Fife) (Lab)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Richard Baker (North East Scotland) (Lab)
Fergus Ewing (Minister for Community Safety)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 8 June 2010

[The Convener *opened the meeting at 10:35*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. There have been no apologies. I remind all present to switch off mobile phones in order to avoid interrupting the proceedings.

The committee is invited to decide whether to take in private item 3, which is consideration of the Scottish Court Service's proposed framework agreement. Is that agreed?

Members *indicated agreement.*

Legal Services (Scotland) Bill: Stage 2

10:36

The Convener: The major business of the morning is stage 2 of the Legal Services (Scotland) Bill. This is the first day of stage 2 proceedings on the bill, and the committee will not proceed beyond section 60 today. I welcome the Minister for Community Safety, Fergus Ewing MSP, who is accompanied by various officials who will assist him in the course of this morning's considerations. I welcome also Richard Baker MSP, a non-committee member who has a particular interest in some of the amendments. Members should have their copies of the bill, the revised marshalled list and the revised groupings of amendments for today's consideration.

Section 1—Regulatory objectives

The Convener: We start, appropriately, at section 1. Amendment 219, in the name of Robert Brown, is grouped with amendments 220 to 222, 1, 223 to 225, 2, 226 and 97. I refer members to the pre-emption information on the groupings paper, and point out a further pre-emption that is not noted, namely that amendment 226 pre-empts amendment 97.

Robert Brown (Glasgow) (LD): It is worth while giving a context to the bill and to the substantial number of amendments taken from suggestions by the Law Society of Scotland. This is a difficult and controversial bill. I admit that I have struggled, as I think the rest of the committee has, to comprehend fully the practical implications, the potential unintended consequences, and the balance of advantages and disadvantages of the changes for the public, the legal profession and the independence of the legal system.

One of the main reasons for the difficulties is that the regulatory framework and the potential for outside control of legal firms of the kind permitted by the bill does not appear to exist anywhere else in the world, with the exception of England, although the provision has not yet come into effect there. There is a dearth of evidence, and even of credible suggestion, about how it will operate in practice.

Secondly, the untrammelled virtues of open competition took something of a knock with the banking crisis. We are perhaps a bit more sceptical about the claimed advantages of opening up other markets. I am unenthusiastic anyway about regarding the law of Scotland as just another commodity that is sold in a market. While there are rogues and villains in legal practice, as in all walks of life, it is the underpinning of legal

ethics built into training and practice that distinguishes the practice of law as a profession.

The first set of amendments is designed to strengthen the ethical content of the regulatory objectives and the professional principles in sections 1 and 2 of the bill. Amendment 219 adds the objective of protecting and promoting "the interests of justice". I am rather surprised that that is not in the bill already, because it is potentially the objective that should have precedence over most other aims. Amendment 220 gives it that priority, along with the constitutional principle of the rule of law.

The argument has been presented to me that it is not helpful to provide a hierarchy of objectives. While I do not accept that objection, I am happy to listen to the minister's view on that. The other objectives, such as access to justice or competition, are ultimately a means to those greater ends.

The Law Society of Scotland takes the view that the protection and promotion of the interests of justice is one of the fundamental objectives of the provision of legal services and is ahead of the protection and promotion of the interests of consumers and the public interest. I agree. The protection and promotion of the interests of consumers and the public interest and the promotion of access to justice and competition are appropriate regulatory objectives, but they are not as fundamental to the provision of legal services as supporting the rule of law and protecting and promoting the interests of justice.

My amendment 221 is more technical, but it puts the interests of justice at the heart of the professional principles as well as the regulatory objectives. The only difference between it and Richard Baker's amendment 222 is that my amendment separates out "act with integrity" as a separate principle. Arguably, it is.

I am happy to support the minister's amendment 1 and James Kelly's amendment 223 seems to be a distinct improvement of section 2.

The spelling out of the obligation of professional confidence and to

"act in conformity with professional ethics"

in Richard Baker's amendment 224 is helpful, although it might be questioned which professional ethics are imposed. I am interested in the argument on that. I also want to hear the case for amendment 225.

Amendment 226 removes the qualification of practicability from the duties on the Scottish ministers in regard to the regulatory objectives. I have difficulty in seeing how the Scottish ministers could or should ever be excused from the application of those objectives to them, or indeed in conceiving circumstances in which that would be desirable.

Nigel Don's amendment 97 would be a modest improvement to the bill as drafted, but unless the minister can make a case to the contrary, the phrase "so far as practicable" should be got rid of altogether in this context.

I move amendment 219.

Richard Baker (North East Scotland) (Lab): I support Robert Brown's amendments on the regulatory objectives and his comments on them. I do not have a strong view on whether his amendment 221 or my amendment 222 is preferable in clarifying the principle of acting with independence and referring to acting with integrity. I am happy simply to support his amendment.

I lodged amendments 224 and 225 following discussions with the Law Society of Scotland. I know that the Law Society has been in dialogue with the Scottish Government on referring to the matter of confidentiality in the professional principles that the regulatory objectives are to promote. That dialogue resulted in the minister's amendment 1. Amendment 224 is broader in scope than amendment 1, as it includes reference to professional ethics. The legal profession is defined by its requirement to act ethically in the interests of justice and in the best interests of clients. In particular, the Law Society is concerned that the bill does not place enough importance on client confidentiality; it believes that that requires to be explicitly mentioned among the professional principles. I lodged amendment 224 on that basis. I lodged amendment 225 because, as currently drafted, section 3(1)(a)(i) appears not to include documents such as parliamentary bills, for example. Legal activities such as the drafting of bills or amendments to bills would therefore be excluded. Committee members will be keenly aware of the importance of such activities, particularly the consideration of complex bills such as the Legal Services (Scotland) Bill. I hope that committee members agree that the definition of legal services should be broad enough to include legislative work.

The Minister for Community Safety (Fergus Ewing): In their evidence to the committee, the Law Society of Scotland, the Scottish Law Agents Society and Professor Alan Paterson raised the issue of whether the professional principles should specifically mention client confidentiality. It may be recalled that I specifically alluded to that in my speech at stage 1. We consider that such confidentiality is, arguably, included in the professional principles in the bill as currently drafted, particularly in section 2(c). However, I informed the committee that we would consider the issue further. In view of the concerns that existed and in order to remove all doubt,

amendment 1 was lodged. It inserts into section 2(c), which refers to the professional principle of acting

"in the best interests of ... clients",

a specific reference to keeping clients' affairs confidential.

Amendment 224, in the name of Richard Baker, would insert a similar requirement for confidentiality, with the addition of the words:

"act in conformity with professional ethics."

I consider the reference to professional ethics to be unnecessary. Professional ethics are professional principles, for which there is already provision in section 2 of the bill.

10:45

A number of provisions in part 4 provide the Scottish ministers with regulation-making powers. For example, proposed new section 3B(5) of the Solicitors (Scotland) Act 1980 gives the Scottish ministers a power to make regulations to make further provision about the council of the Law Society of Scotland's regulatory functions. Amendment 2 ensures that there is consistency by specifying that, in making such regulations, the Scottish ministers must act in a way that is compatible with the oversight requirements that are set out in sections 4(2) and 4(3).

Robert Brown's amendments 219 and 220, which are supported by Richard Baker, insert a new regulatory objective of protecting and promoting the interests of justice and insert into section 1 a new subsection that provides for a prioritisation of objectives in the case of regulatory conflict. Robert Brown's amendment 221 and Richard Baker's amendment 222 amend the professional principles to refer to the interests of justice. I do not support those amendments because, in my view, they are unnecessary. Section 1, on the regulatory objectives, already refers to the constitutional principle of the rule of law. It also refers to the interests of consumers, the public interest in general, and other objectives, all of which serve the interests of justice.

The section on professional principles already ensures that persons who provide legal services

"support the proper administration of justice",

which is in section 2(a),

"act with independence and integrity",

which is in section 2(b), and, when conducting or exercising litigation,

"comply with such duties as are normally owed to the court by such persons."

Given the objectives and principles that are already set out in the bill, my view is that separate references to the interests of justice would be redundant.

I entirely understand the arguments that Robert Brown and Richard Baker make and I entirely support the spirit in which they are made. We are all at one in that regard. Our argument is that, because of the comprehensive nature of the bill as set out in sections 1 and 2, where the regulatory objectives and professional principles are clearly spelled out, the amendments that my two colleagues have lodged are unnecessary and, in fact, redundant.

We have given the regulatory objectives and professional principles careful consideration and we consulted the bill reference group on them. The members of the group, including the Law Society of Scotland, generally felt that section 1 is acceptable as it stands and there was a consensus that further amendments such as those that have been lodged should not be pursued. The bill reference group also agreed that ranking the regulatory objectives could be misleading. I would go further. To prioritise certain objectives would inevitably downgrade the others. The regulatory objectives should be considered as a package, one being as important as the next.

James Kelly's amendment 223 would omit

"maintain good standards of work"

from section 2(d) and substitute:

"ensure standards of work of reasonable and ordinary care and skill".

I have not yet had the opportunity to hear James Kelly discuss his amendment. Plainly, I will listen to him with interest and respect. On the face of it, however, we do not support the amendment as the change in wording would water down the professional principle of maintaining good standards of work.

Richard Baker's amendment 225 extends the definition of legal services in section 3 by specifically including the provision of legal advice or assistance in connection with legislative instruments. I listened carefully to Richard Baker's exposition of the arguments for his amendment. However, we do not support the amendment because we take the view that it is unnecessary. Legislative instruments are already covered by the wording "other legal document". Furthermore, to include specific examples of legal documents would create uncertainty about whether other documents that were not specifically mentioned were covered.

Robert Brown's amendment 226, which is supported by Richard Baker, removes the phrase "so far as practicable" from section 4(2). The result would be that the Scottish ministers must, regardless of how impracticable it might be, act in

a way that was compatible with the regulatory objectives. I do not support the amendment. The phrase "so far as practicable" is necessary because the duties are broad and it might not be possible objectively to measure compliance. In particular, there might be tensions between objectives and a reasonable balance will need to be struck between them. Indeed, amendment 97, in the name of Nigel Don, recognises the requirement for the wording "so far as practicable", which amendment 226 seeks to remove. Amendment 97 seeks to insert "reasonably" into that wording. As you know, convener, the Scottish ministers should always act in a reasonable way; therefore, I hope that members will accept that the word is implied. Although I welcome the support for the current wording, I do not consider that further clarification is necessary.

I invite the committee to agree to amendments 1 and 2; I respectfully invite Robert Brown to withdraw amendment 219; and I invite members not to move amendments 220 to 226 and 97.

James Kelly (Glasgow Rutherglen) (Lab): I will be brief. Amendment 223 seeks to remove from section 2(d) the words

"maintain good standards of work"

and replace them with

"ensure standards of work of reasonable and ordinary care and skill".

I am not comfortable with the current wording, as I feel that the use of the word "good" is a bit vague and loose. I do not agree with the minister that the proposed wording waters the provision down; I think that it is more specific in that it uses the term "reasonable", which is well known in legal circles. It also refers to the standards of work being of "ordinary care and skill". I submit that the proposed wording is more comprehensive and specific about the professional standards that we want to see adopted.

I also support Robert Brown's and Richard Baker's amendments.

Nigel Don (North East Scotland) (SNP): Amendment 97 was lodged to clarify the meaning of section 4(2), which lays out some ministerial duties. Ministers could not be expected to do something that was impracticable; therefore, I feel that the word "practicable" is redundant. Nevertheless, if it is to be in there, my understanding of statutory interpretation is that that which is practicable is anything that can be done, regardless of cost, whereas that which is reasonably practicable requires the court, if necessary—hopefully, the courts will go nowhere near this—to take the cost into account. That is why the amendment proposes to introduce the word "reasonably"; however, I am happy to take the minister's assurance that that is unnecessary.

The Convener: There being no further comments, I make one of my own. The amendments in the group are largely predicated on concerns that arose in the committee's taking of evidence, and the Government has responded to what was seen as a particular difficulty regarding client confidentiality. In general terms, those who practise law have very clear fundamental duties, one of which is to act in the interests of justice. Lawyers are officers of the court and in many instances, also have a clear duty to their clients. That is a special duty, but all such matters are subsumed by the need to ensure that the interests of justice are protected and promoted. In that respect, Robert Brown's amendment 219 is worthy of support.

Client confidentiality is an important feature of the operation of any legal practitioner. If those who seek the assistance of lawyers cannot be certain that the information that they will provide will be dealt with confidentially, the very principles of the legal system are undermined and in profound difficulty. Amendment 1, in the name of the minister, clearly recognises that and I congratulate him on responding by lodging that essential amendment. I am, however, of the view that other amendments that go a little bit further are preferable. Amendment 224 refers to professional ethics and underlines the fact that the legal profession must act ethically and in the best interests of its clients as well as in the interests of justice. That is an interesting amendment. Although I have grounds for assuming that, in the vast majority of cases, legal practitioners accord with those ethics, it is perhaps arguable that that should be included in the bill.

Amendment 226 relates to ministerial oversight and seeks to remove the phrase "so far as practicable". I listened with interest to what Robert Brown said, and I foresee difficulties in the definition of what is "practicable". However, one must assume that Governments of whatever hue or complexion will act in a reasonable manner. Although I have frequently disagreed with the actions of the current and previous Governments, I have not considered that they have ever acted unreasonably. Therefore, amendment 97 may not be necessary.

There is a considerable consensus around the table, which the Government recognises, that the existing section 1 needs improvement; the argument is about what constitutes the best procedure for that improvement.

Fergus Ewing: This has been a useful debate. I do not think that any of us are at loggerheads on these matters; we are simply trying to identify the most appropriate framework that sets out the objectives and principles to which all lawyers—whether in licensed legal services providers or

not—should subscribe. There are arguments to support Robert Brown's and Richard Baker's amendments, which they have properly made today, although we believe that, on somewhat technical but nonetheless important grounds, they should not be supported. Nevertheless, if they are agreed to, they will not create serious problems or defects in the bill, with one exception. I did not pick up the convener's views on amendment 220, which would create a hierarchy of objectives. We believe that it would be a dangerous approach to put one of the objectives above the others. That does not seem to be a prudent course of action. That said, I welcome the debate, which has been useful, and I thank all members for their contributions.

Robert Brown: It has been a useful and important, if somewhat theoretical, debate. I will run through what I think has been said about the different amendments. There is beginning to be consensus around amendment 219, on the interests of justice, and I will press the amendment.

I accept the minister's caution on amendment 220 and, with the committee's permission, I will not move that amendment. The matter might be worth looking at in further discussion, but it is perhaps not worth pressing at the moment.

We discussed amendments 221 and 222 earlier and Richard Baker has kindly indicated that he is prepared to back amendment 221. I think that amendment 224 on client confidentiality is preferable to amendment 1. James Kelly made a good case for amendment 223.

I am not entirely persuaded of the need for the phrase

"so far as reasonably practicable".

It is not an area in which there would be a huge financial requirement on the Government that could not be met in certain situations; it is a relatively technical matter of the framework that surrounds the protocols, regulatory principles and so forth that apply to the regulator. I cannot, frankly, conceive of a situation in which the practicability of the matter would come under discussion. If there were genuinely a situation in which it was totally impracticable to follow the rules—although I cannot foresee where that might be the case—that would probably be implied in the law already, although I may be mistaken about that. I will, therefore, move amendment 226 in that context. If the amendment is not agreed to, amendment 97 is a reasonable adaptation of the phrase.

11:00

The Convener: The question is, that amendment 219 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 219 agreed to.

Amendment 220 not moved.

Section 1, as amended, agreed to.

Section 2—Professional principles

The Convener: Amendment 221, in the name of Robert Brown, has already been debated with amendment 219. There is a potential pre-emption: if amendment 221 is agreed to, I cannot call amendment 222.

Amendment 221 moved—[Robert Brown].

The Convener: The question is, that amendment 221 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 221 agreed to.

Amendment 1 moved—[Fergus Ewing].

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

AGAINST

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 1 disagreed to.

Amendment 223 moved—[James Kelly].

The Convener: The question is, that amendment 223 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

I use my casting vote against the amendment, because I think that it is unnecessary, that the standards to which the amendment refers can be assumed and that, where they are not present, there is a remedy.

Amendment 223 disagreed to.

Amendment 224 moved—[Richard Baker].

The Convener: The question is, that amendment 224 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 224 agreed to.

Section 2, as amended, agreed to.

Section 3—Legal services

Amendment 225 moved—[Richard Baker].

The Convener: The question is, that amendment 225 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 225 disagreed to.

Section 3 agreed to.

Section 4—Ministerial oversight

Amendment 2 moved—[Fergus Ewing]—and agreed to.

Amendment 226 moved—[Robert Brown.]

The Convener: I point out that if amendment 226 is agreed to, amendment 97 will be pre-empted.

The question is, that amendment 226 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

I use my casting vote against amendment 226, because I do not think that it is necessary.

Amendment 226 disagreed to.

Amendment 97 not moved.

Section 4, as amended, agreed to.

After section 4

The Convener: Amendment 3, in the name of the minister, is in a group on its own.

Fergus Ewing: During stage 1, the Law Society of Scotland suggested that further provision be inserted throughout the bill to require the Scottish ministers to consult before exercising their functions. I agree that consultation is desirable in relation to many of the functions of the Scottish ministers. However, rather than insert numerous specific consultation requirements, I thought that it would be preferable to have a freestanding section that requires the Scottish ministers, in addition to any specific requirement, to consult, where appropriate, persons or bodies on relevant matters.

Amendment 3 will therefore insert a new section that makes provision for consultation by the Scottish ministers in relation to the exercise of their functions under parts 2 to 4. Proposed new subsection (2) provides:

"Where ... the Scottish Ministers consider it appropriate to do so in the case of an individual function, they must consult such persons or bodies as appear to them to have a significant interest in the particular subject-matter to which the exercise of the function relates."

Proposed new subsection (3) provides:

"The general requirement to consult under subsection (2) has effect in conjunction with, or in the absence of, any particular consultation requirement".

I am grateful to the Law Society for its suggestions on the matter.

I move amendment 3.

The Convener: If there are no comments from members, I will assume that the minister does not want to wind up and I will move straight to the question.

Amendment 3 agreed to.

Before section 5

The Convener: Amendment 227, in the name of Bill Butler, is grouped with amendments 228, 229, 234, 245, 246, 251, 253, 255, 257 to 259, 263 to 267, 269 to 271, 273, 275 to 277, 280 to 282, 285, 287, 290, 294, 295, 297, 300 to 306, 308, 309, 316, 318, 320, 322, 324 to 329, and 331 to 356.

Bill Butler (Glasgow Anniesland) (Lab): I will speak to amendments 227, 228 and 229. Members will be relieved to hear that I will not speak to the 75 consequential amendments in the group.

It is fair to say that the issue of ownership has been thorny and has excited great passion outwith the Parliament. The Parliament must reflect and try to make sense of the strongly held views that have been expressed. In lodging the amendments, I am arguing not that no change is an option—it is not—but that any change in the law must serve to promote access to justice or, at the very least, must not damage access to justice. The question is whether the bill fosters or potentially damages access to justice.

Competing goals and interests must be considered and balanced against each other. On one hand, there is the desire to allow law firms to grow, remodel and introduce new capital, whether internal or external, which might well bring public benefits. On the other hand, there is a need to ensure that the public are protected, through preserving privilege and independence while maintaining the Scottish solicitors guarantee fund and the master insurance policy. It is obvious that a balance must be struck and that the approach must be proportionate.

There are key considerations in the decision on where the balance is to be struck. The risk that is associated with getting things wrong and going too far is enormous, because there will be no going back after the changes have been made. Thus, if firms were allowed to have 75 per cent external ownership and the approach was subsequently found to be a disaster, it would be virtually impossible to reduce the level of external ownership.

In contrast, it would be easy to go further with future legislation to increase the percentage of non-solicitor ownership if, ultimately, it was thought that the legislation ought to go further. I therefore believe that there is a strong case for not being too aggressive or too adventurous. As I said, the approach must be proportionate and ought to be restrained in light of the fact that the percentage of non-solicitor ownership could be increased in the future.

Taking all that into account, I propose in the amendments that the appropriate split be that a maximum of 25 per cent non-solicitor ownership be permitted at present. My information is that that percentage constitutes what is called negative control in terms of company law and is therefore considered to be an appropriate place to start the process. I believe that it also represents the current position in England, where legal disciplinary practices, or alternative business structures, will not be seen until the end of 2011. On the worst-case scenario for those who are pushing for greater change, it can be viewed as a first step in a process.

The non-solicitor ownership may be external or internal, but there will require to be additional controls on non-external ownership. I believe that with a 75:25 per cent split, the entity will remain a

legal practice or law firm. There is accordingly, in my view, no need to come up with new names such as "licensed legal services providers" or the like. I refer colleagues to the phrase in amendment 227: "licensed legal services providers" is seen as the equivalent of

"a firm of solicitors or an incorporated practice".

I believe that there is no need to force complicated structures upon the profession with this split. I believe that a limited liability partnership or incorporated practice—that is, a limited company—will be more than robust enough to deal with these matters if 75 per cent of the business is owned by solicitors. Similarly, if 75 per cent of the practice is owned by solicitors and it is accepted that that means that the entity remains a law practice, there is surely no basis upon which any other entity should be permitted to be a regulator. That is why the Law Society of Scotland would be the preferred regulator in that case.

In conclusion, I am not saying that this group of amendments is an argument for no change. I accept that law firms ought to be able to introduce outside and non-solicitor capital, but that can surely be done in a proportionate way only if providers of legal services continue to be law firms in the sense that a large enough proportion of their capital is held by solicitors and they continue to be tightly regulated by the Law Society of Scotland. I believe that the amendments provide the best way to achieve that by fixing the maximum figure for non-solicitor ownership at 25 per cent.

I move amendment 227.

Stewart Maxwell (West of Scotland) (SNP): I oppose amendment 227, in particular, for a number of reasons. I would like to ask a couple of questions about Bill Butler's comments in asking us to support amendment 227. He started off by explaining that there is a risk that we could "damage access to justice". I find that to be a curious line of argument, given that it was the Labour Party that introduced exactly the same measure in England. Does he believe that the Labour Party has damaged access to justice in England by doing so? I do not believe that it has, so I find it curious that a member of the Labour Party here is making that argument.

Secondly, Bill Butler also said that the bill would—I hope that I quote him correctly—

"force complicated structures upon the profession."

Of course, that is completely untrue because the bill is permissive; its provisions are entirely voluntary and organisations and individuals can become part of ABSs if they so desire and they meet the standards that are set down by an approved regulator. Nothing is being forced on the profession in the way that has been suggested.

11:15

I have two other points to make. On the balance between ownership or investment from outside and from inside the profession, it is clear—as we on the committee are only too aware—that a regulator can decide on that balance if it so wishes. If, hypothetically speaking, the Law Society of Scotland became an approved regulator and decided that it wished to regulate only the firms that met a particular standard—25 per cent outside ownership, a ratio of 51:49 per cent, which we will discuss soon, or any other standard that it wished to put in place—it could do so. It would therefore be much more appropriate to leave the approved regulator to decide on that issue rather than to set it out in the bill.

My final point concerns the super-complaint that was investigated by the Office of Fair Trading, which started the whole process, particularly with regard to the rule in England and Wales. If we instigate a fixed maximum for outside investment and ownership, we will fail to deal with the issue of the super-complaint—in other words, we leave the way open for another super-complaint that would oppose the very thing that Bill Butler is trying to insert in the bill.

For those reasons, I am afraid that I cannot support the amendments in Bill Butler's name.

Robert Brown: I also oppose amendment 227, although on slightly more lukewarm terms than Stewart Maxwell. It is important that we debate the issue, but I am not persuaded by the argument.

I have one minor question for Bill Butler. Amendment 227 mentions licensed providers being licensed in certain circumstances, but it is not clear whether other people beyond that would be forbidden to operate in the field. I am not sure what the answer to that is, because the amendment meshes the Solicitors (Scotland) Act 1980 with the bill.

It seems that amendment 227 is, in effect, a wrecking proposition with regard to the concept of the bill. The bill's purpose, when push comes to shove, is to enable the larger corporate firms that currently practise as Scottish solicitors to compete on a level playing field with legal entities in England, not least in respect of the importance of English law internationally. We went into that in some detail during our discussions on the bill to find out how it would work vis-à-vis the continent and countries such as Germany. Most of the larger firms support the bill on that basis, and we must take their position seriously because of their importance to the Scottish economy and to the legal services market, in particular. However, we must also ensure that the unintended consequences of the bill do not include Scottish firms being easily taken over by their competitors

elsewhere. The issue concerns the safeguards that we should put in place.

I said that my view was more lukewarm than that of Stewart Maxwell. The super-complaint that was inquired into by the OFT has been waved over the bill left, right and centre from the beginning, and I accept that there exists that potential. However, the ability to raise a super-complaint is one thing; to have it accepted and regarded as valid is something else. I am not altogether persuaded that a super-complaint that is investigated by the OFT is as valid as it has been made out to be.

On whether we leave it to the regulators to decide the balance, that is fine—we will further debate the 51:49 per cent ratio later. Such things are always arbitrary to some degree, and Bill Butler makes an important point about the influence of minority owners. We must bear that in mind as we examine the issue. It is a question of striking a balance between acting in the interests of the larger firms and the Scottish economy while not damaging the interests of the smaller firms.

I do not altogether accept the argument that the bill is permissive. One might say that it was entirely permitted that the supermarkets came to ordinary high streets and pinched all the business from the little shops, but the effect, nevertheless, was that the business of the little shops vanished like snow off a dyke.

There is an element of that in this situation. Permissive though the bill is, the effects on the profession will go beyond what is suggested by the people who support it. I am against amendment 227, but there is a further debate to be had on the subject.

James Kelly: Amendment 227, which has been lodged by Bill Butler, is important. As members of the committee are well aware from listening to the evidence, at stage 2, there have been arguments for and against the proposal for 100 per cent ABS.

There is an onus on us as MSPs to look at that evidence and to try to come up with a solution that navigates a way forward and takes account of the different strands of evidence that we have taken, and to produce a comprehensive proposal that has as much support as possible from the legal profession and the consumer bodies.

With regard to 100 per cent ABS, strong arguments have been made for opening things up, in particular the boost that that would give the Scottish economy. On the other hand, the legal profession, in particular, has raised real concerns about such a step and has argued that it would undermine the profession's independence and threaten access to justice. There have been heated arguments on both sides.

Although it recognises that there is a job to be done in opening up firms and allowing them to attract external capital and to set up their businesses to exploit the economic opportunities that will be afforded by new legal structures, Bill Butler's proposal also seeks to ensure that the solicitors remain the majority owners of the firm. It therefore protects Scots law and the legal profession's independence. As a result, it addresses some of the very real concerns that have been expressed by experts in the field, such as Professor Alan Paterson.

As far as regulation is concerned, Bill Butler very competently made it clear that the logical follow-on from this proposal is that only one regulator—the Law Society of Scotland—would be required. I have to say that I have always been a bit uncomfortable about the bill's lack of clarity around regulatory processes, how many regulators there would be and what parts of the industry would be regulated. In this proposal, it is clear that the only regulator would be the Law Society and therefore some of the complex and complicated structures that Bill Butler referred to in his remarks would be done away with.

In summary, I support Bill Butler's whole proposal. I do not think that these are wrecking amendments; rather, I believe that the proposition is very reasonable as it takes on board the different arguments that we have heard and seeks to put forward a compromise that will give legal firms the chance to have a competitive advantage, and it will boost the Scottish economy while protecting the independence of Scots law and the legal profession.

Nigel Don: We have been round the houses many times on this very interesting subject. I must confess that I find myself reflecting on the views of those who are concerned about the legal profession's independence, who I believe have made an enormously important and very persuasive case. Clearly there is something to be said for ensuring that lawyers remain totally independent. After all, as has been very well articulated and persuasively argued, they are—and should stay—the public's interface with the courts.

The alternative argument is that the existing structures, although historically fine, prevent the development of the business in the public interest. It seems to me that, if you take on that argument, you have to see where it leads. Robert Brown said that supermarkets have displaced high street shops. That is undoubtedly the case; we shop in supermarkets and they have hugely benefited the general public by increasing enormously the availability of many foodstuffs—at the very least—and other supplies, and by reducing the cost of the weekly shop. That trend will not be reversed, and

our grandchildren might be very surprised to learn how reluctant we were to allow those organisations to provide us with legal services. They could probably do so more cheaply and very effectively, and therefore could widen access to justice.

We have an opportunity here that needs to be explored—we have explored it—that could be effective and in the general public interest. However, the new arrangements would need to be well regulated. Although I accept that Bill Butler's 25 per cent suggestion is not an arbitrary number but one of the break points, it seems that any number is perhaps unnecessary. If we simply allow the legal profession to develop unfettered, it will use its skills and judgment, and businessmen and women will use theirs, to provide good services. The bill is about ensuring that such practitioners are properly and professionally regulated, so we should allow them an opportunity to get on with doing that. Although 25 per cent is not an arbitrary number, it is one that we do not need. I am absolutely sure that the vast majority of lawyers in Scotland will not make use of the legislation that the bill will become, even if it is permissive, and the public should be given the opportunity to see what the legal profession can come up with in the general interest.

The Convener: If there are no other contributions, I will make one. Bill Butler moved in a typically considered and eloquent manner principal amendment 227. There will be some relief around the table that he has undertaken not to debate at length the other 75 consequential amendments.

It is perhaps appropriate at this stage to say that the committee and individual members have been confronted with a real difficulty insofar as part 2 of the bill is concerned, because the legal profession has been unable to come to a clear and settled view on its wishes. Indeed, 50 per cent of the 10,000-odd solicitors in Scotland have expressed no view on the matter and the remaining are split roughly 50:50 as to what will be the best way forward. In the most recent test of legal opinion by the Law Society, motions have been passed that are mutually contradictory. Clearly, that is causing legislators serious difficulty.

I am aware of, and generally respect, the fact that there are some deeply held views about the legislation. As members will know, lobbying has been relentless, but it is important to stress that at no time has it been other than proportionate. It has made manifest the extent to which the legal profession is divided on this vital issue. We have listened as carefully as possible to all sides of the argument and it is unfortunate that the legal profession has been unable to achieve a settled view. As such, the committee and the Parliament must deal with the bill in recognition of that fact.

Amendment 227 is not a wrecking amendment. Bill Butler has moved this morning an amendment that represents one side of the argument: it is entirely appropriate that the argument should be reflected in an amendment at stage 2. Where I have some difficulty is that, were the amendment to be agreed to, it would impede members of the legal profession who seek to avail themselves of the advantages that the bill would advance to them. An amendment that will be debated later in the bill's proceedings seeks to allow 49 per cent external ownership of a practice. I will listen to that debate with particular interest because it might offer a better advised way forward.

Nigel Don dealt with the permissiveness of the bill. Like Mr Don and many others, I think that it will be interesting to reflect in the years ahead on precisely how many people avail themselves of the opportunities that the bill will provide. One of our main considerations has to be the independence of the legal profession, which has to be jealously guarded, not only by those in the profession but by the body politic, the Parliament and the courts. I have had to consider that in deciding the attitude that I take to the bill. That is why I am convinced that, for the moment, ownership should involve a majority of legally qualified individuals.

Amendment 227 has merit, but I regret that I cannot support it.

11:30

Fergus Ewing: In December 2007, the Scottish Government published a policy statement in which it committed itself to four main aims for the Scottish legal system. The first was to compete internationally and be more attractive to major businesses. The second was to have regulation and business structures that support the availability of competitive legal services in communities. The third was the retention of an independent referral bar and the fourth was the protection of the legal profession's core values to protect the interests of justice and consumers.

I restate that simply because members have pitched the debate to point to the high-level values and expectations that we are right to have of our legal profession and of lawyers. I welcome the debate and congratulate Bill Butler on the moderate and balanced way in which he pitched it. I always kind of thought that he was a fighting radical by nature—perhaps he is that, too—but he presented the arguments moderately, as the convener said. It is also good that the opportunity to debate the matter further will arise later.

It is good that we are having the debate because it is plain that the issues that members have raised have greatly concerned many solicitors in Scotland's legal profession. I have had 14 or 15 meetings with various solicitors who have taken a leading part in the debate. Although 50 per cent of the legal profession has not participated and although the referendum of the whole profession registered support for ABS, divisions exist. We would all like those divisions to be healed. As the convener said, the outcome of the Law Society's recent annual general meeting appeared to show that the position differed and that the divisions have not yet healed. It is therefore right that we in the Parliament have a debate in which we consider all the issues fully and dispassionately. For that reason, I very much welcome Bill Butler's amendment 227.

Of course, we are all concerned about promoting the legal profession's independence. That is why section 1(d) says that the regulatory objectives include

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

The current debate is about how we implement that objective.

Amendment 227, which is in Bill Butler's name, stipulates that a firm is eligible to be a licensed provider if it

"is owned and managed to the extent of not more than 25% by a non-solicitor investor".

That model is restrictive and I do not believe that it is compatible with the policy intention behind the bill, which was supported at stage 1. If the amendment were agreed to, limited forms of multidisciplinary practice would be possible, but many potentially viable business models would be ruled out.

I have spoken before about the opportunities for smaller practices, for example, many of which are struggling to survive in towns and rural areas. As the committee heard at stage 1, the bill would allow them to offer a variety of professional services—legal, accountancy, surveying, estate agency and other professional services—in one-stop shops in many towns and rural areas. Such firms would have the benefits of lower overheads and the combination of business experience and expertise. That might be a distinct advantage in many smaller towns. We should be able to allow that important type of business in the decades ahead. However, the restrictive model that the amendment proposes would make such arrangements impossible for many small firms.

For example, a two-partner practice would not be able to go into business with the accountant across the street, because of the 25 per cent rule. Even with the clear majority of ownership residing with the legal professionals, such a business structure would be unacceptable. In fact, the amendment would result in only larger legal practices being able to take advantage, to any real extent, of the ability to form multidisciplinary practices offering a variety of services, as many firms are simply too small to be able to use the 25 per cent external ownership allowance. Bill Butler has not mentioned that argument, but I would be interested to hear his response to it. I do not think that it is his intention to exclude a one-person practice from merging with an accountant, but the 25 per cent rule seems to be an insurmountable obstacle to that taking place. I await his comments on that.

Amendment 227 would therefore remove a potential lifeline for small businesses, which might not otherwise find it easy to survive in a difficult business climate, because they would not be able to avail themselves of the opportunity to join up with fellow professionals to reduce overheads, to operate more efficiently and to survive and, hopefully, thrive.

The amendment would also be unacceptable to the larger firms. As I have stated, the long-term sustainability of the legal profession will be threatened unless Scottish firms are able to operate on a level playing field in England. That was recognised at stage 1, notably by Richard Keen, the dean of the Faculty of Advocates, who is quoted in paragraph 59 of the committee's stage 1 report as saying:

"My greater fear is that if a business model is available in England but not in Scotland there will be a temptation for some larger firms to go down and join the English Law Society and leave the Law Society of Scotland."—[*Official Report, Justice Committee*, 8 December 2009; c 2471.]

The committee considered that point carefully at stage 1. Although it found difficult the issue of the risk of large Scottish firms feeling impelled to register in England because of the lack of opportunity to avail themselves of ABS measures, which, as Bill Butler said, are expected to be available in England in October next year, it concluded in its report, at paragraph 102:

"Without this Bill, and recognising that the legislation for England and Wales has already been enacted and will come into force over the next year or so, Scottish law firms may be less able than their competitors to take advantage of the opportunities arising in areas of law not reserved to Scottish solicitors."

I agreed with the committee then and I agree with its arguments now. I hope that they commend themselves to members.

Amendment 227 would have the effect of allowing only one regulator—the Law Society of Scotland. We believe strongly that allowing multiple approved regulators is the correct approach. Although it is unlikely that there will be

any huge consumer benefit in having more than one, there is a potential advantage for licensed providers, which may consider the published schemes of any regulator and choose the one that is best for their business model. For example, if a firm of accountants joins with solicitors but the accountants form the large majority, it may well be more appropriate that, should the Institute of Chartered Accountants of Scotland emerge as a regulator, the firm would wish to continue to use it as the regulator, as it would use it for its chartered accountancy regulation. Surely that would be an advantage. To remove that possibility would surely serve no purpose.

The remaining amendments in the group would make changes to the bill that are largely consequential on the fundamental change that would be made by amendment 227. I will not dwell, as I have perhaps been encouraged to do, on some of those matters.

We do not believe that amendment 227 should be supported, for the reasons that Mr Brown and other MSPs have suggested. We think that it would perpetuate unnecessary restrictions on the business models, would fail to increase competition in the legal services market and would be to the detriment of the legal profession, consumers and the Scottish economy.

Bill Butler: I express my thanks to colleagues for what has been a detailed and reasonable debate. When I have said what I will say in summation, I hope that the debate will still seem reasonable and worthy of the time that we have spent on it. The debate is necessary—on that I agree with the convener and the minister, but that does not make us a holy trinity. It is necessary because there is such uncertainty on the matter outwith the Parliament that we have to explore the issues. I know that, later on in our proceedings, there is to be an exploration of another split or percentage.

I believe that I have made a reasoned argument—some may see it as radical and others may see it as moderate, but I hope that it is seen as reasonable. Amendment 227 is not a wrecking amendment. As Nigel Don rightly said, 25 per cent is not an arbitrary figure. As I tried to indicate, it constitutes what I am informed is, under company law, negative control. The figure is therefore an appropriate place at which to start the process.

The minister said that, if the amendments in the group were agreed to, there would be only one regulator. I do not view that with any apprehension at all. I take the point, but I do not view it as a main obstacle. I did not fully follow the argument about the exclusion of the merger of a one-person practice with an accountant. We are talking about the percentage the business, not the number of persons involved. Perhaps I misunderstood the minister, but I did not follow his argument.

I turn to detailed comments and criticisms of the amendments. Both Robert Brown and Mr Ewing talked about the danger of our not passing the bill being that the big four will move down south—if I can put it in that popular way. The big four are already registered in England but have large numbers of clients in Scotland, so it would be economic suicide for them to fail to be registered in Scotland. Firms that were registered in Scotland would gladly take up that work and would grow to service those clients. Even if the big four chose to have their headquarters in England, they would still have to employ the same number of Scottish solicitors and trainees to service their Scottish work, or they would lose that work to a firm registered in Scotland that was ready to take their place. Therefore, although I admit that the argument has force, I do not accept it.

I turn to Stewart Maxwell's points, one of which was that my proposal in amendment 227 does not chime with what my party moved south of the border. I could say, "That is devolution," but let me be a wee bit more precise. I think that Mr Maxwell is mistaken. The Legal Services Act 2007 in England allows law firms with more than 25 per cent external ownership to practise only if they are licensed by a licensing authority. No firm has been granted that status yet. A recent article in *The Times* suggested that no body will be given that status, which effectively puts the whole process at least on hold. Interestingly, the 2007 act also provided for legal disciplinary practices, which may have external ownership but only to a maximum of 25 per cent. I could go on, but I will not. As usual, I am chiming with the leadership of my party. The point is a subordinate one, because the main point should be that this should be beyond party-political consideration. We are dealing with what is best for the system of law in Scotland. That should be our paramount concern. I agree with Stewart Maxwell that the bill is permissive. That is the case. However, the small shops example to which Robert Brown referred is a good one that I think deals with Mr Maxwell's point.

Mr Maxwell also said that a percentage should not be set down in a bill. Why ever not? We can do so if we feel that that is the correct thing to do. Perhaps the amendments in the group will not meet with the agreement of committee members—I feel that that is what will happen—but the time may come when we agree to put a percentage in the bill. It would be within our powers and responsibilities to do that.

11:45

On Robert Brown's point about the super-complaint, I agree that another super-complaint

may come along—just as buses come along when you least expect them. That is a possibility, but we have to deal with what is before us and not get overexcited about super-complaints. I can exclusively reveal that I never get overexcited by super-complaints—no sensible person should.

Robert Brown also made a point about the 1980 act. He has me there. I will have to take it under advisement, as they say in the States. I do not have an absolute answer to his point. I accept that, if the amendments in the group are agreed to—which they may not be—we will have to look again at the point at stage 3.

I am grateful to members for their participation in what I believe is an important debate on part of this putative bill. There are strong views on the matter outwith the Parliament. As the minister rightly said, we have to engage in a healing process to come to some kind of resolution of the differences.

I started out on the basis that this is about access to justice. That is the most important thing. Taken together, the amendments in the group would ensure access to justice and the independence of the Scottish legal profession. On that basis, I press amendment 227.

The Convener: Thank you for putting the argument in such a lucid manner.

The question is, that amendment 227, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 227 disagreed to.

Amendments 228 and 229 not moved.

11:47

Meeting suspended.

11:55

On resuming—

The Convener: Amendment 230, in the name of Richard Baker, is grouped with amendments 231 and 232.

Richard Baker: Amendments 230 to 232 relate to the regulation of claims management companies that offer legal advice and representation on a so-called no-win, no-fee basis. A regulatory regime for claims management activities was introduced in England and Wales through the Compensation Act 2006, but that has not been replicated in Scotland.

I recognise that the scope of regulation for claims management companies south of the border goes further than what I propose in my amendments, as they relate only to the regulation of claims management businesses with regard to employment law services. However, that would represent important progress in the regulation of such businesses and I would seek further opportunities to extend the scope of regulation to include, for example, claims management companies that are engaged in personal injury cases, because it was such a case that first brought the issue to my attention.

A constituent came to me who had taken a personal injury case to a local claims management business. The company took up the case but did not pursue it to the extent that it had indicated it would, and my constituent was left with a greatly reduced sum of damages as a result. On pursuing the matter with the Law Society of Scotland, he was informed—correctly, of course—that it had no authority in the case of the claims management company. He remains distressed by the whole experience.

That example relates to personal injury and would not be covered by amendments 230 to 232, but I have examples of bad practice in employment law that also make a compelling case for regulation. In one, the claimant signed up to a contingency fee agreement under which she would pay 10 per cent of her damages. When she realised that her trade union would take the case through its lawyers without her having to forfeit damages in that way, the claims management company tried to enforce a penalty clause in the contract against her and issued a fee for £500. After a court case, the fee was set aside, but regulation could have avoided such a contract being drawn up in the first place.

In another case, an individual engaged the services of a non-solicitor employment law representative. He did not offer no win, no fee; he simply told her that his hourly rate was £100 an hour. He did not give her a contract or terms and conditions. There was no arrangement restricting

or limiting the number of hours that would be worked, capping the bill or requiring regular updates on the hours being worked. As a result, my constituent had paid more than £20,000 to the representative before the tribunal was heard. After the unsuccessful tribunal, he demanded a further £20,000. The representative had advised my constituent to resign and seek constructive dismissal despite the fact that, as I understand it, such cases are extremely difficult to win. He lost her tribunal and the employment judge was highly critical of his conduct.

Regulation would help to avoid such situations in the future. Having spoken with the minister about the matter, I understand that the Scottish Government is not opposed in principle to such regulation but believes that it has not yet found sufficient evidence of malpractice to justify a regulatory regime. I will certainly forward to the minister the details of the cases that I mentioned. I have not yet done that, but they will not be the only examples. I am keen to have further dialogue with the minister on the matter, even if he does not agree with the amendments in this group, and I welcome the fact that he previously indicated that he is open to such discussions.

I point out that the regulatory regime that Westminster introduced has been assessed as having been effective. For example, malpractice by companies handling claims against the Criminal Injuries Compensation Authority has been significantly reduced, including through some companies voluntarily leaving the market. Misleading use of the expression “no win, no fee” has largely been eliminated, misleading claims on websites have been removed almost entirely and rules that require websites to give a physical address are being complied with. I believe that similar benefits could be had in Scotland, and I hope that members will give these amendments due consideration.

I move amendment 230.

12:00

Robert Brown: I have some sympathy with Richard Baker’s proposal although, as he rightly points out, it is restricted to employment law services providers and does not relate to claims management more widely. It crosses my mind that the way forward might be to give ministers some sort of power to regulate such matters, which could be subject to affirmative resolution by Parliament.

There are a number of other issues at stake. We will come on to deal with will writers, who are an important group. It is undoubtedly the case that there are issues with claims management. It is important to point out that, as well as trade unions, which are mentioned in subsection (4) of the new section that amendment 230 proposes, the automobile association and the RAC are insurers that operate in areas to do with claims. There are certainly a number of issues with claims management more generally.

At the moment, I am not persuaded to back amendment 230 because there are issues that need to be looked into. We have not consulted on the proposal or gone into it. However, Richard Baker raises a valid point, to which he has given credence from his own experience. Perhaps we could consider a stage 3 amendment that would provide residual powers for dealing with the issue without the need for full legislation. If something like a will-writing situation that needed to be addressed came along again, we might want to take reasonably swift action without having to go through a separate parliamentary process to provide a full legislative framework.

Stewart Maxwell: I am extremely distressed and have great sympathy for Richard Baker’s constituents in the cases that he mentioned. It is clear that there is an issue although, as Robert Brown has made clear, we did not take any evidence on it or examine it at stage 1, which leaves us in a difficult position with regard to the extent and seriousness of the problem. We all know that individual cases often make bad law.

At this stage, I am not prepared to support amendment 230, but it deals with an extremely serious issue that requires to be looked at. I do not know whether it would be possible to do that before stage 3; if it is, all well and good. I am pleased that Richard Baker has brought his proposal to the committee, because it raises an issue that requires to be examined.

James Kelly: I would like to speak in support of the amendments, which present us with an opportunity to legislate in an area in which there is a gap and there is cause for concern. I note what other members have said about the fact that we did not take evidence on the issue at stage 1, but I believe that, as proposed, the amendments are proportionate in that they focus on employment law.

Richard Baker has given some chilling examples of cases in which his constituents have had an adverse experience when they have dealt with a claims company. There has been a lot of discussion about access to justice, and I think that we would all agree that we must ensure that we have a system to which people who feel that they have been adversely treated and have a claim to make against a body or company have access, and in which their claim is treated competently and fairly.

It is clear that there are concerns about the way in which the field of claims management companies operates, which, as it could put some people off taking a legitimate case through the courts, undermines access to justice. We must always look carefully at any proposal to introduce additional regulation. We do not want to introduce a system that is too cumbersome, but we are talking about an area in which regulation would provide more fairness and would, in the long run, improve access to justice and provide greater transparency. The issue that the amendments addresses is well worth looking at.

The Convener: The amendments raise some interesting matters, but I do not think that they will get terribly further forward at this stage. First, the proposals have not been consulted on. Secondly, we have been given no evidence to back up what Richard Baker said, although I personally have little doubt that the arguments have considerable merit. I am also inhibited from supporting them by the fact that, as members will have heard me say time and again, hard cases make bad law. We need to know where we are going and ensure that the matter is properly researched.

However, I am attracted by the possible solution that Robert Brown advanced, so I will listen with interest to the minister's response.

Fergus Ewing: Amendments 230 to 232, in the name of Richard Baker, would create a new type of entity, in the form of a licensed employment law services provider that would be regulated by the Law Society of Scotland.

Convener, I was somewhat taken aback when I heard Richard Baker's arguments in support of the amendments. Being taken aback is not something that Government ministers are particularly fond of—

The Convener: Perhaps it should happen more often, Mr Ewing.

Fergus Ewing: You may well say so, but I could not possibly comment.

The reason why I was taken aback is that amendments 230 to 232 clearly relate to employment law services providers, whereas Richard Baker's remarks related to claims management companies. I was aware that Richard Baker intended to pursue the issue of how claims management companies operate. Indeed, I invited him to do so in the course of my speech in the stage 1 debate, when I said that we would happily consider with him the wider issue as well as any evidence of cases. However, as the convener has said, we have not heard any evidence today and I have not received any examples from Richard Baker on the particular cases to which he has again alluded today. As has been rightly pointed out, we need to consider what evidence there is first. I am of course willing to consider such evidence—I suspect that there are, or have been, cases that would cause concern—but neither the Government nor the committee has yet received any evidence from Mr Baker on the matter.

As I understand it, claims management companies deal mainly with insurance claims, whereas amendments 230 to 232 relate entirely to employment law. Insurance claims may relate to personal injuries. It is fair to point out that, although claims management need not involve lawyers at the outset, if such matters are to be pursued in a civil action, given that civil litigation is reserved to solicitors, a solicitor will then need to become involved.

There may be an issue as to whether the ambit of the bill, which relates to legal services, is wide enough to be extended to claims management, which might be considered to happen prior to, and perhaps need not incorporate, legal services. I just put forward that point, but I did not come here this morning specifically equipped, or preadvised, on the issue of claims management. We expected that claims management would be raised in an amendment, but we have been taken somewhat unawares, as I had thought that the intention of amendments 230 to 232 was to deal purely with employment law. The amendments are not about claims management.

That said, having made some initial inquiries with the Tribunals Service, I am aware of concerns about non-lawyers at employment tribunals overcharging for representation. However, given the lack of consultation on the matter, I submit that it would be premature to legislate on what would be a significant change in approach without further discussion and examination of evidence. I do not support amendments 230 to 232, but I am happy to look further at the specific issue in relation to employment law. I am also happy to look further—as I indicated at stage 1 and do so again today—at specific cases of injustice, as and when those cases are presented to me.

I respectfully invite Richard Baker to withdraw amendment 230 and not to move amendments 231 and 232.

The Convener: We revert to Richard Baker, who should perhaps clarify the position in winding up and indicate whether he will press or withdraw amendment 230.

Richard Baker: I am happy to clarify the position, convener. Ministers are often take aback by what I say, but I am a bit surprised on this occasion. I was perhaps a bit fast and loose in using the phrase "claims management businesses". The first example that I gave was about claims management in terms of damages

and personal injury. I made it clear that I understood that such business would not be affected by the amendments but that I wanted to make progress on the issue and was restricting the provision to employment law. The other two examples that I gave were clearly about employment law, which is why I am a bit surprised that the minister did not understand the case that I was making. Those were clearly issues of employment law, and he rightly says that that is what the amendments are about. I am sorry about the confusion, but I am slightly puzzled as to why the minister was confused. He has said that he is happy to have further dialogue on the issues, which I very much welcome.

I am heartened by the comments from other committee members. I appreciate Robert Brown's comments, which may, in time, offer a way forward and should be considered more fully. Perhaps a power for ministers to establish a regime by affirmative instrument may be a way forward. Robert Brown highlights a number of complexities, which I readily acknowledge. I appreciate the crucial point that evidence is key, which the minister pointed out and Stewart Maxwell rightly referred to.

To summate, I do not think that there is a great division of opinion as to whether, if there is a problem, there is a good case for regulation. What I am left to do is persuade others that there is a case and provide compelling evidence that there have been problems and that regulation is required. Convener, I understand your position that that case needs to be presented and that research into the issue must carried out.

I will press my amendments. Although I do not think that they will be successful, I am heartened by the committee's comments. I undertake to get further evidence of the problem, which I will supply to committee members and the minister. I accept his point that the examples that I gave—which I got only recently—-were not available to him before today's meeting. I will supply those to him along with any further evidence that I can obtain over the summer. I do not think that it is a matter of great division or debate; it is simply a matter of achieving clarity on the extent of the problem and the requirement for regulation.

The Convener: The question is, that amendment 230 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 230 disagreed to.

Amendments 231 and 232 not moved.

Section 5—Approved regulators

The Convener: Amendment 235, in the name of Robert Brown, is grouped with amendments 233, 237, 239, 10, 241 to 243 and 11 to 13. I draw members' attention to the pre-emptions that are detailed on the groupings list.

Robert Brown: The amendments relate to arrangements for the approval of regulators and raise the issue of what is meant by regulatory competition in practice and who possible regulators might be. Like James Kelly, I am not wildly impressed by the principle of regulatory competition. In practice, I see in that small profession of regulation the potential for a market only for the Law Society of Scotland and perhaps ICAS on the accountancy side. Also, it seems to me that the regulators should at least be based in Scotland; it should not be open to bodies from elsewhere that have no particular link to Scotland and no feel for our system to offer themselves as regulators, albeit that they are not so empowered at present under the legislation. I would not, for example, want the English solicitors regulatory body entering that field. The purpose of amendment 235 is to prevent that.

Amendment 233 relates to the fees that are charged by the Scottish Government for considering applications to be a regulator. The basis of those fees is not specified at present and should certainly be limited to no more than cost recovery. The basis for charging and what it is appropriate to charge for should be clarified, and I would appreciate knowing the minister's intentions in that regard.

12:15

Amendment 237 relates to section 6(1)(a), which seems inadequate as it stands and clumsy in the amended version that the minister has proffered in amendment 6, in the next group. Amendment 6 should have been considered in this group, as an alternative to amendment 237; it is not clear to me why it has been placed in another group. Amendment 237 is intended to add to the objective of competence in the law, however phrased, the more central requirement of having a proper feel

"and understanding of the regulatory objectives and the professional principles"

that are the key to good regulation.

Amendment 239 is designed to tighten the conditions that it would be relevant to impose on a regulator. Currently, section 6(2) is too broad and its terms are unclear, and the amendment seeks to bring some clarity to it. Introducing the concept of a time limit for the approval of an applicant as an approved regulator would bring the provision into line with section 7(4), which provides that an approved regulator may be authorised

"without limit of time, or ... for a fixed period of at least 3 years".

Amendment 241 is consequential and requires ministers to consult on conditions, as well as on approval of a regulator. That is right.

Amendment 243 imposes the elementary requirement of transparency by providing that ministers must give reasons for their actions under section 6. Amendments 241, 242 and 243 may be pre-empted by amendment 10. If amendment 10 is agreed to, I will seek an undertaking from the minister to consider reinserting the effects of amendments 241 and 243 in the proper place at stage 3, as both make a valid point.

This group of amendments also addresses the role of the Lord President in approving a regulator. I understand that, currently, the Lord President has a substantial role in most of the regulatory rules relating to solicitors. It is wrong for ministers to be directly and solely responsible for approving a regulator, on the important constitutional ground that that erodes the constitutional independence of the legal profession. The series of amendments that Bill Aitken and I have lodged to require the Lord President's approval for various things are preferable to provision for the Lord President just to be consulted. Scottish Government amendment 13 is okay, but I am not particularly attracted to Government amendment 8, in the next group.

I move amendment 235.

Fergus Ewing: In its stage 1 report, the Subordinate Legislation Committee expressed concern that negative procedure is to be used for regulations under the power that is given to the Scottish ministers in section 6(7). In light of the committee's concerns, I have given further consideration to the power and have lodged amendments 11 and 12.

Amendment 11 narrows the scope of the Scottish ministers' power to make further provision relating to the criteria in section 6(7)(b) for the approval of regulators of licensed providers and will ensure that any regulations that are made using the power relate to the applicant's capability to act as an approved regulator.

Amendment 12 removes section 6(7)(c), with the effect that the Scottish ministers will no longer be able to make regulations about the categories of bodies that may or may not be approved regulators. I accept the concerns that have been expressed about the width of the power and now consider it to be unnecessary. The Scottish ministers are able to exclude unsuitable applicants by reference to their applications. It is unlikely that it would ever be desirable to exclude an entire class of applicant without consideration on an individual basis.

Amendment 10 removes sections 6(3) to 6(6). Amendment 13 reinstates the provisions in a new section, to improve the drafting. The new section requires that, where the Scottish ministers inform an applicant that they intend to refuse to approve the applicant as an approved regulator, or to impose conditions under section 6(2), they must give reasons for the decision. The Law Society of Scotland requested that provision. Although it is unlikely that the Scottish ministers would ever take such action without explanation, it is entirely reasonable to ensure that an explanation is given. Amendment 243, in the name of Robert Brown, seeks to do the same thing, so I ask him not to move it in favour of amendment 13.

Amendment 235, in the name of Robert Brown, restricts the definition of approved regulators to professional bodies that are based in Scotland. First, I do not want to restrict the definition of approved regulators to professional bodies, because other bodies, such as new bodies that are created for the purpose, may be just as able to be regulators. As long as a body meets the approval criteria, it should be able to be approved. A restriction that would prevent new types of bodies from being established to act as approved regulators would be a clear departure from the original intention behind the bill.

Secondly, I do not consider a geographical restriction on the bodies that could act as approved regulators to be necessary or desirable. Whether such bodies have the competence under their constitution or statutory authority to make an application under the bill is a matter on which those bodies must be satisfied.

The bill provides in detail for the criteria for the approval of bodies as approved regulators. As long as a body meets those criteria, it should be approved. It might be unlikely that a body that is based outside Scotland would be able to satisfy the Scottish ministers that it had the necessary expertise or the capability to regulate licensed legal services providers in Scotland. However, if it were able to do so, I see no reason why it should not be approved. I certainly do not think that we should exclude bodies because they are not Scottish.

I remind members that the legislative approach of the bill is based on a decision to take a uniquely Scottish approach, to avoid setting up a quango, to avoid having a Scottish legal services board and, most specifically, to avoid incurring, over time, the cost of tens of millions of pounds that we believe would be associated with such a quango. Our regulatory solution is not only particularly Scottish but will be far less of a drain on the public purse in the difficult times ahead.

For those reasons, I cannot accept amendment 235.

Robert Brown's amendment 233 inserts new subsection 5(7), to limit the fees that can be imposed on approved regulators by the Scottish ministers. As a result, the fees will be limited to the cost to the Scottish ministers of considering an application for approval or authorisation, as Robert Brown has made clear. It is not the intention of the Scottish ministers to charge such fees. However, the provision was included in case, at some point in the future, the Scottish ministers deemed it necessary to levy an appropriate and proportionate charge. As the Scottish ministers must act reasonably, my view is that, with respect, the amendment is unnecessary. Although I entirely understand the rationale behind Robert Brown's proposal, I hope that the provisions, as set, will be acceptable, as they allow a degree of flexibility that is important in the current financial climate.

Robert Brown's amendment 237 adds a new criterion to be considered by the Scottish ministers with respect to applications to be an approved regulator. It provides that the Scottish ministers must be satisfied about the applicant's knowledge of the regulatory objectives and professional principles. Again, I consider the amendment to be unnecessary. Amendment 6 makes it clear that applicants must satisfy the Scottish ministers that they have the necessary expertise as regards the provision of legal services. That would include knowledge and understanding of the legal regulatory objectives and professional principles. That is clearly implied.

Robert Brown's amendment 239 inserts examples of conditions that the Scottish ministers can impose on approved regulators. On the basis that the Scottish ministers must impose reasonable conditions, the amendment is, with respect, unnecessary.

Robert Brown's amendment 241 provides for a specific requirement on the Scottish ministers to consult on the conditions that are to be imposed on approved regulators and on any removal or variation of those conditions. I consider that to be unnecessary, given that the general requirement to consult, in relation to approval, includes consideration of any conditions that should be imposed. Amendment 9, in my name, makes provision for consultation in relation to the removal or variation of conditions.

Bill Aitken's amendment 242 appears to have been lodged in consequence of Robert Brown's amendment 236, which was supported by Bill Aitken, and amendments 238 and 240, which are both in the name of Bill Aitken and provide the Lord President with an approval role. Those amendments will be discussed later but, in brief, I cannot support amendments to provide the Lord President with the same broad role in relation to approving regulators as the Scottish ministers have, for reasons that I suspect we will turn to in the next grouping. Therefore, I cannot support amendment 242, which appears to be consequential.

I therefore invite the committee to approve amendments 10 to 13, and I respectfully invite Robert Brown to withdraw amendment 235 and members not to move amendments 233, 237, 239 and 241 to 243.

Robert Brown: I am grateful to the minister for his detailed reply on the issues and I will take on board some of his points. I will press amendment 235, as the point is still valid. We can have an argument about the phrase "professional or other body". I accept that there is an issue about what a professional body is in that context. However, any body would be unsuitable and inappropriate if it did not have a professional attitude and approach. The central point—that the body should be based in Scotland—remains one that I wish to push, for the reasons that I explained. I did not fully understand the minister's comments about the costs if we had taken a different approach and had a super-regulator. That certainly is not what I have suggested and is not implied by amendment 235.

I will not move amendment 233, which is on costs, as I am satisfied by what the minister said about it. I will move amendment 237, but I will probably not move amendment 239. I accept that my other amendments in the group overlap with existing provisions.

The issue about the Lord President is an important point of principle. It is a bit funny that we are having a debate on that at the tail end of the beginning of the process. We must go into the matter in more detail. The Lord President's role is much more central than the role that ministers appear to be going for. Unless I am persuaded to the contrary, I will seek to push that issue in later debates.

The Convener: The question is, that amendment 235 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

The casting vote goes against the amendment. I will give reasons for that. We are talking in a vacuum to an extent, but the likely outcome is that there will be only one regulator. That has already been said during the meeting. In theory, the bill would be unnecessarily proscriptive if we agreed to amendment 235, which is why I voted against it.

Amendment 235 disagreed to.

The Convener: The sheer mechanics of getting through the next group of amendments will take some time, so I propose to end the public part of the meeting now. There is an administrative item to be dealt with in private. I thank the minister and his team for attending. I now bring the public part of the meeting to a close.

12:27

Meeting continued in private until 12:31.

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