The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 22 June 2010

Session 3

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Tuesday 22 June 2010

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JUSTICE COMMITTEE
21st 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 GAVE EVIDENCE:

Gerry Bonnar (Scottish Government)
Fergus Ewing (Minister for Community Safety)
Fraser Gough (Scottish Government)
James How (Scottish Government Justice Directorate)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 22 June 2010

[The Convener *opened the meeting at 09:34*]

Decisions on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. We have received no apologies and we have a full turnout. I remind everyone to switch off mobile phones.

Do members agree to take item 5 in private?

Members *indicated agreement.*

The Convener: Does the committee also agree to consider in private at future meetings its approach to scrutiny of the Domestic Abuse (Scotland) Bill and the Commissioner for Victims and Witnesses (Scotland) Bill?

Members *indicated agreement.*

Legal Services (Scotland) Bill: Stage 2

09:35

The Convener: The principal business of the morning is day 3 of stage 2 proceedings on the Legal Services (Scotland) Bill. There is no limit as to how far the committee can proceed today. It is not realistic to expect that we will complete our consideration, but we made good progress last week and I anticipate that we will do so again today.

I welcome the Minister for Community Safety, Fergus Ewing. In accordance with normal practice, a number of Scottish Government officials will sit beside the minister, and officials might alternate during the morning's business. Members should have their copies of the bill, the third marshalled list of amendments and the groupings of amendments. I propose to have a brief break at approximately 11 am—I see that Mr Ewing assents to that.

Section 39—Head of Legal Services

The Convener: Amendment 44, in the name of the minister, is grouped with amendments 45 to 48, 319, 49, 321, 323, 50, 51 and 102.

The Minister for Community Safety (Fergus Ewing): Amendment 44 will add the qualification "valid" to "practising certificate" in relation to heads of legal services, with the effect that a head of legal services must hold a valid practising certificate. Amendment 45 will make changes to section 39(2), with the effect that the head of legal services' practising certificate must not be subject to conditions imposed by the disciplinary tribunal under section 53(5) of the Solicitors (Scotland) Act 1980. Amendment 45 takes account of representations from the Law Society of Scotland.

Amendment 46 will add a new paragraph to section 39(5), the effect of which will be to require a head of legal services to ensure that designated persons adhere to the professional principles that are set out in section 2. We lodged the amendment in response to concerns that were expressed at stage 1 about non-lawyer designated persons doing legal work.

Amendment 47 is a drafting amendment. Amendments 48 and 49 will alter sections 39 and 40 to clarify that the Scottish ministers can make regulations only relating to the functions of heads of legal services and heads of practice that they are required to exercise as a result of their position and not in a general capacity. The approach addresses concerns that the Law Society raised about the independence of the legal profession.

Amendment 50 will provide that the basis on which a person's suitability for an appointment to an operational position can be determined is set out in the practice rules rather than the licensing rules, as at present.

Amendment 51 will add a new subsection to section 43, which will make provision for an appeal to the sheriff against a decision by an approved regulator to rescind the appointment of a head of legal services, head of practice or member of the practice committee. Amendment 51 directly addresses concerns that the Law Society raised.

Amendment 102 will provide that licensing rules must stipulate that a licence may be suspended if a licensed provider deliberately continues to have within it a person who has been disqualified from certain positions.

Amendments 319, 321 and 323, in the name of Robert Brown, will require the Scottish ministers to consult the Lord President before making regulations about heads of legal services, heads of practice and the practice committee, respectively. I note the committee's position on Lord President issues, as previously debated, and in the light of that I am no longer minded to oppose amendments 319, 321 and 323. I look forward to hearing members' comments.

I move amendment 44.

The Convener: No doubt Mr Brown will bear in mind the minister's comments with regard to the principle of the Lord President's involvement, which I would have thought is now established.

Robert Brown (Glasgow) (LD): As the minister said, amendments 319, 321 and 323 relate to the powers of the Lord President in relation to the important functions of the head of legal services, the head of practice and the practice committee. It is highly appropriate that the Lord President be consulted on such matters.

Amendment 44 agreed to.

Amendments 45 to 48 moved—[Fergus Ewing]—and agreed to.

Amendment 319 moved—[Robert Brown].

The Convener: The question is, that amendment 319 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)

Abstentions

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 0, Abstentions 3.

Amendment 319 agreed to.

Section 39, as amended, agreed to.

Section 40—Head of Practice

Amendment 49 moved—[Fergus Ewing]—and agreed to.

Amendment 321 moved—[Robert Brown].

The Convener: The question is, that amendment 321 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)

Abstentions

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 0, Abstentions 3.

Amendment 321 agreed to.

Section 40, as amended, agreed to.

Section 41—Practice Committee

Amendment 323 moved—[Robert Brown].

The Convener: The question is, that amendment 323 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)

Abstentions

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 0, Abstentions 3.

Amendment 323 agreed to.

Section 41, as amended, agreed to.

Section 42 agreed to.

Section 43—Challenge to appointment

Amendments 50 and 51 moved—[Fergus Ewing]—and agreed to.

Section 43, as amended, agreed to.

Section 44 agreed to.

Section 45—Effect of disqualification

Amendment 102 moved—[Fergus Ewing]—and agreed to.

Section 45, as amended, agreed to.

Section 46 agreed to.

Section 47—Designated persons

The Convener: Amendment 52, in the name of the minister, is grouped with amendments 53, 330, 54 and 55.

Fergus Ewing: During stage 1, concern was expressed about designated persons relating to the possibility of the bill allowing for non-solicitors to do legal work. I have, therefore, lodged amendments to provide further safeguards. Amendment 55 makes the head of legal services responsible for ensuring that designated persons who carry out legal work are adequately supervised in doing so and ensures that only designated persons can carry out legal work within a licensed provider. I consider that giving an explicit duty to the head of legal services to ensure adequate supervision of a designated person and stating explicitly that being designated does not affect what an individual can or cannot do by virtue of the reserved areas in section 32 of the Solicitors (Scotland) Act 1980—in addition to making designated persons subject to the professional principles in amendment 46—addresses the concerns that have been raised. Indeed, amendment 55 goes much further than the current position in traditional firms, whereby an unqualified person such as a paralegal is able to undertake legal work, including work in the reserved areas, simply on the basis that such a person is employed by a solicitor.

At present, when an unqualified person behaves badly, the solicitor, rather than the unqualified person, will face disciplinary proceedings. Again, the bill goes much further than the current position in traditional firms, as section 44 provides that persons—solicitors or non-solicitors—can be disqualified from being designated. Furthermore, when non-solicitor designated persons are also investors, they could be banned from having an interest in a licensed provider because of improper behaviour under the proposed new section that is provided for in amendment 114.

Amendment 52 inserts the word "written" into section 47(2) so that the licensed provider will have to indicate designation in writing.

Amendment 53 deals with drafting.

09:45

Amendment 55 inserts a new section, "Working context", following section 47. As has been noted, the new section makes the head of legal services responsible for ensuring that designated persons who undertake legal work are adequately supervised and provides that only designated persons can undertake legal work in a licensed provider.

Amendment 54 is consequential to amendment 55.

Amendment 330, which is in Robert Brown's name, would remove the provision that allows an investor in a licensed provider to be a designated person. If the amendment were agreed to, it would prevent a solicitor or non-solicitor investor from doing legal work in the licensed provider. I want to ensure that all investors can be designated to do legal work. However, to protect consumers, all non-solicitor investors will be subject to the rigorous fitness-for-involvement test.

It is important that those who have the most interest in the business can invest and work in the licensed provider. Accordingly, I invite Robert Brown not to move amendment 330.

I move amendment 52.

Robert Brown: I support the Government amendments in the group, but designation is a curious concept in the bill and it is interesting that its purpose is not defined. Designation means designation

"to carry out legal work",

so it is significant. I understand why it might be necessary to designate an official or paralegal in a legal services provider for that purpose, but I do not follow the basis for designating an investor in a firm.

I would like the minister to elaborate on his comment that, if amendment 330 were agreed to, it would prevent solicitors in a firm from doing legal work—perhaps I misunderstood that. That was not the intention behind the amendment—if it were, the method of arriving at the result was curiously phrased. Investors—in general, they are outside investors—surely do not do legal work, unless they are separately qualified, so why should they be designated?

Amendment 330 is intended to narrow the scope of designated persons by omitting investors. I rather thought that the Scottish Government had

accepted the logic of that when it proposed to delete the reference to a manager in section 47(3)(b)(i). That followed the logic of employees—yes; investors—no. The minister might persuade me that I have got that all wrong, as I am sure that I have, but I require to be persuaded.

The Convener: Mr Brown shows characteristic modesty.

An arguable point is involved, but perhaps some clarification is required about the total intent. We can see what the Government aims at, but perhaps we are not quite convinced that the wording has succeeded. I ask the minister for clarity, which would help.

Fergus Ewing: We all want to move in the same direction. The Government's amendments were framed to meet concerns that the committee expressed after stage 1. The bill makes no changes to the work that is reserved to solicitors under the Solicitors (Scotland) Act 1980. In traditional law firms, unqualified people can work in reserved areas if they prove that they drew up or prepared the writ or papers in question without receiving or expecting to receive any fee or reward. That is the existing legal practice.

I made the point that the Government amendments, which I understand are broadly acceptable, will impose additional duties and safeguards in relation to non-solicitors' work on legal matters in legal services providers. That approach is correct and we are happy to take it, following the committee's recommendations.

My point that Robert Brown's amendment 330 would risk preventing solicitors in legal services providers from undertaking legal work was restricted to solicitors who are investors. Perhaps that is an unintended consequence of his amendment, as he said. If there are to be solicitors who are investors in LSPs, it would be a bit perverse if they could invest, but not do legal work, in the LSP of which they were a member.

I am happy to have discussions about the matter with Mr Brown, the convener and other members if they so wish to ensure that we have provided all the necessary safeguards sought by the committee that are reasonable and appropriate.

The Convener: I will allow Robert Brown to make another contribution.

Robert Brown: I accept the minister's point about possible unintended consequences. That issue needs to be explored further. However, will he address the issue of investors who are not solicitors, and give the committee an understanding of why investors in that capacity need to be designated and what the implications of that are? That is essentially the point that I was trying to make in my amendment.

Fergus Ewing: Our proposal would mean that such designated persons—that is, non-solicitors in legal services providers—would nonetheless be able to be investors. I think that we all accept the principle that, if one has an alternative business structure, it is unfair for the office manager or other non-qualified people who play a big part in a legal firm not to benefit from it. Why should they be excluded from being shareholders? Their shareholding may be modest. Employees of John Lewis, for example, have a stake—albeit a modest one—in that company. Designated people often do very good work in debt collection, for example. I think that I have mentioned to the committee before that a lady who did debt collection work in a firm that I was in did that work much more efficiently than any solicitor could, because she was much more organised. That is an anecdotal argument, but it is nonetheless a good one. She might have been an ideal person to have had a stake in the business and thereby could have benefited from its success and been motivated for it to succeed. That is one of the broad intentions behind our proposal.

If Robert Brown remains not 100 per cent persuaded—I wonder whether it is possible to persuade Robert Brown 100 per cent; that is an interesting challenge for all of us—

The Convener: That is most unkind.

Fergus Ewing: That is not necessarily a criticism, convener. I would be more than happy to discuss the matter further with Mr Brown if he remains not 100 per cent persuaded. We all have the same aim: to protect the public fully in relation to non-solicitors carrying out legal work in the new entities.

The Convener: When you are in a hole, minister, you should stop digging.

Amendment 52 agreed to.

Amendment 53 moved—[Fergus Ewing]—and agreed to.

The Convener: I invite Robert Brown to move or not move amendment 330.

Robert Brown: I am not entirely satisfied, but I will discuss the matter further, if I may. I will not move amendment 330 at this stage.

The Convener: I think that that is the appropriate way forward.

Amendment 330 not moved.

Amendment 54 moved—[Fergus Ewing]—and agreed to.

Section 47, as amended, agreed to.

After section 47

Amendment 55 moved—[Fergus Ewing]—and agreed to.

Section 48 agreed to.

Section 49—Fitness for involvement

Amendment 103 moved—[Fergus Ewing]—and agreed to.

The Convener: The next group is on outside investors. Amendment 104, in the name of the minister, is grouped with amendments 110, 110A, 113 and 113A.

Fergus Ewing: Amendment 104 is a drafting amendment.

Amendment 110 relates to the fitness-for-involvement test. During stage 1, the committee rightly focused much attention on that test and recommended that we consider whether improvements could be made.

Amendment 110 provides one such improvement. It inserts a new subparagraph into section 50(2)(a) to provide that a non-solicitor's associations are relevant to that investor's fitness for involvement in a licensed provider. It makes it clear that those associations include

"family, business or other associations"

that have a bearing on the investor's character. That provision will ensure that the fitness test is as robust as possible.

Amendment 110A, in the name of Robert Brown, seeks to qualify amendment 110 by stating that family, business or other associations are relevant only in so far as they have a bearing on an individual's "suitability" to be an investor. I await with interest Mr Brown's arguments on the matter, but we believe that such a provision is unnecessary. All the fitness-for-involvement provisions are focused on the suitability of persons to be investors, and there is no need to state that explicitly for that one provision. For those reasons, we do not support amendment 110A.

Amendment 113 also relates to the fitness-for-involvement test. It ensures that individuals are not able to avoid the fitness test by hiding behind a company or a number of companies. It adds a new subsection after section 50(4) and provides that, where a non-solicitor investor is a body, it is relevant for the approved regulator to consider whether the persons who own and control that body would meet the fitness-for-involvement test if they were investing individually. Accordingly, an approved regulator will have to consider the fitness not only of any body that invests in a licensed provider but of that body's owners and controllers.

Amendment 113A, in the name of Robert Brown, appears to be an attempt to widen the group of people who can be subjected to the fitness test by virtue of amendment 113 to include those who have "substantial influence" in the body. With respect, I consider amendment 113A to be unnecessary, as those people who have a substantial influence in the body would be covered by the reference in my amendment 113 to "persons controlling" the body. For that reason, we do not support amendment 113A.

I move amendment 104, and I invite Robert Brown not to move his amendments.

Robert Brown: I am not sure why amendment 104 removes the reference to outside investors being controlled by the licensing rules.

More generally, the committee has had concerns about preventing unsuitable people from entering the legal services market. I support amendment 110 from the Scottish Government, but it does not quite hit the nail on the head. It seems possible for an outside investor to be apparently clean, as far as can be proved, as regards his family and associations, but still to be unsuitable, on broader grounds, to be such an investor.

We are all aware of the publicity and concerns surrounding public sector bodies and contractual arrangements. Amendment 110A does not limit the grounds on which such issues can be considered, as the minister suggested, but widens them. I do not think that we should be opening doors that should remain firmly shut.

Similarly, and perhaps more importantly, amendment 113A supplements the Scottish Government's amendment 113. The substantial issue is indeed influence, not control, and amendment 113A tightens up the provisions considerably. I do not accept the minister's view, which I think is contrary to English language usage and logic, that "control" is the same as "influence". "Control" means control; "influence" means something rather less.

We could get into complicated issues around minority shareholdings and so on, but the wording "substantial influence" is designed to get at those people who, without actually controlling a body in the sense that they have a majority vote, for instance, nevertheless have substantial influence on the direction of travel of the organisation. In discussion, most committee members have expressed the view that influence is at least as important as control in this regard. We need a slightly wider provision when it comes to the important issue of outside investment in legal organisations. That is the background to amendment 113A.

The Convener: The matter concerned the committee seriously during stage 1 consideration. None of us wishes it to be possible for any firm providing legal services to be infiltrated by people with malign intent. We must ensure that any safeguards that we put in place form a significant barrier to any such insinuation.

I have some difficulties with the workability of Robert Brown's amendments, although I accept his arguments in general terms. Perhaps, when he sums up, the minister might direct me along the lines of how he sees the provisions being enforced were we to approve Mr Brown's amendments today.

10:00

Fergus Ewing: Again, we all want to go in the same direction so we are responding to the concerns that the committee expressed at stage 1 and working in partnership with the committee on these matters.

It might be useful for us to remind ourselves of the way in which the bill works. Section 49 makes provision on fitness for involvement and section 50, which we are looking at just now, delimits factors as to fitness. We want to make sure that, as section 49(1) says,

"An approved regulator must—

(a) before issuing a licence to a licensed legal services provider ... satisfy itself as to the fitness"

for involvement of that licensed provider.

Section 50 then goes on to describe what that means in practice. It takes into account the traditional issues and standard tests that we are familiar with, such as whether someone has been adjudged bankrupt or disqualified from being a director. The new test that we have introduced would, I believe, cover the scenario of the procurement issue involving NHS Greater Glasgow and Clyde, although I should say that that involved a different area of law altogether. It will mean that we can look at the probity and character of an investor as well as their associations.

If I may be candid, we are talking about potential criminal associations. If the police provide information to a regulator about an applicant's criminal associations, one hopes and expects that the legislation will ensure that that applicant will not become a licensed legal services provider. That is what we are trying to achieve. These amendments tidy up the provisions further and ensure that they are as tight as possible.

Mr Brown's amendment 110A is not necessary and might actually delimit things. However, he has responded with a textual argument and says that he does not agree. Again, I am happy to look closely at the issue with him before stage 3, and to write to the committee once we have had those discussions. Indeed, in relation to all such matters about which I say I am happy to have discussions, it might be useful for us to have those discussions early on, if possible. Then we can write to the committee and can have an organised process that is carried out with as much notice as possible before stage 3, so that we are not all rushing around at the last minute. I give the committee that undertaking—I see that the officials are noting it down carefully as I speak.

We all want to move in the right direction. However, amendment 110A is not necessary and might be counterproductive; it might delimit things in a way that is not intended. Although Robert Brown disagrees with that, if he is willing not to move amendment 110A today, we can discuss who is right about that in an open fashion and come back to the committee with our arguments. No doubt we will also discuss the point with the Law Society as it will take a close interest.

Amendment 113A seeks to introduce the test of influence and relates to the arguments around influence versus control. We looked at the issue from the point of view of a regulator who is trying to ascertain what "influence" means, because it does not have a clear meaning. It can cover a spectrum of matters, from the completely insubstantial to the major. Given that element of vagueness, it is not a helpful or necessary test. Again, because we all want to make this system of regulation as tough as possible so that we can keep the crooks out, we are determined to work with the committee to make sure that it will work as well as we hope and expect it to.

If Mr Brown is happy not to move his amendments, we will be happy to revert to him in the way that I have described.

Amendment 104 agreed to.

Amendments 105 to 107 moved—[Fergus Ewing]—and agreed to.

Section 49, as amended, agreed to.

After section 49

Amendment 108 moved—[Fergus Ewing]—and agreed to.

Section 50—Factors as to fitness

Amendment 109 moved—[Fergus Ewing]—and agreed to.

Amendment 110 moved—[Fergus Ewing.]

The Convener: Amendment 110A, in the name of Robert Brown, has already been debated with amendment 104. Is Mr Brown moving or not moving the amendment?

Robert Brown: There is a possible deficiency with the and/or aspect of the amendment. That being the case, I will have further discussions and not move it at this stage.

Amendment 110A not moved.

Amendment 110 agreed to.

Amendments 111 and 112 moved—[Fergus Ewing]—and agreed to.

Amendment 113 moved—[Fergus Ewing].

Amendment 113A moved—[Robert Brown].

The Convener: The question is, that amendment 113A 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 113A agreed to.

Amendment 113, as amended, agreed to.

Section 50, as amended, agreed to.

After Section 50

Amendment 114 moved—[Fergus Ewing]—and agreed to.

Section 51—Behaving properly

Amendments 115 to 117 moved—[Fergus Ewing]—and agreed to.

Section 51, as amended, agreed to.

Section 52—More about investors

The Convener: Amendment 174, in the name of the minister, is grouped with amendments 175, 175A, 118, 119, 177 and 214.

Fergus Ewing: The bulk of these amendments are about the powers that the Scottish ministers have by virtue of section 52 relating to external investors. In the light of concerns that Justice Committee members and others raised about investors, we reconsidered section 52 and lodged amendments to ensure that the provisions are as robust as possible.

Amendment 174 removes text from section 52(2)(a). Amendment 175 inserts new subsections (2A) and (2B) into section 52. New subsection (2A)(a) provides a power for the Scottish ministers to amend, by regulations, the percentage relating to exemptible investors that was introduced by amendment 108, which the committee has already considered. As was mentioned in relation to amendment 108, that important safeguard gives the Scottish ministers the flexibility to deal with any unforeseen issues in relation to the exemption of investors. By virtue of amendment 214, regulations that are made under the power will be subject to the affirmative procedure.

New subsection (2A)(b) replaces, with slight modification, section 52(2)(a)(iv), which amendment 174 removes. Subsections (2B)(a) and (b) replace sections 52(2)(a)(i) and (iii), which amendment 174 removes, with a minor drafting change. Subsection (2B)(c) replaces and expands section 52(2)(a)(ii), which amendment 174 removes, by setting out what interest is relevant in calculating a percentage stake of ownership or control in an entity, and what associations count towards such a stake. The effect of the provision is that the Scottish ministers' regulation-making powers are extended to include consideration of what counts as an interest or stake in a licensed provider, including further provision about family, business and other associates. That expansion makes the bill more robust in respect of outside or non-solicitor investors.

Amendment 175A, in the name of Robert Brown, seeks to make the power in section 52(2A)(a) subject to the consent of the Lord President. I made my views on the issue known previously. However, given the committee's views, I am no longer minded to oppose the amendment.

Amendment 177 is a drafting amendment and replaces text that amendment 118 removes. Amendment 119 inserts into section 52(4)(a) the phrase "to any extent", making it absolutely clear that the provision catches all investors, even those with a minimal interest or stake in the entity.

In its stage 1 report, the Subordinate Legislation Committee suggested that regulations that are made under the power in section 52(2), which allows for provision to be made about investors in licensed providers, should be subject to the additional scrutiny of affirmative procedure. I acknowledge that the power is potentially wide ranging. However, as I stated in my response to the Subordinate Legislation Committee, I believe that that is necessary, given the importance of ensuring that the provisions relating to outside investors are robust. I maintain that negative procedure is appropriate for the majority of regulations that are made under those powers, which apply only to a narrow class of persons. For

that reason, I do not intend to change the parliamentary procedure that is to be used for the majority of regulations that will be made under the powers.

However, I accept the Subordinate Legislation Committee recommendation in relation to the power in section 52(2)(a)(iv), to modify definitions of different types of investors. As I have said, amendment 175 places that power in new subsection (2A)(b) of section 52. Amendment 214 makes regulations that are made under that provision subject to affirmative procedure.

I move amendment 174.

Robert Brown: I have nothing to add.

Amendment 174 agreed to.

Amendment 175 moved—[Fergus Ewing].

Amendment 175A moved—[Robert Brown].

The Convener: The question is, that amendment 175A 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)

Abstentions

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 0, Abstentions 3.

Amendment 175A agreed to.

Amendment 175, as amended, agreed to.

Amendments 118, 119, 176 and 177 moved—[Fergus Ewing]—and agreed to.

Section 52, as amended, agreed to.

Schedule 8—Investors in licensed providers

Amendments 121 to 127, 178 and 129 to 132 moved—[Fergus Ewing]—and agreed to.

Schedule 8, as amended, agreed to.

Section 53—Duty to warn

10:15

The Convener: Amendment 56, in the name of the minister, is grouped with amendment 57.

Fergus Ewing: Amendment 56 removes the licensed provider's duties under section 53(2) when the fact that the licensed provider no longer provides legal services is due to a revocation or suspension of its licence by the approved regulator. In such a case, the regulator would obviously already be aware of the situation and would be able to direct the licensed provider to take any steps that were necessary to protect its clients.

Amendment 57 is similar to amendment 56, in that it prevents the application of sections 54(2) to 54(5) in the event that the reason for the licensed provider ceasing to operate is that its licence has been revoked or suspended by the approved regulator.

I move amendment 56.

Amendment 56 agreed to.

Section 53, as amended, agreed to.

Section 54—Ceasing to operate

Amendment 57 moved—[Fergus Ewing]—and agreed to.

Section 54, as amended, agreed to.

Sections 55 and 56 agreed to.

Section 57—Employing disqualified lawyer

The Convener: Amendment 58, in the name of the minister, is grouped with amendments 59 to 65.

Fergus Ewing: Amendments 58 and 60 are drafting amendments.

Amendment 59 adds, after section 57(6), the wording:

"the Court's determination is final."

I consider it appropriate that, for all appeals that it is possible to make to the sheriff court or the Court of Session under the bill, the decision of the sheriff or the court should be final and no further appeal should be possible.

Amendment 61 relates to section 59. As section 59 is currently drafted, a person would commit an offence if they implied that they were a licensed provider even if they were legitimately such an entity. Amendment 61 will ensure that an offence will be committed only if such an implication is false.

Amendments 62 to 65 are drafting amendments.

I move amendment 58.

The Convener: I have a brief comment to make. You have not considered it appropriate to include an appeal provision in the event of there being anything wrong. I take it that you agree with me that were someone to wish to take the matter

further, it would be open to them to do so by means of judicial review.

Fergus Ewing: I have not sought specific advice on that from the Scottish Government legal directorate, but my officials say that that is their understanding.

The Convener: Therefore, there would be a remedy.

Amendment 58 agreed to.

Amendments 179 and 59 moved—[Fergus Ewing]—and agreed to.

Section 57, as amended, agreed to.

Section 58—Concealing disqualification

Amendments 60 and 180 moved—[Fergus Ewing]—and agreed to.

Section 58, as amended, agreed to.

Section 59—Pretending to be licensed

Amendment 61 moved—[Fergus Ewing] and agreed to.

Section 59, as amended, agreed to.

Section 60—Professional privilege

Amendments 62 and 63 moved—[Fergus Ewing] and agreed to.

Section 60, as amended, agreed to.

Sections 61 to 63 agreed to.

Section 64—Complaints about regulators

The Convener: Amendment 133, in the name of the minister, is grouped with amendments 134 to 140.

Fergus Ewing: As currently drafted, section 64 provides that complaints against approved regulators are made to the Scottish ministers, who may investigate the complaints themselves or delegate the function to the Scottish Legal Complaints Commission. The provision is an exception to that for the handling of other types of legal complaints, all of which go in the first instance to the SLCC, which acts as a gateway. In their evidence to the committee, Consumer Focus Scotland and the Office of Fair Trading raised their concerns about the matter and suggested that an inconsistent approach has the potential to confuse consumers. The committee recommended that further consideration be given to complaints against regulators and that the evidence provided by the SLCC should be examined.

Following discussion at the bill reference group, I decided that the SLCC's gateway function should be extended to include complaints against approved regulators. That will ensure that the bill creates a consistent initial point of contact for all legal complaints. Amendment 133 adds new subsections at the start of section 64 to provide that a complaint against approved regulators must be made to the SLCC; that it is responsible for determining the nature of the complaint; and that, if the complaint is not a handling complaint, and is not

"frivolous, vexatious or totally without merit",

the SLCC will refer it to the Scottish ministers. Amendments 134 to 137 are consequential on amendment 133. Amendment 138 is a drafting amendment. Amendment 139 ensures that, where ministers delegate to the SLCC the function to investigate complaints against regulators, they can remove the requirement on the SLCC to refer such complaints to them.

Amendment 140 inserts a new section after section 64, on the levies that approved regulators are to pay to the SLCC. At the moment, the bill does not provide for the funding of complaints against regulators, which the SLCC highlighted as being of particular concern in its evidence to the Justice Committee at stage 1. In addition, amendment 133 gives the SLCC the function of acting as a gateway for all complaints regulators. Obviously, that has an associated cost. The new section provides that approved regulators must pay an annual levy to the SLCC. A complaints levy must also be paid in the event that the SLCC investigates a complaint against an approved regulator, having had that function delegated to it under section 64(6), and that that complaint is upheld. Following consultation with approved regulators and the Scottish ministers, the SLCC will set the amount of the annual general levy and the complaints levy. In the unlikely event that the Scottish ministers decide to investigate a complaint themselves, regulations can be made under section 64(7) to require approved regulators to cover the costs.

I move amendment 133.

Amendment 133 agreed to.

Amendments 134 to 139 moved—[Fergus Ewing]—and agreed to.

Section 64, as amended, agreed to.

After section 64

Amendment 140 moved—[Fergus Ewing] and agreed to.

Section 65—Complaints about providers

The Convener: Amendment 141, in the name of the minister, is grouped with amendments 142 to 144.

Fergus Ewing: At the moment, the SLCC is required annually to consult professional organisations and other members on its budget for the next financial year. As licensed providers are to be subject to both the annual general levy and the complaints levy, I feel that they and approved regulators should be included in the consultation. That is what Amendment 141 will achieve. Amendment 142 is a drafting amendment.

Amendment 143 alters the way in which the annual general levy that is payable to the SLCC by licensed providers is collected. Under the bill at present, the levy is to be paid directly to the SLCC by those providers. Under section 27 of the Legal Profession and Legal Aid (Scotland) Act 2007, the relevant professional body—that is, the Law Society, the Faculty of Advocates or the Association of Commercial Attorneys—has a duty to collect the levy from its members and pay it over in a single sum to the SLCC. As a result, the bill's current provisions might cause the SLCC some difficulties, in that it will have to collect the levy individually from all licensed providers instead of from three bodies, with an associated logistical and cost burden. The SLCC has indicated that, although it can adapt to cope with that system of collecting the levy, it will in doing so incur significant additional costs and its strong preference is for the collection of the levy from the new bodies and individuals to be consistent with the system in the 2007 act. I agree and, accordingly, amendment 143 requires approved regulators to gather the levy from their licensed providers and pay it to the SLCC in a single sum.

Amendment 144 is a minor amendment that adds two terms to the 2007 act that are to be interpreted in accordance with the bill.

I move amendment 141.

Robert Brown: I want to raise a minor technical matter about amendment 142. I have to say that I deprecate parliamentary draftsmen's tendency to start sentences with the word "But". Given that such a use adds nothing whatever to the sentence's meaning, especially in this instance, I oppose this particular amendment.

The Convener: That is not a pedantic point. Sentences that begin with "But" are clearly inappropriate and contrary to any grammar that I was ever taught. Do you wish to say anything about this, minister? I appreciate that although you might well share the views that Mr Brown and I have expressed, it might not be politic of you to say so.

Fergus Ewing: At this historic moment in the Scottish Parliament's deliberations, I feel duty-bound to defend the draftsmen who have used this word, which they say appears frequently in legislation and is in accord with principles that are not opposed by many grammarians.

Amendment 141 agreed to.

Amendments 142 to 144 moved—[Fergus Ewing].

The Convener: Does any member object to a single question being put on these amendments?

Robert Brown: Yes.

The Convener: I will therefore call the amendments seriatim. The question is, that amendment 142 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)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

Against

Brown, Robert (Glasgow) (LD)

Abstentions

Aitken, Bill (Glasgow) (Con)

The Convener: The result of the division is: For 6, Against 1, Abstentions 1.

Amendment 142 agreed to.

The Convener: As members will note, I abstained on this occasion. I think that the point was there to be made and should be borne in mind in future.

Amendments 143 and 144 agreed to.

Section 65, as amended, agreed to.

Section 66 agreed to.

Section 67—Registers of licensed providers

Amendments 145, 64, and 65 moved—[Fergus Ewing]—and agreed to.

Section 67, as amended, agreed to.

Section 68—Lists of disqualified persons

Amendments 146 to 150 moved—[Fergus Ewing]—and agreed to.

Section 68, as amended, agreed to.

Sections 69 and 70 agreed to.

After section 70

10:30

The Convener: Amendment 66, in the name of the minister, is grouped with amendment 162.

Fergus Ewing: Amendments 66 and 162 relate to the appeals process. Following the introduction of the bill, the Sheriff Court Rules Council made representations to the Scottish Government to suggest that the bill should provide for the procedure that is to apply to appeals to the sheriff and specify exactly what a sheriff can do with regard to various rights of appeal. That is set out in amendments 66 and 162, which provide for, respectively, appeals that relate to the regulation of licensed legal services and those that relate to confirmation and will writing services.

I move amendment 66.

Amendment 66 agreed to.

Sections 71 and 72 agreed to.

Section 73—Approving bodies

The Convener: Amendment 181, in the name of the minister, is grouped with amendments 357, 151, 358, 380, 152, 381, 382, 153, 154, 383 to 387, 182, 155 to 158, 183, 159, 160, 166 and 168. I point out that, contrary to the information that is contained in the groupings, amendment 357 is not a direct alternative to amendment 151.

Fergus Ewing: Amendments 181 to 183 are technical drafting amendments. Amendments 357 and 358, in the name of Bill Aitken, return to the issue of the Lord President's consent. I have made my views known on that but, given the committee's views, I am no longer minded to oppose those amendments.

Amendment 151 allows the Scottish ministers to remove or vary conditions after consulting the approving body. Amendment 152 requires ministers to give reasons if they intend to refuse to certify or impose conditions on an applicant to be an approving body. Although it is unlikely that ministers would take such action without giving reasons, it is reasonable to require such explanation to be given.

The Subordinate Legislation Committee expressed concerns in its stage 1 report about the powers that are given to ministers under section 74(7) and section 81(5). After further consideration, I have lodged amendments 153, 154 and 160. Amendment 153 narrows the scope of the Scottish ministers' power to make regulations that relate to the criteria for the approval of regulators of confirmation agents. It will ensure that the criteria relate to the applicant's capability to act as an approving body.

Amendment 154 removes section 74(7)(c). As a result, ministers will no longer be able to make regulations about what categories of bodies may or may not be approving bodies. I accept the concerns about the power being very wide, and now consider it to be unnecessary. Ministers are able to exclude unsuitable applicants by reference to their application, and it is unlikely that it would ever be desirable to exclude an entire class of applicants without individual consideration.

Amendment 160 amends section 81(5) so that regulations that are made under it may include provision for the review of confirmation agents. The existing powers are narrowed so that provision about the functions of approving bodies or relating to confirmation agents can be made only where Scottish ministers consider it to be necessary to safeguard the interests of clients of confirmation agents.

Amendment 159 substitutes a new section 81(4) to provide in the text of the bill a requirement on approving bodies to carry out an annual review. I consider such a review to be an important part of the on-going monitoring of confirmation agents.

The bill as introduced makes provision in section 76(3) for any penalty that is imposed by an approving body on a confirmation agent to be paid to the approving body. Further consideration has been given to the appropriateness of allowing approved regulators to impose and retain fines. I consider it to be more appropriate that a financial penalty that is imposed under section 76 is paid to the Scottish ministers rather than the approving body. Amendment 155 provides for that while allowing the approving body to collect the penalty on ministers' behalf.

The bill as introduced does not provide for the audit of approving bodies. In order to support ministers' oversight role in the regulatory framework and to ensure that approving bodies are operating effectively, they are required by amendment 156 to carry out an annual internal review of their operation as such and send a report to the Scottish ministers. The report will be laid before Parliament.

Amendment 157 clarifies that a person commits an offence under section 77(1)(b) only if they imply falsely that they are a confirmation agent. Amendment 158 is consequential on amendment 157.

Amendment 380, in the name of James Kelly, requires Scottish ministers to consult the OFT and other appropriate persons or bodies before either imposing conditions on certification of an applicant to be an approving body of confirmation agents, or amending, adding or deleting any such conditions. The amendment is unnecessary and potentially inappropriate. The requirement under section 74(3) to consult the OFT before deciding whether to certify an applicant could include consideration

of any appropriate conditions at that stage. However, the OFT will have an interest only if competition issues arise out of the conditions. If competition issues arise out of any subsequent amendment or deletion of conditions, the Scottish ministers will consult the OFT and other appropriate persons or bodies under the provisions for consultation that was inserted by amendment 3, which the Justice Committee accepted unanimously on 8 June. I cannot, therefore, support amendment 380.

Amendment 381 would require the Scottish ministers to give reasons for their intention to refuse to certify or impose conditions on an approving body. The amendment is unnecessary because amendment 152, in my name, will already have the same effect. Amendment 382, in the name of James Kelly, would insert two new subsections into section 74. Proposed new subsection (6A) would require that, if representations were made under subsection (6), the Scottish ministers must after considering them make a decision and notify the applicant as to whether it would be certified as an approving body and what conditions, if any, would be imposed. Proposed new subsection (6B) would provide that the applicant could then appeal to the sheriff within 28 days of being notified of the Scottish ministers' decisions. I consider proposed new subsection (6A) to be unnecessary. It is self-evident that the Scottish ministers must consider representations and notify the applicant of their reconsidered decision. Proposed new subsection (6B) is also unnecessary, as a decision by Scottish ministers under section 64 could be judicially reviewed. As a result, I cannot support amendment 382.

Amendment 383, in the name of James Kelly, would allow ministers to make further provision by regulation about what conditions they may impose on approving bodies for confirmation agents and procedures relating to those conditions. I consider the amendment to be unnecessary. The Scottish ministers will always impose conditions that they consider to be appropriate for an application. There is no need to prescribe in regulations a list of possible conditions. Furthermore, I consider that procedures relating to conditions would be more appropriately set out in guidance rather than regulations. Consequently, I do not support amendment 383.

Amendment 384, in the name of James Kelly, would have the effect of requiring that only suitably qualified and experienced members may be granted the right to provide confirmation services. The amendment is unnecessary because section 75(2)(a) requires the regulatory scheme to set out the training requirements to be met by prospective confirmation agents. Consequently, I cannot support amendment 384.

Amendment 385, in the name of James Kelly, would require that the regulatory scheme of any approving body must describe the qualifications required to be a confirmation agent. The amendment is unnecessary. As I have said, the level of training required to be a confirmation agent will be set out in the regulatory scheme, so there is no need for a separate mention of qualifications.

Amendment 386, in the name of James Kelly, would require annual renewal of certification for confirmation agents. It is not necessary, as amendment 159 amends section 81(4) in such a way as to require an annual review by an approving body of the performance of all its confirmation agents. Furthermore, approving bodies will monitor the confirmation agents on an on-going basis and will be able to take action to revoke or suspend their right to practise should that be necessary.

Amendment 387, in the name of James Kelly, would require that a confirmation agent keeps in place sufficient arrangements for compensating persons who suffer loss by reason of dishonesty. I do not support the amendment. An application for grant of confirmation is an administrative process that does not involve handling clients' moneys, so a compensation fund is unnecessary.

Amendment 166 is consequential on amendment 160. The effect would be that the regulation power for Scottish ministers in relation to confirmation agents in section 81(5)(b) is subject to affirmative resolution. Amendment 168 is a drafting amendment.

I move amendment 181 and invite members not to move the amendments in their names.

The Convener: Your representations on amendments 357 and 358 fall on stony ground as far as I am concerned. I will pursue the amendments on the basis of previous arguments as well as the principle established by the committee.

With regard to the amendments in the name of James Kelly, as ever I will listen with considerable interest to what he has to say. No doubt, when addressing matters, he will deal with the various points that the minister has raised, such as the necessity of some of the amendments; the issue of the holding of money, which is dealt with in amendment 387; whether the matter in amendment 383 could be dealt with in guidance; and the possibility of appeal by means of judicial review, which relates to amendment 382. I will listen to what Mr Kelly has to say, but I am minded to support the Government on those matters.

James Kelly (Glasgow Rutherglen) (Lab): I support the convener's position on amendments 357 and 358, as I am not convinced by the

minister's arguments in that regard. I will not repeat the arguments that other members have made about extending the powers of approval and consent of the Lord President, as they are well documented.

Amendment 380 places a duty on the Scottish ministers to consult when adding conditions on the granting of certification. The amendment is necessary, as it places an additional responsibility on the ministers to run a consultation, rather than simply putting the conditions in place, which means that they will be able to take on board other points of view, which will make the process more rounded.

Amendment 381 is necessary because it requires ministers to set out the reasons why they have refused an application or have placed conditions on an application. It is important that that be set out in the legislation, so that people can be clear about why they have not been granted certification or conditions have been placed on the granting of their certification.

Amendment 382 is linked to amendment 381. It sets out a process for the consideration of representations where an application has been refused or has had conditions placed on it. Again, I think that it is important that that be set out in the bill, so that people can be clear about why refusals have been made or conditions have been added. It is important that all parties are clear about the process that is to be followed.

Amendment 383 gives the Scottish ministers powers to grant specific conditions. Again, that gives increased flexibility to the ministers, and it improves the process.

Amendments 384 and 385 are linked, in that they deal with qualifications and training. Qualifications and training are important in the approval of confirmation agents. It is vital that we have confidence that people who are being approved to carry out work in this important area have the necessary skills. Part of the job of establishing whether they have got the necessary skills involves an examination of their qualifications and the training that they have received.

The minister made a point about the regulatory scheme covering training, but it does not cover qualifications, and it is important to consider the two areas. It is one thing to have run through a number of training courses, but a more stringent bar tends to be set with regard to qualifications, which means that someone who has a qualification is likely to have achieved a higher level of skill than someone who has not. I do not think that the legislation is adequate, as it does not cover qualifications. Therefore, I intend to press amendments 384 and 385.

I also intend to press amendment 386, which affirms that the licence must be reviewed annually. The minister said that the regulated scheme will cover annual reviews, but the requirement in amendment 386 for the agent to hold a certificate that is granted annually is more stringent and provides greater protection.

I take a similar approach to amendment 387. Throughout our evidence taking, we have discussed guarantees and compensation funds. Service providers might get into a situation where funds go missing, and we do not want customers to be punished in such cases. I submit that the establishment of a compensation fund is essential because it will provide greater safeguards.

10:45

Robert Brown: I confess that I am slightly less convinced that the area that is covered by amendments 357 and 358 requires the Lord President's involvement. It is not quite the same as the areas that we have already discussed. If there is any further argument about that, I will be interested to hear it, because I think that the area is slightly different.

Amendments 380 and 383 cover the question of conditions. I might have missed it but, if there is no provision that allows the imposition of conditions, will the Government be able to impose conditions? It is a question of the Government having the power to start with. Perhaps the power is already in the bill somewhere and I have just missed it. I ask the minister to confirm that.

The point of amendment 381 is manifestly covered by amendment 152. Amendment 382 seems unnecessary. I agree with the minister's comments in that regard. I am certainly not in favour of adding to the bulk of statutes unless doing so adds something to the substance of the matter.

I have some sympathy with amendments 384 and 385, on qualifications and experience. The minister might want to say a little bit more about them. We do not want to straitjacket the matter too much but, at the same time, it is an important issue.

Amendment 386 echoes the point that I made before about the requirement for legal services providers to have an annual certificate. The amendment raises a relevant point. We need to consider the procedures and what will happen. The annual renewal of the certificate is an opportunity to ensure that things happen in the way that they should, because people will be required to check and certify certain things and ensure that everything is in order. It is a good control mechanism to ensure that things happen as they should, and it is a simple one as well.

The Convener: In discussing amendment 386, are you going to comment on amendment 159?

Robert Brown: I have forgotten the point of amendment 159.

The Convener: Government amendment 159 seems largely to address Mr Kelly's point. I would be interested to hear your views on it.

Robert Brown: I do not think that amendment 159 does that. It covers a slightly different issue. There is a formal procedure to be gone through in that area, and no doubt other issues are involved in it. Annual licensing seems to me to be the important mechanism in that case as well. I am not persuaded that amendment 159 necessarily does the trick, although it is a useful back-up.

The Convener: Sorry to have interrupted you. I thought that you should have an opportunity to make that point.

Robert Brown: That is fine.

On amendment 387, on a compensation fund, the minister made the point that no money will change hands when people apply for confirmation, but I am not sure whether granting confirmation is all that confirmation agents will do. It might be that that is not the only regulated function, so it seems to me that there are wider issues. In some circumstances, agents could hold quite a lot of money. I might have totally misunderstood what confirmation agents do, but I think that there are wider issues than just the issuing of documentation. I would like to hear a little more from the minister about that.

The Convener: As there are no other contributions, I ask the minister to wind up. I think that particular attention should be paid to amendments 384, 385 and 387.

Fergus Ewing: On the duty to consult the OFT, I am sure that members will have noticed that the bill already includes an explicit duty on ministers to consult the OFT. Section 74(3) states:

"Before deciding whether or not to certify the applicant as an approving body, the Scottish Ministers must consult ... the OFT".

Section 74(4) states:

"In consulting under subsection (3), the Scottish Ministers ... must send a copy of the application to the OFT".

It is absolutely clear that, when we are looking at approving bodies for confirmation agents, we must consult the OFT. That duty is right and clear. It is plain that the OFT's interests relate substantially to competition issues. That is where it has a relevant locus. We believe, with respect, that that is the correct approach and that the amendments in the name of Mr Kelly are not appropriate.

On whether there needs to be a compensation fund, my understanding is that confirmation agents, in that role, do not hold clients' money. If they do not hold clients' money—third parties' money—there is no money to embezzle. They do not have the scope to carry out fraud because they are not looking after money for third parties. Confirmation agents might also be accountants but, if they are holding clients' money as accountants, not as confirmation agents, that will be a matter for the regulation of accountants—it is not something for this bill. However, qua confirmation agents, given that they do not have the capacity to carry out fraud, it seems somewhat unfair and burdensome to impose on them an obligation to pay a levy for insurance that they do not need.

That is my understanding of the position. My officials and I had a quick discussion about it. If I have misled the committee in any way, we will immediately revert to you thereafter, but we do not think that I have done so. That is the basis on which we proceeded in this respect. If we were wrong, Mr Kelly's arguments would have force, but I think that we are probably not wrong in this respect. I hope that our arguments will be accepted. Mr Brown also referred to that issue.

On training, I respectfully point out to committee members section 75(2), which deals with what the approving body must do. We are looking to the approving body to ensure that proper regulations are brought into force. That is the scheme in this part of the bill. The approving body must make a regulatory scheme. The very first thing that a regulatory scheme must do is

"describe the training requirements to be met by a prospective confirmation agent".

Members' legitimate concern that confirmation agents should be appropriately trained is therefore dealt with explicitly in section 75(2)(a). Incidentally—just to reassure members—that section provides that the scheme must

"incorporate a code of practice to which a confirmation agent is subject"—

thereby ensuring high standards, as one would expect. It also provides that professional indemnity is required. Perhaps Mr Brown was asking what other responsibilities confirmation agents might have. Plainly, they have a duty to carry out work without being negligent. If negligence arises, then and only then might their clients have a claim qua delict, rather than fraud. There is provision for professional indemnity in section 75(2)(c).

There could be a question about what sort of training confirmation agents should do. I am not aware that there is a specific diploma or recognised degree or qualification in that respect. I suspect that the training is more likely to comprise

a sort of melange of disciplines relating both to accounting and to confirmation, with perhaps a bit of finance thrown in. I am sure that members will appreciate that in confirmation work, one needs to be reasonably familiar with a wide range of financial instruments and other such relatively abstruse matters.

The point is that there is not one recognised qualification that we could point to. As that is the case, it follows logically that the best way to ensure that appropriate training is stipulated and required is to leave the detail to guidelines and the professionals who carry out the work. I give an undertaking that appropriate bodies, such as the Institute of Chartered Accountants of Scotland and the Law Society of Scotland, will be consulted on such matters, but that is no more than one would expect, as those bodies would probably be involved in helping to specify what any curriculum or qualification might entail.

Those comments cover the amendments on training, compensation and the OFT. On the annual report, I think that amendment 159 is fairly clear. It says that the approving body that regulates confirmation agents must do three things:

"(a) review annually the performance of its confirmation agents,

(b) prepare a report on the review,

(c) send a copy of the report to the Scottish Ministers."

That is crystal clear; it could not be clearer. The amendment will ensure that there is proper, sufficient monitoring without going over the score and imposing an unreasonable number of burdens on the approving body. It will ensure that performance is reviewed annually, the report of which the Scottish ministers will then lay before Parliament. With respect, I suggest that amendment 159 covers the issue.

Finally, convener, I should apologise for inviting you not to move amendments 357 and 358, on the Lord President, as I had already indicated that they are based on the arguments that we have discussed before and which I accept. I do not oppose the amendments and am happy to have the opportunity to correct my comments and clarify that matter.

Amendment 181 agreed to.

Section 73, as amended, agreed to.

Section 74—Certification of bodies

Amendment 357 moved—[Bill Aitken].

The Convener: The question is, that amendment 357 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)

Abstentions

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 0, Abstentions 3.

Amendment 357 agreed to.

Amendment 151 moved—[Fergus Ewing]—and agreed to.

Amendment 358 moved—[Bill Aitken].

The Convener: The question is, that amendment 358 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)

Abstentions

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 0, Abstentions 3.

Amendment 358 agreed to.

Amendment 380 moved—[James Kelly].

The Convener: The question is, that amendment 380 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 do not consider it necessary.

Amendment 380 disagreed to.

Amendment 152 moved—[Fergus Ewing]—and agreed to.

Amendment 381 not moved.

Amendment 382 moved—[James Kelly].

The Convener: The question is, that amendment 382 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 as, again, I do not consider it necessary.

Amendment 382 disagreed to.

Amendments 153 and 154 moved—[Fergus Ewing]—and agreed to.

Amendment 383 moved—[James Kelly].

11:00

The Convener: The question is, that amendment 383 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.

There being equality of votes, I vote against the amendment as the matter can be dealt with by guidance.

Amendment 383 disagreed to.

Section 74, as amended, agreed to.

Section 75—Regulatory schemes

Amendment 384 moved—[James Kelly].

The Convener: The question is, that amendment 384 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 384 disagreed to.

Amendment 385 moved—[James Kelly].

The Convener: The question is, that amendment 385 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.

My casting vote goes against the amendment, as it is unnecessary.

Amendment 385 disagreed to.

Amendment 386 moved—[James Kelly].

The Convener: The question is, that amendment 386 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.

My casting vote goes against the amendment, as the matter is adequately dealt with by amendment 159.

Amendment 386 disagreed to.

Amendment 387 moved—[James Kelly].

The Convener: The question is, that amendment 387 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)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

Abstentions

Brown, Robert (Glasgow) (LD)

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 387 disagreed to.

The Convener: If the assurances given by the minister turn out not to be true—I know that they were given in all good faith—the matter will require to be revisited.

Amendment 182 moved—[Fergus Ewing]—and agreed to.

Section 75, as amended, agreed to.

Section 76—Financial sanctions

Amendment 155 moved—[Fergus Ewing]—and agreed to.

Section 76, as amended, agreed to.

After section 76

Amendment 156 moved—[Fergus Ewing]—and agreed to.

Section 77—Pretending to be authorised

Amendments 157 and 158 moved—[Fergus Ewing]—and agreed to.

Section 77, as amended, agreed to.

Sections 78 to 80 agreed to.

Section 81—Ministerial intervention

Amendments 183, 159 and 160 moved—[Fergus Ewing].

The Convener: Does any member object to my putting a single question on the amendments?

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Yes.

The Convener: That is fine. I will therefore call the amendments seriatim.

Amendment 183 agreed to.

The Convener: The question is, that amendment 159 be agreed to. Are we agreed?

Members: No.

Cathie Craigie: I do not want to vote for the amendment, as I do not know that it does what the committee wants.

The Convener: That is a perfectly honourable position.

Cathie Craigie: I want to reserve my position until stage 3.

The Convener: Right. There will be a division.

For

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 5, Against 0, Abstentions 0.

Amendment 159 agreed to.

Amendment 160 agreed to.

Section 81, as amended, agreed to.

The Convener: This might be an appropriate time to stop for 10 minutes.

11:06

Meeting suspended.

11:24

On resuming—

After section 81

The Convener: We move on to will writing services. Amendment 184, in the name of the minister, is grouped with amendments 185 to 198, 200, 201, 199, 161, 202, 163, 203, 164, 204, 205, 165, 206, 207, 213 and 215 to 218.

Fergus Ewing: Will writing is not a reserved activity under the Solicitors (Scotland) Act 1980. Unqualified individuals can provide will writing services, but the fact that there are no requirements for training, professional indemnity

insurance or other safeguards means that consumers are vulnerable to non-regulated practices, which are often unnecessarily expensive.

An example that was brought to my attention concerned an elderly client who was charged £1,000 for a straightforward will in a non-inheritance tax estate. That client was driven to her bank by the will writer to withdraw the money, in cash, to pay the fee. In another case, consumers who wanted a will were sold specialised services that they did not require. In some cases, consumers have been persuaded to pay up to £2,400 when a simple will costing £150 or, indeed, much less would have sufficed.

As well as individual instances of poor practice, it is possible to identify some main themes, including a lack of skill and competence; poor knowledge of inheritance tax; the provision of advice that is based on English law; low advertised costs that translate into substantial fees through bait and switch and the tying in of other services; cold calling and unsolicited mail; a lack of professional indemnity insurance; and poor storage of wills. Over the past few months, bodies including the Law Society of Scotland and the Scottish Law Agents Society have lobbied for non-lawyer will writers to be subject to regulation. In addition, three existing self-regulatory will writing bodies have indicated their support for the introduction of regulation in this area and a willingness to regulate.

Shortly after the bill's introduction, I informed the committee that regulation of non-lawyer will writers was under consideration and that amendments to put such regulation in place might be lodged at stage 2. During stage 1, I reiterated my support for regulation, subject to the results of a consultation that was under way. The committee agreed that

"unregulated will writing is an issue that requires to be addressed".

The consultation exercise has since been completed. An overwhelming majority of respondents were in favour of the introduction of regulation for non-lawyer will writers. A majority were also in favour of the establishment of a regulatory scheme similar to the one that is proposed for confirmation services in part 3 of the bill.

Therefore, I have lodged amendments—33 of them—to establish a robust regulatory framework for non-lawyer will writers and to prevent any unregulated non-lawyers from drafting wills for fee, gain or reward. The regulation will continue to allow non-lawyers to provide a will writing service but will protect consumers by ensuring that all such will writers are subject to robust regulatory rules, enforcement measures and sanctions.

However, individuals who prepare their own wills—including deathbed wills—with or without a do-it-yourself pack or other persons who provide a free advice service will not be affected, nor will solicitor will writers, who are already regulated by the Law Society of Scotland.

As I said, the regulatory framework is similar to the one that is proposed for confirmation services. It may come as a relief that, therefore, I do not intend to go through each of the 33 amendments or the 11 proposed new sections in turn, but I will explain how the framework will operate and will highlight some key amendments.

Amendments 203 and 204 seek to make changes to section 32 of the Solicitors (Scotland) Act 1980 to make will writing an activity that is reserved to solicitors unless it is carried out by persons who are regulated under the bill. As with confirmation services, the regulation of non-lawyer will writers will be carried out by professional or other bodies that will regulate their own members with approval and oversight from the Scottish ministers. Any body that wishes its members to be able to draft wills must make an application to the Scottish ministers to receive certification as an approving body.

We estimate that the costs to the Scottish Government will be minimal and similar to those that are set out in relation to confirmation agents in the financial memorandum. As part of the application, the approving body will be required to set out a regulatory scheme, which is described in amendment 187. As with the regulatory scheme for confirmation services, it will include qualifying criteria and training requirements, a code of practice and complaints procedures and sanctions. Crucially, it must require that will writers have in place sufficient arrangements for professional indemnity. In addition, to address specific concerns that have been raised about will writers, such schemes must provide that the code of practice and related standards to which will writers are subject apply to anyone acting on their behalf; that if a service for storing wills is offered, sufficient arrangements are in place for their storage, including arrangements to maintain such arrangements in the event that the will writer's business ceases to exist; that it is a breach of the code of practice for the will writer to fail to comply with any enactment that is specified in the code of practice; and that a breach of the code of practice by a person acting on behalf of a will writer constitutes a breach by the will writer.

11:30

Amendment 191 will give powers to the Scottish ministers to revoke certification should an approving body fail to comply with a direction that

it is given by them, such as a requirement to review or amend its scheme.

Amendments 197 and 198 make provision for complaints about will writers by altering the existing sections in the bill that deal with complaints about confirmation agents. Both service and conduct complaints can be made about will writers. They will be handled by the Scottish Legal Complaints Commission and the approving body respectively in the same way that complaints about other types of legal services practitioners are handled by the SLCC and their professional bodies.

Amendment 195 provides that, if the Scottish ministers believe that intervention is necessary in order to ensure that the provision of will writing services is regulated effectively, they may make regulations to establish a body with a view to its becoming an approving body or make regulations to allow them to act as an approving body. Regulations that are made under those provisions are to be subject to affirmative procedure. The power is similar to the step-in power in section 35 relating to licensed providers, and is a slight departure from the regulatory approach taken with confirmation agents. That is because, unlike confirmation agents, will writers currently exist and will writing is the primary or sole function of many of them. By introducing a prohibition on their current activities unless they are regulated, there is a risk of putting those individuals out of business entirely if their approving body ceased to regulate. Therefore, I believe that step-in powers are needed to allow ministers to act if necessary and as a last resort to ensure that will writing services are regulated.

I have covered the key amendments in the group and given a broad overview of how the regulation of non-will writers will operate. I do not intend specifically to cover the various consequential and drafting amendments in the group.

In summary, the regulation will continue to allow non-lawyers to provide a will writing service, but will ensure that such will writers are subject to robust regulatory rules, enforcement measures and sanctions. Serious concerns about non-lawyer will writers have been expressed elsewhere. The regulation will be the first regulation of its kind in the United Kingdom and will ensure that Scottish consumers are given the protection that they deserve.

I move amendment 184.

Robert Brown: I strongly welcome the amendments, which reflect the committee's views. The letter that we received from the Scottish Law Agents Society right at the beginning pointed out concerns that existed. The amendments fill a gap in the bill.

I want to ask about the provision of such services through the internet. It is clear that there is potential, as there was and is with will forms, for English styles and phraseology that are not always suitable to Scottish circumstances to be supplied by providers in other parts of the UK, for example, in a way that is, from the Scottish Government's point of view, difficult to get at. Will the minister comment on that aspect?

Stewart Maxwell (West of Scotland) (SNP): I, too, welcome the amendments and agree with Robert Brown. I back up his question about wills on the internet. I think that it was mentioned when I was questioning Which? at stage 1 that it offers a will service on the internet that is regulated by English law. Consumers in Scotland may be completely unaware that they will get a will that is determined by English law. There is a serious issue. Will the minister say how that matter could be dealt with here or whether it could be dealt with in consultation with the UK Government?

James Kelly: I welcome the amendments, many of which have emerged as a result of concerns that were raised at stage 1. One strength of the parliamentary process is that we can flag up and reiterate in our stage 1 report any concerns that are expressed in evidence. The process has certainly helped the minister, who has taken on board the committee's formal and informal comments, and these particular amendments strengthen the system.

The Convener: I concur. This series of amendments plugs an important gap in consumer protection.

I ask the minister to wind up and to address, in particular, the issues raised by Mr Brown and Mr Maxwell.

Fergus Ewing: Mr Brown and Mr Maxwell asked about will writing services that are offered via the internet, presumably for a fee—at least, I think that is what is being envisaged.

Under the regulations, anyone offering such services to people in Scotland will require to be authorised and regulated and these amendments include not only enforcement provisions but, in amendment 190, a new offence of pretending to be authorised. So there is a requirement to be authorised and an offence of pretending to be authorised. As a result, anyone who pretends to be a will writer without having registered may be committing an offence.

It is perfectly possible for those who become registered as will writers to offer services on the internet; indeed, there is no reason why that should not be the case, provided that the

individual is properly regulated and complies with the new rules. After all, providing such services on the internet is not necessarily wrong. I think that Mr Brown and Mr Maxwell envisage scenarios in which cowboys offer these services, but such activities—if these individuals seek to charge a fee—will be outlawed. In that respect, I think that the amendments cater for and cover that particular scenario but given that we are discussing 33 amendments, 11 new sections and what is, in effect, an entirely new chapter of the bill, we are of course happy to look again at the issue.

As for our dealings with the UK Government, which Mr Maxwell asked about, we are very happy to discuss this matter with it and, indeed, would like our friends and colleagues south of the border to follow happily the lead that we are giving in the UK on this issue. It would certainly be useful to have some exchange in this respect, because—to be quite candid and frank about this—I am sure that consumers south of the border are being ripped off by cowboys charging a fortune for a service that might well be defective. Such a practice is wrong, no matter whether it is happening in Paisley or Plymouth, and I am very happy to work with our UK Government colleagues on the matter.

I am very pleased by the committee's broad support for the amendments and acknowledge the work that the Law Society and the Scottish Law Agents Society have carried out. Indeed, both organisations gave evidence to this effect at stage 1. I thank the committee for its input and believe that, if members agree to the amendments, we will be doing a good thing.

Amendment 184 agreed to.

Amendments 185 to 195 moved—[Fergus Ewing]—and agreed to.

Section 82—Regard to OFT input

Amendment 196 moved—[Fergus Ewing]—and agreed to.

Section 82, as amended, agreed to.

Section 83—Complaints about agents

Amendments 197, 198, 200, 201, 199, 161 and 202 moved—[Fergus Ewing]—and agreed to.

Section 83, as amended, agreed to.

Section 84 agreed to.

After section 84

Amendment 162 moved—[Fergus Ewing]—and agreed to.

Section 85—Consequential modification

Amendments 163, 203, 164, 204, 205, 165, 206 and 207 moved—[Fergus Ewing]—and agreed to.

Section 85, as amended, agreed to.

Section 86—Application by the profession

The Convener: Amendment 67, in the minister's name, is grouped with amendments 68 to 71.

Fergus Ewing: Amendments 67 to 70 substitute the word "practitioners" for "practices" in every occurrence in section 86. They are drafting amendments to achieve consistency with usage elsewhere in the bill.

Amendment 71 is a drafting amendment to substitute "litigation practitioners" for the fuller wording in section 86(4)(d). Amendment 95, which we have already debated and which affects section 101, introduces the definition of "litigation practitioner" because the term occurs in a few places.

I move amendment 67.

Amendment 67 agreed to.

Amendments 68 to 71 moved—[Fergus Ewing]—and agreed to.

Section 86, as amended, agreed to.

Sections 87 to 89 agreed to.

Section 90—Qualified persons

The Convener: The next group is on the description of licensed legal services providers. Amendment 72, in the minister's name, is grouped with amendment 365.

Fergus Ewing: Amendment 72 relates to the branding of licensed providers. The Law Society of Scotland has expressed concern that a licensed provider that primarily provides non-legal services, such as a large accountancy firm that employs only a few solicitors, could nevertheless brand itself as a firm of solicitors. I agree that that is a potential issue, so I have lodged amendment 72 to remove the exemption that allows licensed providers to call themselves solicitors or a firm of solicitors. Instead, the amendment requires a licensed provider to have the Law Society's written permission before so labelling itself.

Amendment 72 will also require the Law Society's council to make rules that

"set the procedure for getting the Society's authority",

and

"specify the grounds on which the Society may refuse to give that authority (and require the Society to give reasons in writing if it refuses to give that authority)".

That will allow licensed providers that are primarily firms of solicitors to be labelled as such, while preventing the use of that brand in a potentially misleading way.

11:45

Amendment 365, in the name of Robert Brown, is similar to amendment 72, in that it relates to branding. However, amendment 365 would put the onus on the Scottish ministers to decide what terms could be used by whom. It would allow ministers to designate terms, the use of which would be restricted to firms of solicitors or licensed providers, or different types of those entities.

It is not appropriate to include such a provision in the bill. It should be left to approved regulators, such as the Law Society, to determine which terms are acceptable. The Scottish ministers may, if necessary, provide guidance on the matter.

The main issue is not, as it says in amendment 365, whether the Government should be able to

"designate such terms as it considers appropriate as being restricted in use".

The term that we are worried about is "solicitor". That is what we are concerned about. I recommend the approach in amendment 72, which deals specifically with the matter, and I invite Robert Brown not to move amendment 365.

I move amendment 72.

Robert Brown: I support amendment 72. However, it relates only to the term "solicitor", as the minister said, which was not the limit of the committee's concerns. We examined a number of different titles.

This is a tricky area, because we must consider how wide provision should be. The issue is branding. The public are entitled to know who are the people who use certain terms. There should be restrictions on who uses the term "solicitor", but there are other terms. For example, is it valid for someone to describe their organisation as "solicitors and accountants" if it is made up of one solicitor and 20 accountants? That is probably in the range of what is all right, but what about the term "lawyer", which is used quite widely, suggests quite a lot and gives a degree of confidence to people? As I understand it, the term can be used by people who have no particular qualifications.

There is a range of possibilities and an entity's descriptive title is important in the public interest. That is a matter for the Scottish ministers, and the power in amendment 365 could be used with value in certain circumstances, although ministers might decide, on consideration, not to use it. Amendment 365 sets out a list of people whom ministers might consult—it does not include the Lord President, which is a matter that I might have to come back to.

There is a serious issue to do with people's confidence in the system. I do not think that anyone can get too excited about the term "licensed legal services provider", but terms such as "lawyer" are altogether different. The Government might well take an interest in the matter, in the public interest.

The Convener: There is nothing wrong with amendment 72, but Robert Brown is right to raise an issue that caused the committee considerable concern at stage 1. For the public, the term "lawyer" covers a multitude of tasks—and indeed sins. It can be used collectively, it is occasionally used pejoratively and it can be used in respect of a person who has the most remote connection with legal services.

Therefore, there is at least an argument for tightening things up, so that what is described as a lawyer is what members understand by the term. We must recognise that the public do not always have the knowledge that members have as a result of our activities on the committee, so protection might be necessary.

Amendment 72 is unobjectionable, but I will be interested to hear Mr Ewing's response to Mr Brown. I suspect, as I think that Mr Brown does, that a little more work is needed on amendment 365.

Fergus Ewing: The debate has been useful. It is clear that the greatest concerns rightly focus on LSPs that it is plain are largely accountancy firms calling themselves solicitors. Amendment 72 deals with that, and I am grateful to members for their support. The question is whether we need to go further than simply protecting the use of the term "solicitor". It is a reasonable debate, and I will respond as follows.

First, although solicitor is a species of the genus lawyer, it is recognised in law. The term "solicitor" is protected by law; one cannot call oneself a solicitor if one is not, and it is an offence under the 1980 act to do so. As the convener rightly says, the word "lawyer" is a much wider term that encompasses a variety of people. For example, a paralegal could legitimately say, "I am a lawyer", as could an advocate or a barrister. Others might claim, with some legitimacy, the use of the term. It is not a term for which, as I understand it, there is any particular existing statutory protection.

Given that situation, it is fair to say that the issues that Robert Brown and the convener rightly raise go somewhat beyond the scope of what we have been considering. We are happy to examine the matter with the Law Society of Scotland and to consider specifically whether anything else needs to be done, and can be done in the bill. I am not

convinced that it can, but it would probably require the 1980 act to be amended, which would need fairly detailed consultation, including with the UK Government.

It is perhaps analogous to the issue of whether the term "accountant" is protected. As I understand it, the use of that term is not protected by ICAS, and covers chartered accountants, certified accountants and those who may not have any particular qualifications. From time to time that has been an issue with ICAS, which rightly feels that there should be protection of the word "accountant".

I am happy to go away and consider the issue further with the Law Society of Scotland. There is a fair gap between stage 2 and stage 3 proceedings. I am not convinced that we would be able to grapple with and resolve the issue at stage 3, but I am willing to examine it with members and the Law Society. On that basis. I hope that members will—and I urge them to—support amendment 72. Perhaps Robert Brown would be willing not to move his amendment, on the basis of my assurances that we will get back to the committee on those matters.

Amendment 72 agreed to.

The Convener: The next group is on practising rules. Amendment 73, in the name of the minister, is grouped with amendments 359 to 361 and 74.

Fergus Ewing: Amendment 73 will amend section 65(1) of the Solicitors (Scotland) Act 1980—which provides the interpretation of terms that are used in that act—by adding references to the Legal Services (Scotland) Act 2010 and licensed providers. Amendment 74 is a drafting amendment.

Amendments 359, 360 and 361, in the name of Bill Aitken, would amend the Solicitors (Scotland) Act 1980 and provide that a solicitor's practising certificate must be suspended if he or she were convicted of dishonesty or were in prison, or if a disqualification order under the Company Directors Disqualification Act 1986 were made against him or her, although the solicitor may have the practising certificate reinstated when the disqualification order ceased to have effect.

The Law Society of Scotland submitted to the Scottish Government various proposals for amendments to the 1980 act, which the society described as being necessary technical amendments. Accordingly, I gave assurances to the committee that any changes to the 1980 act would be technical in nature, and limited to those that we considered to be necessary. I have lodged a number of amendments to respond to the Law Society's concerns.

However, I consider that amendments 359, 360 and 361, which mirror those that the Law Society suggested, represent a change in policy; they are not necessarily technical amendments. In addition, the Law Society did not supply evidence to indicate that there is a problem with the provisions in the 1980 act as it stands, and I am not aware of any consultation on those matters within or outwith the legal professions.

I consider there to be significant issues with amendments 359, 360 and 361.

The Scottish Solicitors Discipline Tribunal already has the power to suspend the practising certificate of any solicitor who is convicted of an act involving dishonesty or who is sentenced to a term of imprisonment under section 53 of the 1980 act. Amendment 359 would make such suspension automatic and would remove the entitlement to a hearing and the right of appeal to the court. It is not appropriate to make such a substantial change without considering fully the implications of, and examining the rationale behind, the Law Society's request.

Amendment 360 would provide for a similar suspension of a practising certificate in the event that a solicitor was subject to a disqualification order made under the Company Directors Disqualification Act 1986. There is a wide range of reasons for such disqualification orders to be made, and although they all undoubtedly make one unfit to be a director of a company, it is not immediately clear that they all necessarily make one unfit to be a solicitor. If an issue exists with that, the Law Society ought to provide much more information and appropriate consideration should be given to whether such a change is truly necessary.

Furthermore, there do not appear to be any provisions to bring such suspensions to an end. Under amendment 360, if a solicitor was sentenced to imprisonment but was subsequently acquitted, or his or her sentence reduced to a non-custodial punishment, there would be no means by which to apply for termination of the suspension. The absence of such a provision raises significant questions about the amendments' compatibility with article 1 of protocol 1 of the European convention on human rights.

Consequently, although I agree that the amendments raise important issues, I cannot support them. The 1980 act has been in operation for 30 years. I am not aware that there have been any problems in the area and want to consider the issues in much greater detail before committing to such a significant change in policy. Of course, I am happy to discuss that with the Law Society before stage 3.

I move amendment 73.

The Convener: The two amendments in the group that I lodged are, as the minister said, Law Society amendments. Throughout consideration of the bill, one of our primary concerns has been to ensure that it is as tight as possible. We do not want a situation whereby—this has been repeated throughout arguments about a number of sections of the bill—people of dubious character come into the profession, and we want to ensure that any actions that we take through the legislation strictly uphold the integrity of the Scottish legal profession. Fortunately, that integrity has not often been called into question, so we can be reasonably relaxed.

However, the purpose of amendment 359 is to ensure that when a court has given a custodial sentence, and bearing in mind the fact that these days it is virtually impossible to get a custodial sentence in certain circumstances, anyone who has been given a custodial sentence will have committed a serious offence. I thought that the provisions in amendment 359 would be a useful addition to the armoury that we are using to maintain the integrity of the profession that we all value. The wording of amendment 359 is the same as that in section 53(1)(b) except that it does not specify that the term of imprisonment must be not less than two years.

Amendment 360 deals with the problems that could arise under the companies acts, and the arguments are similar.

I have listened carefully to what the minister said, particularly about compliance with article 1. That is a significant argument. I have also taken on board the minister's undertaking that the matter can be re-examined. In the circumstances, I will not move amendments 359 and 360.

12:00

Fergus Ewing: I have undertaken to discuss the matter with the Law Society before stage 3, if that is desired. I am happy to do that.

Amendment 73 agreed to.

Section 90, as amended, agreed to.

Section 91—Changes as to practice rules

Amendments 359 to 361 not moved.

Amendment 74 moved—[Fergus Ewing]—and agreed to.

The Convener: Amendment 362 in my name is in a group with amendment 363. It is basically a technical amendment in respect of the 1980 act. Given the previous arguments, I will not move amendment 362, so further debate would be academic. The same arguments apply to some extent to amendment 363, in respect of which I think the definition has been dealt with elsewhere.

Amendments 362 and 363 not moved.

Section 91, as amended, agreed to.

After section 91

The Convener: Amendment 75, in the name of the minister, is in a group on its own.

Fergus Ewing: Our intention when drafting the bill was to ensure that charitable bodies are not burdened by unnecessary regulation and cost; it was not to restrict the way in which organisations such as citizens advice bureaux can operate. However, Citizens Advice Scotland raised concerns about the inability of bureaux to employ solicitors directly, and concerns about wider implications were also raised by the Justice Committee.

We met CAS on 12 February to discuss the matter in more detail. It made it clear that, rather than their becoming involved in the new regulatory scheme, it wants provision to simply allow citizens advice bureaux to employ solicitors directly. Although CAS encourages solicitors to work for bureaux on a pro bono basis, it wants to be able to pay solicitors for the provision of legal services to members of the public if they are not able to encourage them to provide their services for free.

CAS is prohibited from employing solicitors by section 26(1) of the Solicitors (Scotland) Act 1980, which makes it an offence for any solicitor, upon the account or for the profit of any unqualified person, to, for example, act as an agent in any court proceedings or prepare certain writs. However, law centres are currently able to employ solicitors, as the result of a specific exemption in section 26(2) of the 1980 act. I have decided that a similar exemption for CABx is the most effective way of allowing them to do the same. Amendment 75 will resolve that issue without involving citizens advice bureaux in the new regulatory regime, with the regulatory and cost burdens that that would entail. It will amend the 1980 act so that the general prohibition in section 26(1) does not apply to a solicitor who is employed by an individual bureau, thereby allowing citizens advice bodies to employ solicitors. It defines a citizens advice body as a non-profit-making body that has

"the sole or primary objective of providing legal and other advice (including information) to the public",

without charge. The intention is that that definition will capture CABx and similar bodies. However, should the definition be too broad or too narrow, there is provision for the Scottish ministers to make regulations altering the definition, after consulting the Lord President, the Office of Fair Trading and other appropriate organisations.

I move amendment 75.

Amendment 75 agreed to.

The Convener: Amendment 208, in the name of the minister, is grouped with amendment 388.

Fergus Ewing: Amendments 208 and 388 will implement the recommendation that was made in the "Report of the Scottish Civil Courts Review" that a person without a right of audience should be entitled to address the court on behalf of a party litigant, but only in circumstances in which the court considers that such representation would help it. The amendments will amend the Court of Session Act 1988 and the Sheriff Courts (Scotland) Act 1971 to allow the Court of Session to make appropriate rules of court to permit a lay representative, when appearing along with a party litigant, to make oral submissions to the court on the party's behalf. That is the first recommendation of the "Report of the Scottish Civil Courts Review" that requires that primary legislation be implemented.

I move amendment 208.

Amendment 208 agreed to.

Amendment 388 moved—[Fergus Ewing]—and agreed to.

Amendment 210 moved—[Fergus Ewing].

The Convener: Amendment 210A, in my name, is grouped with amendments 210B, 211A, 364, 366 and 370. Amendment 210A addresses the somewhat vexed question of the guarantee fund. Although there may be differences in nuance among us, the political view—indeed, the external view—is clearly that there must be a guarantee fund. In the absence of the ability to fund us in other directions, with insurance underwriters unable to provide some form of insurance cover—apart from anything else, the ability to insure against one's own fraud indicates a fairly novel approach to life—there is no apparent answer apart from the utilisation, to some extent, of the Law Society guarantee fund as it exists at the moment.

For its part, the Law Society has expressed some unease about the purpose behind amendment 210 and the related amendments. It seems that, if the Law Society fund must be utilised in providing what we all agree is necessary protection to the consumer, it should have some input to regulation of individuals who have the potential to have a negative impact on the operation of that fund.

I hope that the matter might be agreed further down the road. However, having considered the matter at considerable length, I do not see any way round it. We must have the appropriate protection in place, and I can come up with no reasonable solution other than the Law Society fund. At the same time, I recognise the Law Society's anxieties and concerns that we could have an influx into the profession, which could, in certain circumstances—although there is no need to exaggerate the argument—result in the fund being left vulnerable if the Law Society did not have the power to regulate in that respect.

I move amendment 210A.

Robert Brown: This is an unusual process in which we are going back to a previous group of amendments and we are apparently considering amendments to an amendment that we have debated, but not yet voted on. I am not certain that I follow the interrelation with the 1980 act, as the issue is a bit complicated in that regard.

I support the aim of amendment 210B to restrict the operation of the fund to the Law Society. Nevertheless, given last week's votes, I wonder whether it might be cleaner to insert a clear requirement at stage 3 for a body wishing to be an approved regulator to have guarantee fund arrangements. With respect, I do not altogether accept your comments about that, convener. The insurance aspect is straightforward, and there is no miracle solution in that direction. However, if accountants, for instance, wished to play a regulatory role, I cannot see any particular reason why they could not provide a guarantee fund arrangement of their own. The same might be said about other parties.

As I said last week, if other bodies wish to regulate but cannot provide a guarantee fund arrangement because of their size or whatever, we have to question whether they ought to be in the regulatory business in the first place. I have some scepticism regarding the underlying regulatory competition issues.

I have seen the letter from the Law Society of Scotland, which seems to be a little bit confused when it comes to the principle. I am not prepared to put into the bill something that has not yet been worked out, or that may not be satisfactory. We all agree that there must be guarantee fund arrangements for such circumstances, but let the minister sort out a properly thought-out proposal with the profession that could be provided for at stage 3. We have plenty of time for that, and the committee can be involved in the process over the recess if necessary.

My view in principle remains that, if a body wishes to regulate, it should set up its own guarantee fund arrangement. If it cannot do so, it might be too small to regulate in the first place. There is no public interest that requires special arrangements to ensure regulatory competition. I will oppose amendment 210. I am happy to support the convener's amendments to improve it,

but I will be voting against amendment 210 if it comes to the vote.

Fergus Ewing: I very much welcome the convener's statements that there must be a guarantee fund. That principle is plainly accepted; I reached it at the very first meeting that I had about the bill. I undertook during stage 1, when giving evidence and in my speech in the chamber, that there must be a guarantee fund. There must be protection for the public against fraud by LSPs, as there is for solicitors. We all support that principle.

Amendments 210A, 210B and 211A, in the name of the convener, seek to limit the use of the guarantee fund to licensed providers that are regulated by the Law Society of Scotland, whereas my amendment 210 would allow all licensed providers to use the fund.

There is agreement among the committee, and among most other bodies of people whom I have consulted, that people who suffer pecuniary loss as a result of fraud while receiving legal services from a licensed provider should have recourse to the same level of compensation arrangements as are provided for by the guarantee fund.

The convener indicated that the guarantee fund is the only practical option. We reached that conclusion, as I indicated last week, after considering the alternatives. It is worth repeating that the guarantee fund is a statutory fund. It does not belong to the Law Society—it was set up under statute and is administered by the Law Society. It is a standalone fund. Were the Law Society to be required to set up a new fund, it would find it as difficult as anyone else. So, too, would accountants. Setting up a multimillion-pound fund to guarantee against fraud is an extremely costly business. That is why the guarantee fund is the only practical option.

There is great force behind the proposition that allowing licensed providers to use the guarantee fund would pose little risk, partly because of the size of the firms that are likely to become licensed providers and the historically low number of claims against such firms. That would bring with it the happy result that the guarantee fund would be in receipt of more contributions—firms would be required to pay into the fund but would not be subject to outgoings in claims against the fund. In other words, the use of the fund has potential benefits. Indeed, the record clearly shows that. Since last week, when I said that I was not certain about the matter, I have looked into it, and the record of claims shows that they tend to involve smaller firms—sadly. There are, therefore, potential benefits from having the guarantee fund.

It has even been suggested that there could be a substantial reduction in the levy of the guarantee fund, taking into account the developments that we are discussing, as well as the pattern of claims over the past couple of years and the size of the fund. That could be beneficial to the generality of solicitors. It should be noted that the guarantee fund covers all solicitors and will continue to do so, whether or not amendments are made to extend cover to licensed providers.

12:15

I appreciate the concerns that have been expressed and make clear that this is the most important unresolved issue. We are in detailed discussion with the Law Society about the matter and have made our views clear to it. We do not think that other regulators would be able to establish a new fund. Were that a requirement, it is unlikely that there would be any other regulators. I appreciate that there are concerns about the matter and will endeavour to establish an agreed approach to the use of the guarantee fund in advance of stage 3.

The Law Society administers the fund, so it has the controls that arise from that. The society deals with claims and considers them carefully; it will continue to do so, no matter where claims come from. As matters rest, the society will have that element of control, as a watchdog and administrator, to ensure that no improper or invalid claims are accepted. As long as it has that responsibility, it will seek to continue to discharge it.

Following the convener's remarks, I am happy to consider additional provisions to provide the Law Society with additional comfort on the matter. For example, it may be possible to confer limited monitoring functions on the society, so that it can ascertain whether everything possible is being done to prevent claims on the guarantee fund by licensed providers that it does not regulate. That could be the subject not only of further discussion but of amendments at stage 3. I hope that that is helpful to members.

Having addressed the most important amendments in the group, I turn to those that remain. Amendments 364, 366 and 370, along with various other suggested amendments to the Solicitors (Scotland) Act 1980, were proposed to me by the Law Society of Scotland some time ago. The society described them as necessary technical amendments. Accordingly, I gave assurances that any changes to the 1980 act would be technical in nature and limited to those that we considered to be necessary. However, amendments 364, 366 and 370 are not simply technical amendments—they represent a significant change of policy. The Law Society has not supplied evidence to indicate that there is a problem with the provisions of the 1980 act as it

stands. I am not aware of any consultation on these matters within or outwith the legal profession.

Amendment 364, in the name of Bill Aitken, would insert amendments into paragraph 1 of part 1 of schedule 3 to the 1980 act. The effect of the amendment would be to allow the Law Society to collect contributions to the guarantee fund at an entity level, rather than from individual partners in solicitors firms and sole practitioners. To some extent, that would be a move away from individual regulation to entity regulation. At present, all principals in a solicitor firm, including sole practitioners, pay into the guarantee fund as individuals. I am not aware of any difficulties with the arrangement, or of any consultation that has taken place on the proposed changes.

I have said all along that those firms that wish to remain as traditional practices will be unaffected by the bill, which is permissive in nature. Amendment 364 would affect such practices, regardless of whether they chose to adopt new business structures. I oppose the amendment on the ground that it involves a significant change of policy that has not been consulted on and which would affect those solicitors who chose to remain in traditional practices.

Amendment 366, in the name of Bill Aitken, would amend section 43 of the 1980 act so that the purpose of the guarantee fund would be to make grants to compensate not only persons who had suffered loss owing to dishonesty, but those who were "likely to suffer loss". Amendment 370, in the name of Bill Aitken, would amend part 1 of schedule 3 to the 1980 act by asserting new paragraph 4A, which would allow the council to

"make loans from the Guarantee Fund to judicial factors appointed by the court on the petition of the Council."

The amendments would change fundamentally the purpose of the guarantee fund. The 1980 act states that the fund is

"for the purpose of making grants in order to compensate persons who in the opinion of the Council suffer pecuniary loss by reason of dishonesty on the part of"

solicitors. In other words, we are talking about fraud and the purpose of the fund is to provide compensation for fraud, not to grant loans that might not be paid back. The effect of the two amendments would be to allow the council to make loans to judicial factors for investigating breaches of the accounts rules and to make grants to those who are "likely to suffer loss". That is absolutely not the purpose of the guarantee fund. It does not compensate for negligence on the part of a solicitor or fund the investigation of accounts rules breaches, and it is not for instances of possible fraud. Its sole purpose is to compensate those who have had the misfortune to be the victims of actual fraud.

For those reasons and because the amendments represent a fundamental change of policy, I cannot support them. I invite the convener to withdraw amendment 210A and not to move his other amendments.

The Convener: It has been useful to have this argument, out of which has come a complete reaffirmation of the political will that there must be a fund. I listened with interest to Robert Brown's arguments, whichwere cogent as always, on the possible alternatives to using the Law Society fund. Although I accept that there might be an argument that some incomers could arrange for a suitable fund, it could not be done without complex negotiations, study and all that goes with that. The Law Society fund is a mature fund, as it has been described by certain occupations, and has been running satisfactorily for several years. It strikes me that we should build on that fund, as to go down any other route would be unnecessarily complex and convoluted.

I listened with considerable interest to what the minister said about the reassurances that the Law Society undoubtedly needs. The ideal situation, on which most members of the committee agree, would be to have in place the fund as agreed unanimously, but to increase the assurance that the Law Society fund would not be prejudiced by giving the society powers to carry out some regulation. On the basis of the minister's undertakings that there will be further discussions and that the appropriate amendments will be lodged at stage 3, I will not press amendment 210A and related amendments. However, firm assurances and discussions will be required on the matter before stage 3.

On amendment 370, I listened to what the minister said about loans. We should take a commonsense approach to carry out that kind of transaction with the smallest possible financial outlays on the part of those intervening. However, I accept that if no fraud is involved, my argument to use the fund loses validity. I will not move amendment 370. However, I still think that there is an argument for amendment 364 being accepted, so I will move it.

Amendment 210A, by agreement, withdrawn.

Amendment 210B not moved.

The Convener: The question is, that amendment 210 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

Against

Brown, Robert (Glasgow) (LD)

The Convener: The result of the division is: For 7, Against 1, Abstentions 0.

Amendment 210 agreed to.

Amendment 211 moved—[Fergus Ewing].

Amendment 211A not moved.

The Convener: The question is, that amendment 211 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

Against

Brown, Robert (Glasgow) (LD)

The Convener: The result of the division is: For 7, Against 1, Abstentions 0.

Amendment 211 agreed to.

The Convener: The next group is on a cap on individual claims. Amendment 212, in the name of the minister, is the only amendment in the group.

Fergus Ewing: The Law Society of Scotland has made representations to me that the guarantee fund in its current form, which involves potentially unlimited liability, is unsustainable. If a multimillion-pound, Enron-type fraud claim on the guarantee fund was successful, the fund would be emptied, but more worryingly, every partner in the private law firm would be liable to pay any remainder, which could put them and their firms out of business. In addition, we consider that it is more important that individuals and small to medium-sized businesses are compensated rather than multimillion-pound firms. Consequently, I lodged amendment 212, which provides a cap on the pay-out for each individual claim.

Following its meeting on 1 April 2010, the Law Society's guarantee fund committee recommended to the society's council a cap of £1.25 million per claim. The Solicitors Regulation Authority in England and Wales limits pay-outs to £2 million. In Northern Ireland, the cap is £750,000, and in the Republic of Ireland it is €700,000, which I am told is just over £580,000.

The Law Society has assured me that a cap of £1.25 million per claim is appropriate. The figure was arrived at after consideration of a number of relevant factors such as consistency with other bodies, the likelihood of a claim for a sum approaching that figure, and the need to ensure that the figure does not prejudice smaller businesses that rely on having the guarantee fund in order to be able to carry out certain types of business. Other factors in arriving at the £1.25 million per claim figure were the fact that the highest individual pay-out in the past eight years was £215,000 and the fact that the average pay-out in the years 2005 to 2009 was about £11,000 to £12,000, which is obviously substantially less than the proposed cap of £1.25 million.

In summary, although robust consumer protection is obviously of paramount importance, an uncapped fund could destroy the legal profession in Scotland. Amendment 212 will ensure that consumers continue to be protected while largely removing that risk.

I move amendment 212.

Robert Brown: I agree with the amendment and I have no particular difficulty with the cap that has been suggested. However, I gather that it has been suggested that the Government will consider an overall cap—in other words, not a cap for individual claims but a cap on the corporate total that arises from an individual deficiency when a number of clients claim. I have some difficulty with that. If there was a limit of, say, £10 million and 12 people appeared with a claim of £1 million each against the fund, I find it difficult to see how we could work that through. Would the first 10 get a settlement and the next two not? How would we time it? There are some problems with the idea of an overall cap. Were it to come back at stage 3, the practicality of such an arrangement would have to be looked at carefully.

The Convener: Minister, you will no doubt address that point from Mr Brown.

Given that the amounts that have been claimed are well below the proposed limit of £1.25 million, we can be reassured that a problem will not arise. It is difficult to envisage an Enron-type circumstance obtaining in Scotland, so we should perhaps not overdramatise that possibility. That said, the consequences for individuals could be serious in respect of claims at the higher level. What we are seeking to do is just the same as any insurer would do in respect of an indemnity limit under a public liability insurance policy, for example, so it is unobjectionable.

Some reply has to be made to Mr Brown about the potential difficulties in respect of a limit being applied where a number of claims arise out of the same occurrence and the aggregate goes beyond the £1.25 million.

12:30

Fergus Ewing: I am grateful to the committee for its support. Certainly no one expects that there should be an Enron-type claim or a Bernie Madoff-type claim, but I guess that in the United States of America they were not expecting such things to happen either, but they did. We cannot exclude the possibility of such ghastly financial frauds taking place on our shores either, which is one of the reasons why we have agreed with the Law Society's argument to support a cap. I am grateful for members' support for that proposal.

Mr Brown's remarks were addressed to an amendment that is not before us, which would seek to provide a maximum limit—I think on a per annum basis—on the total amount that can be drawn from the guarantee fund. My recollection is that the Law Society might be proposing the figure of just over £10 million per annum. Mr Brown has reservations about such an argument. One hopes that there is not likely to be too serious an eventuality.

I anticipated that this issue might come up, so I looked at the levels of claims and noticed that the value of claims in 2008-09 was £1.7 million in total. Perhaps more worryingly, in 2006-07, the value of claims received—not claims admitted—was £4.29 million. In that year, the figure for claims admitted was only £255,000 and for claims withdrawn was £772,000. Plainly, a sum of £4 million is a very large amount of money to be made in one year by way of claims. I stress that those are not necessarily—and are unlikely to be—claims that are admitted.

Nonetheless, it is reasonable for the Law Society to put forward the idea of having a cap. However, it would have adverse consequences. If there are claimants for, say, £12 million, they are entitled to get their money back. They should not have to wait another year simply because of an arbitrary rule set out in Parliament. If 12 people have been defrauded of £1 million on the same day and they make claims to the Law Society at the same time, they should get their money back; they should not have to wait until next year when we get round to it. Where is the equity in that? Nonetheless, I am very happy to have further discussions with the Law Society on the matter, along with the various other discussions that we have already agreed to have. I guess that we will be having a sort of summer conversation with the Law Society. It is very important to get these matters right, so I undertake to report back to the committee on the issue of an overall cap. However, we do not think that the argument should be supported, for the reasons that I have outlined.

Amendment 212 agreed to.

Amendment 365 moved—[Robert Brown].

The Convener: The question is, that amendment 365 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.

Amendment 365 disagreed to.

The Convener: Having listened to the discussion, I think that the case for amendment 365 is very arguable. It strikes me that one can go only so far in this respect. If the wording had been tightened up, I might have considered the argument in even greater depth and I might have been persuaded. Mr Brown can do his homework over the summer.

We have been sitting for well over three hours, which I think is long enough given that we will have to revert to this next week. We have made considerable progress this morning. I thank the minister and his colleagues for their attendance.

12:34

Meeting suspended.

12:36

On resuming—

Subordinate Legislation

Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2010 (SSI 2010/212)

The Convener: We resume to consider agenda item 3. At its meeting on 15 June, the committee agreed to defer consideration of the Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2010 in order to take evidence from the Scottish Government on concerns that members had raised. I draw members' attention to the regulations and to the cover note, which is paper J/S3/10/21/3.

I again welcome the Minister for Community Safety—he must feel that he is earning his salary this morning—and the following Scottish Government officials: James How, who is head of the access to justice team; Gerry Bonnar, who is head of law reform and general branch; and Fraser Gough, who is from the legal directorate.

I invite the minister to make an opening statement. He will be aware of the background, which is that the committee was slightly thrown last week by press reports on a related matter. That being the case, the committee was unanimously of the view that we should continue consideration of the regulations this week. I understand that consultations are on-going on that related matter, so if the minister's response does not satisfy members this morning, we could revisit the matter next week, when the item could again appear on our agenda.

Fergus Ewing: I am grateful to the convener for clarifying that matter.

The policy objective of the regulations is to introduce a new fees structure for solicitors who provide criminal legal aid in relation to solemn proceedings and to increase the fees that are payable to solicitors under criminal legal aid for specified items of work. The regulations have been the subject of extremely extensive consultation with the Law Society of Scotland and the Scottish Legal Aid Board since the policy intention was announced. The financial implications have been taken account of in the forecasting that the board has carried out.

There is no connection between the regulations and the new Crown Office guidelines on suspects' rights to have a solicitor present during initial police questioning. I appreciate that committee members are concerned about the effect of those new Crown Office guidelines. As members will be aware, the Scottish Government is in discussions with the Scottish Legal Aid Board and the Law Society to ensure that the legal aid system operates effectively alongside those guidelines.

Robert Brown: I raised the issue last week because of the relationship between the regulations and those guidelines. The matter is complex, as it is not easy to read from the regulations how the whole issue of introducing or extending block fees, as opposed to detailed fees, will operate in practice.

I have a couple of questions for the minister. The possible implication of the forthcoming Cadder judgment relates to solicitors attending people who are detained on suspicion of committing a crime. In legal aid terms, that is part of a broad range of things that solicitors might have to do in cases. Can the minister clarify how that is dealt with at present? Is a payment issue involved? What are the broad arrangements for covering solicitor work at the early stage, when people are first detained? How does that relate to the regulations? Given that the regulations provide for specific arrangements for identification parades and other things that can happen as part of initial investigations, is it likely to be necessary to amend further the regulations once the Government has a clear view, following the current discussions, about the implications of the forthcoming judgment? It is important that the regulations are correct.

The Convener: It may difficult for you to answer those questions, Mr Ewing, as discussions are continuing and the facts have not yet been fully determined. However, I ask you to answer Mr Brown as far as you can.

Fergus Ewing: The two matters are distinct. We have introduced amended regulations as a result of a huge amount of work by the Scottish Government and the Law Society of Scotland after the Cabinet Secretary for Justice indicated that there should be a review of criminal legal aid fees for serious matters. The regulations are the fruits of that labour and provide a deal that was negotiated between the Scottish Government and the legal profession with the Scottish Legal Aid Board. That is very much to be welcomed by all involved. There are some extra costs, but the Scottish Government has taken them into account.

Mr Brown asks whether the existing system of criminal legal aid caters for work that is done in the early stages of cases—of course it does. I am not here to itemise solicitors' bills; happily, I have long since stopped doing that. However, I am in a position to report—I noted this from preparations for the debate that will take place this week on the Bowen report—the happy news that the changes in the structure of legal aid have arguably had significant benefits in encouraging cases to be dealt with at the earliest possible stage.

Where appropriate, we all want more solemn cases to be settled quickly when the accused decides to plead guilty. Plainly, it is more desirable if the system is conducive to that. The committee will no doubt have read, as I did earlier in the week, Sheriff Principal Bowen's report, which I have here. Footnote 44 on page 38 indicates that changes in fees for counsel in the High Court appear to contribute to the substantial increase in early, section 76 pleas in that forum. The saving of civilian time in terms of jurors and witnesses who do not have to be called is very much to be welcomed.

To answer Robert Brown's question, the existing system caters very well for the provision of legal aid for services by solicitors in the early stages of cases. Plainly, there is a great deal to be said about the Cadder case, but it is not directly relevant to the content of the regulations. Of course, we have protections in Scotland and, as the First Minister said in response to Miss Goldie last week, the simple fact is that, in the case of the Crown v McLean, all seven judges at the Court of Session were persuaded that there had been no breach of the suspect's human rights in his not speaking to a solicitor before being interviewed by the police. The court recognised—this is perhaps just as important, because I am not sure that it has been sufficiently stressed—that Scotland, unlike every other country in Europe, already has a number of safeguards in place. We have corroboration, three verdicts are available to the jury, there is an unrestricted right to legal aid in criminal cases and, in the most serious cases, there is the absolute right to instruct the best solicitors and Queen's counsel in the country.

12:45

I am not going to rehearse the arguments that the First Minister canvassed last week at First Minister's question time, nor will I go into the rest of the background to Cadder or Salduz. Suffice it to say that the cabinet secretary has been attending to those matters for a considerable time, and he is continuing to do so, as members would expect. Indeed, I read today in the newspapers that Oliver Adair of the Law Society said that yesterday's meeting with the cabinet secretary at which the Law Society expressed some of its concerns, which have also been reported, was "constructive". Although I am not here today to talk specifically about that, Mr Brown raised concerns about it, and I feel duty-bound to put on record some of the important points that show that the Government is acting correctly, swiftly and appropriately.

Robert Brown: I primarily asked whether there is likely to be a need to amend the regulations further once the implications of Cadder have been considered.

Fergus Ewing: I am told that the strict answer is no, because any amendment would not be to these regulations. The work on the early stages is covered by a different scheme, which is on advice and assistance, rather than the full criminal legal aid scheme, which, as I am sure Mr Brown remembers, kicks in later. Any amendment would be to the advice and assistance provisions.

The Convener: Are you satisfied with that, Mr Brown?

Robert Brown: Yes.

James Kelly: As Robert Brown said, the regulations deal with new fees structures and are quite complex. I am not necessarily against the policy direction, but it is a matter of concern that it has taken a bit of time to reach the table. It was first discussed in 2007.

I want to raise four specific issues with the minister. First, there is an element of charges being applied retrospectively, going back to April 2008. Why is that happening? It might be because matters have been discussed over time, but I would be grateful if he clarified that.

Secondly, the Executive note outlines the finances relating to the regulations, which are £2 million of in-year costs and £900,000 relating to the retrospective charges. That translates to costs of up to £2.4 million in 2010-11. Where has that money been found? I do not think that it is currently budgeted for, so which budget line is it been taken from? Will it affect other parts of the justice budget?

Thirdly, has account been taken in the finances of the more than 20 per cent increase in legal aid applications in the past year, as noted by the Scottish Legal Aid Board?

Finally, the judgment in the Cadder case is to come out in October. The regulations, if passed, will come into force in early July, at the same time as all the changes in guidelines on suspects' access to lawyers come into force. That will result in an increase in legal aid applications between July and October, which will have financial implications. Before I support the regulations, I will need to understand the increase in legal aid applications that will occur as a result of the new guidelines and how much that will cost.

Fergus Ewing: First, the money has been budgeted for, so I can assure Mr Kelly on that.

Secondly, because it took some time for the negotiations to reach a conclusion, as is often the case with complicated negotiations, it was felt reasonable that there should be an element of backdating. It is estimated that the cost of the

regulations will be circa £900,000 in respect of the retrospective provisions if solicitors choose to submit fresh fee accounts regarding cases for which payments under the previous regulations have already been made. It is further estimated that additional future full-year costs to the legal aid fund will be circa £2 million. The finance director approved that proposal on 20 May. There has been a 20 per cent increase in the number of applications, which has been accounted for.

On the Cadder case, we are looking at the costs with the Scottish Legal Aid Board. We do not have the precise costs at the moment, but we are monitoring the situation and we are satisfied that there should be no significant increase. I hope that that reassures the member.

As I said, the regulations emerged from an extensive consultation with the legal profession. I am not sure whether Mr Kelly will support the fruits of that negotiation, but I hope that he will. The system will be different, as it will introduce an element of block fees, although some work will continue to be chargeable on a detailed basis—in particular, time spent attending identification parades in court and taking precognitions will be charged on a detailed basis. However, the introduction of block fees for solemn cases is part of a movement away from detailed time and line accounting, with the hugely wide variation in costs that arise in that kind of system, towards a system that is more weighted in favour of block fees that remunerates solicitors for advancing cases from stage to stage. Direct comparisons between the new and old systems are, therefore, difficult to make, as the two systems are not equiparate. That said, the proposals have been welcomed by the legal profession and represent a fair outcome, therefore I commend them to the committee.

James Kelly: As I said, I am not against the policy intent of the regulations, although I have concerns about the financial implications. The minister indicated that the £2.4 million has been budgeted for this year. Can he tell us which budget line that has come from?

I am not convinced about the financial implications of the Cadder case. I note the answer that the situation is being monitored and that Government officials are working on it—I appreciate that a lot is going on on the issue—but there are financial implications and I need a better understanding before I support the regulations.

The Convener: I understand why you are flagging up that concern, but the two matters are not necessarily related under the regulations. The argument can be had on another day, once matters have crystallised and are clearer than they are today. Minister, do you want to respond to Mr Kelly?

Fergus Ewing: I am sorry, but I did not catch what he said. Can he reformulate his questions? He asked four questions, which I thought I had answered. If not, if he restates his questions, I will do my best.

James Kelly: You said that the £2.4 million has been accounted for in this year's budget. Under which budget line is that covered?

Fergus Ewing: The Scottish Legal Aid Board budget line.

On the Cadder case, we are monitoring the effect of the guidelines that are in place regarding advice and assistance, which have only recently been introduced. However, it is far too early to state with certainty what effect those guidelines will have, especially as they will not come into force for solemn cases—

James How (Scottish Government Justice Directorate): They will come into force for summary cases on 8 July.

Fergus Ewing: They will not come into force for summary cases until 8 July, so it is still early days. It is far too early for us to make any definitive or exhaustive statement beyond what I have already said.

The Convener: I thank the minister and his team for their attendance. The meeting will be suspended briefly while they withdraw.

12:55

Meeting suspended.

12:55

On resuming—

The Convener: The committee has to consider three negative instruments. We have just taken evidence from the minister on the first—the Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2010, on which the Subordinate Legislation Committee has drawn no matters to Parliament's attention. Given the previous questioning, do members have further comments? If not, are they content to note the regulations?

Members *indicated agreement.*

James Kelly: I agree to note the regulations on the basis that the minister seemed to say that any potential legal aid payments under the new guidelines relate to separate guidelines that the Scottish statutory instruments does not cover.

The Convener: On that understanding, are you prepared to agree to note the regulations?

James Kelly: Yes.

Parental Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations 2010 (SSI 2010/213)

The Convener: I draw members' attention to the cover note, which is paper 4. The Subordinate Legislation Committee draws our attention to the regulations on the basis that one consequential amendment that the schedule makes involves duplication, although the committee does not consider the validity or operation of the regulations to be affected. If members have no comments, are they content to note the regulations?

Members *indicated agreement.*

Knives etc (Disposal of Forfeited Property) (Scotland) Order 2010 (SSI 2010/214)

The Convener: I draw members' attention to the cover note, which is paper 5. The Subordinate Legislation Committee draws our attention to the order on the basis that, in respect of article 4, there is doubt about whether the order is intra vires. However, that committee does not consider that the order requires immediately to be corrected, and the Scottish Government has agreed to make an amending order before the order has practical effect. If members have no comments, are they content to note the order?

Members *indicated agreement.*

The Convener: The order is noted. The committee will move into private session for the remaining agenda item.

12:58

Meeting continued in private until 13:11.

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