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Official Report

JUSTICE COMMITTEE

Tuesday 29 June 2010

Session 3

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JUSTICE COMMITTEE
22nd 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:

Fergus Ewing (Minister for Community Safety)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 29 June 2010

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

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen, and welcome to the committee. We have apologies from Stewart Maxwell, who is replaced this morning by Maureen Watt. I ask everyone to ensure that mobile phones are switched off.

The first item before us is to decide whether to take item 5 in private. Does the committee agree to take item 5 in private?

Members *indicated agreement.*

Legal Services (Scotland) Bill: Stage 2

10:11

The Convener: The principal business of the morning is item 2, which is consideration of the Legal Services (Scotland) Bill at stage 2. This is the fourth and final day of stage 2 proceedings on the bill. I welcome the Minister for Community Safety, Fergus Ewing MSP, who is accompanied by a number of officials.

Members should have copies of the bill, the fourth marshalled list and the fourth groupings of amendments for today's consideration.

Before section 92

The Convener: Amendment 76, in the name of the minister, is grouped with amendment 76A.

The Minister for Community Safety (Fergus Ewing): Good morning. I think that another official, Andrew Mackenzie, is about to join us.

Following the introduction of the bill, there were some concerns that the Law Society of Scotland does not have the ability, under the Solicitors (Scotland) Act 1980, to become an approved regulator. Amendment 76 ensures that it is able to act as an approved regulator under part 2 of the bill, should the society apply and be approved as such by the Scottish ministers.

Amendment 76A, in the name of Robert Brown, would give the Law Society the power also to act as an approving body of confirmation agents and, I assume, following approval of amendments in relation to will writers, of will writers as well, under part 3 of the bill. However, because of the nature of the regulatory framework in part 3 of the bill, the Law Society cannot become such a regulator. In that respect, the Government believes that the amendment represents a misunderstanding of part 3 of the bill. In contrast to part 2, potential regulators of confirmation agents under part 3 will apply to regulate their own members in relation to such services. One cannot be a member of the Law Society without being a solicitor, and solicitors are already, of course, able to provide confirmation and will-writing services, so the amendment would have no effect.

Furthermore, it is our belief that Mr Brown's amendment would require major further amendment of the 1980 act, but such amendment has not been brought forward. It would also mean that the Law Society would have to admit as members non-solicitors, which is something that neither we nor, we imagine, the Law Society would support.

For those reasons, we do not support amendment 76A. I respectfully invite Robert Brown not to move it.

I move amendment 76.

Robert Brown (Glasgow) (LD): First, I support amendment 76, as it seems entirely appropriate.

In the light of the minister's comments, I will not move amendment 76A. However, what does the minister anticipate will happen as regards regulatory bodies—or approval bodies, if you like—with respect to will-writing and confirmation services? The intention behind amendment 76A was to address those aspects. I thought that it was perhaps unlikely that there would be a desire for a regulatory body to emerge in that regard and that it was perhaps necessary to provide a fallback position. I would be interested in the minister's comments on how he sees that element developing in practice, because I have always thought that the Law Society would end up as the main regulator under most aspects of the bill, and it seems that in the areas that we are discussing there might well be reason to consider that possibility.

Amendment 76A not moved.

10:15

Fergus Ewing: I am grateful to Robert Brown for not moving his amendment 76A. In winding up, I will seek to respond to the fair question that he asked.

The approach that we have taken in the bill is not to specify which bodies should be the regulating and approving bodies. Instead, we have set out a framework that determines how the regulating and approving bodies will be selected. In other words, we have not said that the Law Society of Scotland will be the regulating body, although we expect it to apply to be that body, and we have not said which body will be the approving body. The Institute of Chartered Accountants of Scotland might well come forward as a possible approving body in respect of confirmation agents and services, given that that work is, arguably, of an accounting nature, particularly for the more complex estates for which inheritance tax is a significant issue.

Section 73 in part 3 sets out that an approving body is, for the purposes of that part,

"a professional or other body which is certified ... by the ... Ministers under section 74."

Section 74 sets out the certification process, under which the Scottish ministers must be satisfied that the body is appropriate to be certified. Section 75 sets out what must be in the regulatory scheme that the approving body produces. It must encompass all the things that members would expect to be provided by an approving body to ensure proper standards—namely, training, a code of practice and professional indemnity for negligence. All those are set out as a framework in the bill. The bill does not specify which body should be an approving body, but we expect that ICAS might emerge as one.

I hope that that answers Mr Brown's question. If members have any more questions now or during the summer recess, we will endeavour to provide comprehensive answers.

Amendment 76 agreed to.

The Convener: Amendment 364, in my name, has already been debated with amendment 210A. The matter is the subject of on-going discussion and requires to be addressed at stage 3. I will therefore not move amendment 364.

Amendment 364 not moved.

Section 92—Council membership

The Convener: Amendment 389, in my name, is grouped with amendments 390 to 392, 77 and 78.

My amendments 389 to 392 are all on a similar theme and will simply confirm what has been a de facto position for some years. From time to time, it is necessary for the Law Society to co-opt individuals on to its council, for example those who have expertise in a particular subject. The Law Society has been doing that for several years and there have been no problems, but there is a question as to whether the practice has statutory confirmation. Amendments 389 to 392 will provide that confirmation.

The minister's amendments 77 and 78 are unobjectionable.

I move amendment 389.

Fergus Ewing: The amendments in the name of the convener would expressly allow the Law Society to permit the co-option of solicitor members on to its council. I understand that such co-option is provided for in the Law Society's constitution and that currently a number of such members are on the council. However, given that we are amending the Solicitors (Scotland) Act 1980 to allow for the appointment of lay members to the council, I agree with the convener that an explicit reference to co-option in that act might be necessary for the sake of clarity and completeness. I therefore invite members to support the convener's amendments.

Amendment 77 is a drafting amendment.

Amendment 78 will remove the regulation-making powers in section 92, "Council membership". Those powers would have allowed

the Scottish ministers to influence the composition of the council of the Law Society of Scotland by prescribing the number or proportion of lay members and the criteria for their appointment and would have had an impact on the society's representative functions. Some concerns were raised about those powers by members of the legal profession and the Law Society, with suggestions that they might threaten the independence of the legal profession. However, the regulation-making powers were always seen as a last resort and would not have allowed the Scottish ministers to dictate who was a member of the council.

As long as all regulatory functions are dealt with by a regulatory committee that has adequate levels of lay membership and is not subject to interference from the council, I consider the regulation-making powers in section 92 to be unnecessary. Therefore, amendment 78 will remove the relevant provisions. Several amendments that are to be discussed in a later group will ensure that lay persons are adequately represented when regulatory matters are being dealt with. Amendment 78 will remove a provision that was the source of some considerable objection by members of the profession.

I invite the committee to agree to amendments 77 and 78.

The Convener: As no other members want to speak to the amendments, I see no reason to wind up the debate.

Amendment 389 agreed to.

Amendments 390 to 392 moved—[Bill Aitken]—and agreed to.

Amendments 77 and 78 moved—[Fergus Ewing]—and agreed to.

Section 92, as amended, agreed to.

After section 92

The Convener: In view of on-going discussions, I will not move my amendment 366, which was debated with amendment 210A.

Amendment 366 not moved.

The Convener: The next group is on safeguarding the interests of clients. Amendment 367, in my name, is the only amendment in the group.

The purpose of amendment 367 is to empower the council to make grants or loans to a person who has suffered, or is likely to have suffered, loss by reason of a solicitor's dishonesty.

When a judicial factor is appointed, there can be complications and short-term difficulties in enabling legitimate transactions to be settled timeously. It could be argued that such issues can result from the perceived risk of dishonesty that has necessitated the appointment, but at an early stage of an appointment the judicial factor might not be able to confirm that there has been dishonesty, in which case no grant can be approved. There is currently no means to enable the guarantee fund to assist in resolving the short-term funding difficulties that can arise as a result of the appointment, even though the guarantee fund has concluded that there was sufficient evidence of dishonesty at the practice. If the issue is not addressed, such matters could lead to claims for compensation against the fund.

I move amendment 367.

Fergus Ewing: Amendment 367, in the convener's name, was proposed to me by the Law Society of Scotland. As we understand it, the amendment relates to the ability of the Law Society council to apply to the Court of Session for an order to prevent any payment from being made out of a solicitor's account in the event that the solicitor in question has ceased to practise and the council is not satisfied that all relevant documents and money have been made available to clients. The amendment would alter the relevant provision in the Solicitors (Scotland) Act 1980 to give the council that power directly, without needing to make an application to the court. Such an amendment would be a substantial change in policy and would give significant new powers to the council without due consideration or consultation.

I listened carefully to the convener's remarks and I understand that there is some potential substance to the issue that has been raised, but we do not believe that such a major change is appropriate without taking the time fully to consider the implications and to allow for a perhaps more wide-ranging consultation within the legal profession.

We informed the Law Society prior to stage 2 that we would not be lodging such an amendment. At this time, we do not support amendment 367 and we respectfully invite the convener to withdraw it. If there is a legitimate issue that requires to be addressed, I am happy to discuss it further with the Law Society in advance of stage 3. It is one of the issues on which we will write to the Law Society following the conclusion of stage 2, inviting the society to discuss it with us should the society believe that it should be taken further.

The Convener: Having listened to what the minister has said, I am prepared to withdraw the amendment, with the caveat that if the matter is not resolved satisfactorily, I will bring it back at stage 3. I want there to be dialogue between the minister and the Law Society, and I ask to be kept informed of progress in that respect.

Amendment 367, by agreement, withdrawn.

The Convener: We continue on the theme of finance. Amendment 368, in my name, is grouped with amendment 369.

Amendment 368 would enable the Law Society to levy subscription fees on practice units. The existing situation is that, as Mr Brown will no doubt confirm, such fees are levied in respect of individual solicitors. Amendment 368, combined with other suggested amendments to section 34(1A) of the 1980 act and schedule 1 to that act, would enable the society, in the event that the profession agrees to create a firm registration system, to levy a subscription on firms that are registered. There is logic in that for a number of reasons. First, it would be administratively more convenient. Secondly, it would create a level playing field with licensed legal services providers under section 10(1)(e) of the bill. Thirdly, it would allow for consistency of approach in respect of levies that relate to all practice units irrespective of type, such as guarantee fund contributions. Finally, it would allow the society to create a more tailored approach in respect of the services that it offers. Basically, it would create a more transparent and equitable system.

Amendment 369 would give the Law Society the power to charge fees for services that the council of the Law Society renders. That might happen in a number of circumstances. For example, specific services might be provided to a legal services provider on application, or the Law Society might run courses on specific topics. All of that comes at a cost, and clearly there should be a way to recover such costs. At present, the subscription is fixed, which means that all members must pay the same rate, irrespective of the services used. As the law stands, the council is unable to charge fees for specific services such as the running of courses, as I have outlined. If the society were given more flexibility, it would be able to charge more equitably, with those who have used the services paying for them, but not the vast majority of members whose services from the Law Society relate to the run-of-the-mill, day-to-day running of their businesses.

I move amendment 368.

Fergus Ewing: Amendment 368 would allow the Law Society of Scotland to impose subscription charges on an entity basis rather than on an individual basis, as at present. It would allow the Law Society to charge a special subscription on an entity basis. The Law Society has suggested that that would allow an approach that is consistent with that taken in the bill, whereby licensed providers are charged on an entity basis. The convener referred to that. However, I do not consider that such a change has been demonstrated to be necessary or desirable. Regulation of licensed providers is at an entity level, so licensing fees are charged at an entity level. However, regulation of solicitors by the Law Society is at an individual level, so fees are charged at an individual level. To reflect that, at least 50 per cent of the membership of the regulatory committee must comprise lay members. That is set out in subsection (3) of new section 3B of the 1980 act, for which section 93 of the bill provides. That seems to me to be a consistent approach. In addition, I am not aware of any consultation on the matter within the legal profession.

10:30

Furthermore, these changes are fairly major and will affect all solicitors, and not just those who choose to utilise the new business structures permitted in the bill. As a Government, we have repeatedly stressed that the legislation is permissive by nature and therefore that solicitors who choose not to enter into an alternative business structure will not be affected by it. Our concern is that amendment 368 might inadvertently affect such solicitors. For example, it may change the charges that traditional practices have to pay. One might have expected such a change to have been debated within the Law Society before the amendment was lodged; I am not aware of any such consultation.

I suspect that the impact of the changes would depend primarily on those who are winners and those who are losers. In life, as we know, we tend to hear from the losers quite a lot and not so much from the winners. At present, we have no means of knowing the extent to which there will be winners and losers. Members of the profession may want to know which category they may fall into. While I fully understand the convener's arguments, for those reasons it may be helpful if, with his agreement, the matter can be considered further with the Law Society. It is not an unreasonable proposal, but it is one that might entail a commitment to further consultation.

Amendment 369 would allow the Law Society to charge for services that it provides, and to demand and recover such charges. It is unclear why the society feels that that would be necessary, although it may be that the arguments are as the convener has advanced them today—namely, that the society may wish to be able to charge for attendance at certain post-qualifying legal education courses that it runs for the benefit of the profession. At present, solicitors pay through their practising certificate fee, which I am told is in the order of £680—a not insubstantial amount. At present, there is a charge but it is not a direct one. Nonetheless, the amendment represents a fairly major change. It is not clear to me exactly what

changes the Law Society has in mind. If it has in mind matters of the type that the convener has just described, the measure may be seen as not unreasonable. However, as drafted, the amendment would allow various other charges to be imposed. It might be prudent for there to be more discussion between the Government and the Law Society. Although we cannot support amendment 369 at present, we do not wish to dismiss the arguments behind it unduly. Therefore, again, I commit to further dialogue in my summer conversation with the Law Society. On that basis, I respectfully invite the convener not to press amendment 368 and not to move amendment 369.

The Convener: Your summer conversation will be fairly lengthy and convoluted. I can understand your arguments in respect of amendment 368 but I am less persuaded in respect of amendment 369. However, because it is essential that we get the matter right I will not move amendment 369 and will seek the committee's agreement to withdraw amendment 368, with the caveat that if the issue is not resolved, the amendments will come back at stage 3.

Amendment 368, by agreement, withdrawn.

Amendment 369 not moved.

The Convener: I shall not move amendment 370, pending the summer conversation.

Amendment 370 not moved.

Section 93—Regulatory committee

The Convener: Amendment 79, in the name of the minister, is grouped with amendments 80 to 87.

Fergus Ewing: Section 93 of the bill requires the council of the Law Society to delegate its regulatory functions to a regulatory committee to ensure that those functions are carried out independently and in the public interest.

The amendments in the group that we are discussing seek to make some changes to the provisions on the regulatory committee. The proposed changes are necessary primarily as a result of amendment 78, which has already been considered and agreed to. Amendment 78 removed the power in section 92(4) that allowed the Scottish ministers to prescribe the proportion of lay members on the Law Society council. The provision of that power was opposed by certain members of the legal profession, and we agreed that it would not be necessary, given the Law Society's stance and the undertakings that it gave. In the absence of that power, it is possible that the council might contain only a few lay members. We consider it vital that all regulatory functions be carried out by a body with significant lay membership to ensure independence and a focus on the public interest.

Although I am content for the council to make its own determination on the proportion of lay members, that is the case only when its functions relate solely to representative matters. Our amendments seek to ensure that there is a clear split between the representative functions of the council and the regulatory functions of the regulatory committee, and that no undue influence can be brought to bear that might undermine the robustness of the regulatory regime.

Amendment 79 will put it beyond doubt that the council of the Law Society cannot interfere unduly in the regulatory committee's business. Amendment 82 seeks to reinforce the independence of the regulatory committee by providing that it can form sub-committees without the council's approval.

On a practical note, allowing the council to decide how many lay members it has may result in there not being enough lay people to allow the regulatory committee to be formed, so it will be necessary to allow people to be appointed directly to the regulatory committee. That will be achieved by amendments 80 and 81. Amendment 83 will ensure that the work of sub-committees of the regulatory committee can continue in the event of a temporary shortfall in the number of lay members, as is currently the case with the regulatory committee.

Amendment 84 will give the Scottish ministers a power to set the maximum number of people on the regulatory committee. I feel that that measure is prudent to ensure that the regulatory committee does not grow to a size that prevents it from being able to act effectively.

Amendment 85 will ensure that the Scottish ministers act in accordance with the regulatory objectives when they make regulations under new section 3B(5) of the 1980 act and that they take account of the consultation requirements that were inserted by amendment 3, which was agreed to at a previous meeting. Amendment 86 is a drafting amendment.

Turning to amendment 87, I feel that the definition of regulatory functions needs to be a little more explicit to clarify certain areas that involve a representative and a regulatory element. Amendment 87 will achieve that by making provision in relation to, inter alia, the setting of standards of qualification, education and training. Plainly, that is a key element of any system of regulation and is designed to ensure that membership of the profession is restricted to people who have satisfied the necessary standards of qualification, education and training, thereby ensuring that the profession provides a

high quality of legal service. Accordingly, I invite the committee to support amendment 87.

I move amendment 79.

Amendment 79 agreed to.

Amendments 80 to 85, 213, 86 and 87 moved—[Fergus Ewing]—and agreed to.

Section 93, as amended, agreed to.

After section 93

The Convener: Amendment 88, in the name of the minister, is grouped with amendments 89 and 90.

Fergus Ewing: The Law Society proposed the amendments in this group and I accepted them.

Amendment 88 has the effect of requiring the council of the Law Society to enter on the roll of solicitors the place of business of every enrolled solicitor and registered European lawyer.

Amendment 89 has the effect of requiring the council of the Law Society to be satisfied that the solicitor or registered European lawyer has made adequate arrangements for any outstanding business before removing his or her name from the roll or register.

Amendment 90 requires a solicitor or registered European lawyer to notify the council of the Law Society when their practising or registration certificate—which would have ceased to have effect because they were bankrupt or had granted a trust deed, or because they had been sectioned or a guardian had been appointed under the Adults with Incapacity (Scotland) Act 2000—comes back into effect on their discharge.

I move amendment 88.

Amendment 88 agreed to.

Amendment 89 moved—[Fergus Ewing]—and agreed to.

The Convener: We come to representative functions of the Law Society. Amendment 373, in the name of James Kelly, is in a group on its own.

James Kelly (Glasgow Rutherglen) (Lab): Amendment 373 deals with the representative functions of the Law Society as distinct from regulation. As the bill progresses, it is becoming clear from discussions that some form of ABS will be implemented, although the form is to be finalised at stage 3. As I have said consistently throughout proceedings, I am concerned about the complexity of the regulators. The indications have been that there are perhaps going to be only one or two regulators, and everyone accepts that the Law Society will be one of them.

It is key that we have regulation in an ABS market in order to protect lawyers and consumers, and it is logical to have a split between representation and regulation—that is in the public interest. The regulatory committee in section 93 gives the public a role in that regulation, in the form of the chair and 50 per cent of the seats. It is absolutely correct to give the public a role, as there is a public interest in ensuring that regulation is carried out properly. We heard from witnesses at stage 1 about consumers' concerns in dealing with the legal profession, and we must ensure that proper regulation is carried out in order to address those concerns. It is, therefore, correct to give the public a role on the Law Society's regulatory committee.

Nevertheless, I submit that the representation function of the Law Society should be retained by lawyers exclusively. That is the position for other professional bodies. In a previous life, I was a qualified accountant and a member of the Chartered Institute of Management Accountants. The rules governing membership of the institute were strict: in order to obtain membership, a person had to pass all the exams and be a qualified accountant. Accountants were represented by accountants, and I believe that lawyers should be represented by lawyers. We will help to protect the independence of the legal profession by ensuring that lawyers have such representation.

Some people have submitted that amendment 373 would undermine the new arrangements that we are going to introduce, but I disagree. If we have a new solution, it is correct that we have a logical split between representation and regulation. That recognises the complexity of the new situation, gives the public a role and gives the legal profession a role in representing lawyers and protecting the independence of the profession. Amendment 373 supports the bill's principle of modernising the Scottish legal system.

I move amendment 373.

10:45

Robert Brown: I have listened carefully to James Kelly, and I am interested to hear the minister's views in due course. I am not at all enthusiastic about amendment 373. It has the potential to be quite destructive in terms of the whole basis on which the Law Society of Scotland operates—and should operate. It is true that, since the society's foundation in 1949, there has been a tension between its representative and regulatory functions, which has raised issues from time to time. That has been the case recently, with the society engaging in discussions about the bill. However, the tension has not proved to be unmanageable.

There is no totally satisfactory division between the two functions of regulation and representation. Issues concerning risk, the master policy, the guarantee fund or standards might be regarded as regulatory, but they go to the heart of the professional standards that the Law Society trains its members to maintain and understand, and of how solicitors operate in general. The tension seems to be creative, not destructive.

The Law Society of Scotland was rightly and properly set up on a basis that unites the two strands, which come together in the council of the society. Other bodies have a representational function to a more limited degree, for example the Scottish Law Agents Society, the Glasgow Bar Association, the Royal Faculty of Procurators in Glasgow and other local bodies of that sort. They contribute to the representative side, but they cannot replace the Law Society's national role in that regard.

Amendment 373 proposes a major and fundamental change. I believe that it has not been consulted on, discussed or decided on by the Law Society. If there is to be a debate about the amendment—which is entirely proper—such consultation should precede it.

Certainly at this point, I am strongly opposed to amendment 373.

The Convener: I largely concur with Robert Brown. The amendment has not been consulted on, but we require such consultation if it is to be taken further. However, James Kelly is right to underline the difficulties that inevitably arise from time to time where one body simultaneously deals with regulation and representation. I understand the problems that can arise, but I do not think that amendment 373, well intentioned as it undoubtedly is, represents a viable way forward.

Fergus Ewing: Members are obviously aware of the on-going debate about the Law Society's dual representative and regulatory functions. Some people argued that there was an inherent conflict between those functions, and that the separation of those roles was required. That led to a referendum of the Law Society in May, in which 73 per cent of respondents voted in favour of the Law Society retaining both its representative and regulatory roles.

Amendment 373 seeks to remove from the council of the Law Society of Scotland its representative functions and to set up a separate representative council to take over those functions. The amendment is entirely unnecessary. Section 20(2) requires that an approved regulator that has both representative and regulatory functions, such as the Law Society, should exercise its regulatory functions separately from its representative functions. Section 20(1) makes it clear that

"The internal governance arrangements of an approved regulator must incorporate such provision as is necessary with a view to ensuring that the approved regulator will ... always exercise its regulatory functions ... independently of any other person or interest"

and

"properly in other respects".

Section 20(2) goes on to state:

"In relation to an approved regulator which has representative functions,"

that is, the Law Society,

"relevant factors in connection with subsection (1)(a)",

from which I have just read, include

"the need for ... the approved regulator to ... exercise its regulatory functions separately from its other functions (in particular, any representative functions)".

I submit that the bill already expressly, explicitly and clearly contains a requirement that there be a split, in the sense of a division, separating out the exercise of the regulator's representative functions from its regulatory functions. That was explicitly included in the bill to achieve the aims that Mr Kelly seeks to achieve by his amendment. Because the aims are already in the bill, we do not need an amendment to bring in something similar.

In respect of the Law Society, section 93 establishes a regulatory committee to which all regulatory functions of the council must be delegated. Amendments 79 to 87, which we have just debated, clarify and strengthen the separation of functions between representation and regulation. As a result, all regulatory functions will be dealt with by the regulatory committee, while all representative matters will be handled by the council. Unlike the regulatory committee, the council will be under no obligation to appoint a certain proportion of lay members. Given that its sole focus will be on representative issues, I expect that the membership will be primarily composed of solicitors, as it is currently.

For those reasons, I do not support amendment 373, and I respectfully invite Mr Kelly to withdraw it.

The Convener: Mr Kelly, please wind up and indicate whether you intend to press or withdraw amendment 373.

James Kelly: I intend to press it. On the referendum that the minister referred to, the Law Society has run a number of votes and referendums in recent months, which have had, at times, contradictory outcomes. I note the minister's point, but when we discussed the new structures at the first meeting in stage 2, my colleague Bill Butler lodged the 25:75 amendment,

which was the one that had the greatest endorsement from the Law Society—a point that he did not make in its favour. It is up to us as committee members and politicians to come up with the best structure for the operation of the legal profession and the industry in Scotland.

The minister said that amendment 373 is unnecessary, but it provides greater clarity and specifies more clearly the representation roles, particularly in relation to the role of lawyers on the representative committee, and provides greater direction to the profession. We are moving into a new situation in which an ABS model will apply, and we need to get the roles and structures absolutely correct. It is essential to have a split between regulation and representation, and the public should have a voice on the regulatory committee. The important democratic principle of lawyers being represented by lawyers is also correct and will protect the industry and the legal profession. I urge members to support amendment 373.

The Convener: The question is, that amendment 373 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)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 373 disagreed to.

Section 94 agreed to.

After section 94

Amendment 90 moved—[Fergus Ewing]—and agreed to.

The Convener: We now turn to complaints to the tribunal. Amendment 374, in my name, is grouped with amendment 375.

Amendment 374 has a dual purpose. First, it seeks to make it clear that the council can make a complaint to the tribunal against a solicitor on behalf of another person. That is consequential upon amendments that were made by the Legal Profession and Legal Aid (Scotland) Act 2007, which imply that a complaint can be made on behalf of another person. It is understood that, when a member of the public writes to the Law Society about a solicitor, the Law Society may make a complaint on their behalf. Prior to the 2007 act, a distinction did not need to be drawn between a complaint made by a complainer on their own behalf and one made on behalf of another person. In the latter case, the council was the complainer and the initial person's involvement was removed. That might have been the best way forward when the person was elderly or disabled, but compensation can be awarded only when the complainer has been directly affected by the misconduct, therefore if the council is the complainer, no compensation can be awarded. Making it clear that the council can complain on another person's behalf will bring its powers into line with the new definition of a complainer and ensure that, when the council makes such complaints, the person can be awarded compensation.

Amendment 374's other purpose is to make it clear that the practitioners against whom a complaint can be made to the tribunal are the same as those against whom a complaint may be made to the Scottish Legal Complaints Commission, which section 1 of the 2007 act established. The practitioners need to be the same because the commission must refer conduct complaints against practitioners to the council of the Law Society under section 6 of the 2007 act.

Amendment 375 would clarify the extent to which the tribunal rules may provide that functions that are conferred on the tribunal may be exercised on its behalf. It would make it clear that tribunal rules may provide for the tribunal's function in relation to a case or part of a case to be exercised by a part of the tribunal that is constituted in accordance with paragraph 5 of schedule 4 to the 1980 act. That would remove any doubt as to whether the rules make the provision that rule 54 of the "Scottish Solicitors Discipline Tribunal Rules 2008" makes. It would also enable the rules to provide that the tribunal that deals with one aspect of a case does not have to deal with another aspect, and that the tribunal that deals with one aspect can decide on that aspect before a tribunal is constituted to deal with a later aspect.

I move amendment 374.

Fergus Ewing: The Law Society proposed several amendments to the 1980 act. Amendments 374 and 375 are some of the proposed amendments that I did not accept. Amendment 374, in the convener's name, would allow the Law Society's council to complain on another person's behalf. It has been argued that no provision expressly envisages that the council may complain on another's behalf. However, such a power is implied in the existing law, in section 53(2)(bb) of the 1980 act, which empowers the

tribunal to award compensation to a complainer. Section 42ZA of that act says that "complainer" means

"the person who made the complaint",

or,

"where the complaint was made by the person on behalf of another person, includes that other person."

I emphasise those provisions in the existing law because they stress that complaints can be made on another's behalf. I listened carefully to your remarks, convener, about people who might not wish to make complaints themselves—you gave the example of an elderly person who might prefer the Law Society to complain. However, I have received no evidence from the Law Society that that has caused difficulties and I am not aware that the Law Society has consulted on the matter, so I do not support amendment 374.

Amendment 374 would clarify the persons against whom a complaint may be made—they are listed as solicitors, firms of solicitors, incorporated practices, people with rights to conduct litigation or rights of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, conveyancing practitioners and executry practitioners. In each case, the amendment would allow complaints to be made even after a practitioner had ceased to practise. That provision is surely unnecessary for solicitors, firms of solicitors and incorporated practices. When section 51(1A) of the 1980 act was inserted by the Public Appointments and Public Bodies etc (Scotland) Act 2003, it was felt unnecessary to stipulate that section 51(1) of the 1980 act included complaints in respect of the solicitor groups. That is a technical reason for arguing that I am not aware of any difficulties in that regard since then, neither am I aware of any consultation on the matter.

11:00

The reference to those with rights to conduct litigation or rights of audience by virtue of section 27 of the 1990 act represents new policy, as those people are regulated not by the Law Society but by the Scottish ministers, and are subject to the disciplinary measures of their regulators, which are laid down in the regulatory scheme. I am not aware of any consultation on that, nor of any discussions with the Scottish Government. Most important, I am not aware of the Law Society discussing that with the Association of Commercial Attorneys, whose members have rights to conduct litigation and rights of audience, which would be affected by the proposal. Further, amendment 374 would enable the persons who are mentioned in section 51(3) of the 1980 act, such as the Lord Advocate or a judge, to complain that a solicitor might have been guilty of professional misconduct or unsatisfactory professional conduct, or that a solicitor might have failed to comply with any provision of the 1980 act or of rules made thereunder.

Amendment 374 aims to reinstate a provision that was removed by the Legal Services Act 2007, which disapplied sections 51(2) and 51(3) of the 1980 act in respect of professional conduct by a solicitor and inadequate professional services by a solicitor or incorporated practice, because of the new systems of complaints that were introduced thereby. Any complaint that is made about a solicitor's conduct must now be made to the Scottish Legal Complaints Commission under section 2(1)(a)(i) of the Legal Profession and Legal Aid (Scotland) Act 2007, and not to the tribunal. The provision in the Legal Services Act 2007 was not in fact an error, as the Law Society has suggested to me—it was deliberate policy. It is therefore not appropriate to reinstate a provision that would conflict with the requirements of the Legal Profession and Legal Aid (Scotland) Act 2007.

Amendment 375, in the name of the convener, would confirm that rules that are made by the tribunal under section 52(2) of the 1980 act may provide for the functions of the tribunal to be exercised on behalf of the tribunal by any tribunal—if it is properly constituted as defined in paragraph 5 of schedule 4 to the 1980 act—or by the chairman or vice-chairman of the tribunal, unless the tribunal is hearing and determining the merits of any case. The amendment states that the measure is

"For the avoidance of doubt",

with the implication being that it is not actually necessary. We have not heard that the issue has caused difficulties and nor are we aware of any consultation on the matter.

I do not support amendment 374, as it is not only largely unnecessary but inadmissible, in relation to the reference to those with rights to conduct litigation or rights of audience by virtue of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, and in relation to the reinsertion of a provision that was removed by the Legal Services Act 2007. I do not support amendment 375, as I consider it to be unnecessary.

It is plain that the convener has raised substantial issues, which are largely technical. The amendments are intended to clear up doubt and ensure that things that we all recognise need to be done are done. Basically, our response is that we and the Law Society already have the powers to do those things, or that there has been a misconception about the purpose of legislation

and a failure to understand that the proposals might conflict with other legislation that was passed deliberately, but with slightly different policy intent. Nonetheless, because the issues are important, I plan to have discussions on the matters with the Law Society. I have set out at length and in painstaking detail some of the arguments that we will no doubt discuss with the Law Society in the coming months. I respectfully invite the convener to withdraw amendment 374 and not to move amendment 375.

The Convener: There is an issue in relation to amendment 374. The committee would not be minded to have a situation whereby an elderly person or a person who was incapacitated would lose the opportunity to complain, albeit by proxy. The issue must be examined further, although to an extent I am reassured by the minister's point that the remedy might be in other legislation. I listened carefully to what the minister said, so I will seek permission to withdraw amendment 374, with the usual caveats.

Amendment 374, by agreement, withdrawn.

Amendment 375 not moved.

Section 95 agreed to.

Section 96—Availability of legal services

The Convener: Amendment 379, in the name of the minister, is grouped with amendment 91.

Fergus Ewing: Access to justice is an important issue, and I am aware of the concerns that have been raised about the potential effects of increased competition on the provision of legal services throughout Scotland. Safeguards are already present in the bill to ensure that access to justice is not threatened. Section 11 requires approved regulators to include in their licensing rules provision for dealing with applications when they believe that there may be a material and adverse effect on the provision of legal services. The approved regulators are also able to consult the Office of Fair Trading in such situations.

Section 96 provides further protection by giving the Scottish Legal Aid Board a duty to monitor the availability and accessibility of legal services in Scotland and to give advice to the Scottish ministers in that area. However, in the light of concerns that particular areas—specifically rural areas—will be disproportionately affected by any increase in competition, I have decided to strengthen the provision in section 96. Amendment 379 expands section 96 to ensure that factors that particularly affect rural or urban areas are taken into account when the Scottish Legal Aid Board monitors the availability and accessibility of legal services in Scotland.

Amendment 91 relates to the duty that is given to SLAB in section 95 to exclude solicitors or advocates from giving legal assistance to clients who are entitled to legal aid, by way of an amendment to the Legal Aid (Scotland) Act 1986. That duty is currently held by the Law Society and the Faculty of Advocates. Following the introduction of the bill, SLAB suggested that, in order to carry out that function, it would need the Scottish Legal Complaints Commission, the Law Society and the Faculty of Advocates to notify it of any misconduct by solicitors or advocates. I agree with that assessment. Without such information, SLAB would not be able to exclude a solicitor or advocate on the grounds cited in section 31(3) of the 1986 act. Amendment 91 requires the SLCC, the Law Society and the Faculty of Advocates to inform SLAB when a service or conduct complaint relating to a solicitor or advocate is upheld and to give relevant details of the complaint. The proposed new section that would be inserted into the 1986 act by amendment 91 also incorporates the contents of the existing section 97, which would be removed.

I move amendment 379.

Amendment 379 agreed to.

Section 96, as amended, agreed to.

Section 97—Information about legal services

Amendment 91 moved—[Fergus Ewing]—and agreed to.

Section 98—Minor amendments

The Convener: Amendment 92, in the name of the minister, is grouped with amendment 93.

Fergus Ewing: Amendment 92 amends the Legal Profession and Legal Aid (Scotland) Act 2007 to require the SLCC to consult the Scottish ministers, in addition to relevant professional organisations and their members, each January on its proposed budget for the next financial year. Given the recent controversy over the levies that have been imposed by the SLCC, I feel that such consultation would be appropriate.

Amendment 93 is fairly technical and relates to the ancillary provision of the Legal Profession and Legal Aid (Scotland) Act 2007. The ancillary provision is currently limited in scope due to changes made by the Legal Services Act 2007 that affect the Legal Profession and Legal Aid (Scotland) Act 2007. The amendment allows the ancillary provision to be used as intended, including in areas altered by the Legal Services Act 2007.

I move amendment 92.

Amendment 92 agreed to.

Section 98, as amended, agreed to.

After section 98

Amendment 93 moved—[Fergus Ewing]—and agreed to.

Section 99—Regulations

Amendments 94, 214, 166 and 215 moved—[Fergus Ewing]—and agreed to.

Section 99, as amended, agreed to.

After section 99

Amendment 378 moved—[Fergus Ewing]—and agreed to.

Section 100 agreed to.

Section 101—Definitions

Amendment 95 moved—[Fergus Ewing]—and agreed to.

Section 101, as amended, agreed to.

Schedule 9—Index of expressions used

Amendments 96, 167, 216, 168, 217 and 218 moved—[Fergus Ewing]—and agreed to.

Schedule 9, as amended, agreed to.

Section 102 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I am aware that quite a number of matters remain outstanding. Mr Ewing, I think that we would have preferred it had they all been reconciled at stage 2. Obviously, the Government and the Law Society in particular will require to have a fairly significant dialogue over the summer. However, I thank you and your officials for your assistance in the matter.

11:11

Meeting suspended.

11:16

On resuming—

Subordinate Legislation

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2010 (SSI 2010/237)

The Convener: Agenda item 3 is to take oral evidence on Scottish statutory instrument 2010/237, which is a negative instrument. Members' attention is drawn to the cover note—paper J/S3/10/22/1—which highlights the fact that the Subordinate Legislation Committee has not yet reported on the regulations. As the regulations will come into force on 5 July 2010, it was agreed that the Minister for Community Safety should attend today's meeting to answer any questions that members might have. The regulations will need to be considered again after the summer recess, once the Subordinate Legislation Committee has reported.

I welcome again the Minister for Community Safety, Fergus Ewing, who is on this occasion accompanied by Scottish Government officials James How, who is head of the access to justice team, and Fraser Gough, who is from the Scottish Government legal directorate. I invite Mr Ewing to make an opening statement. The regulations concern payments made in respect of bail appeals, but the minister will be aware that we have received a letter from the Cabinet Secretary for Justice on a somewhat wider issue, which I imagine will be the subject of an SSI that we might consider in the autumn. Perhaps the minister can confirm that that is the situation. I leave it to the minister as to whether he wants to address, albeit in a limited way, the issues in the cabinet secretary's letter, given that the minister might not at this stage be fully briefed on any forthcoming SSI.

Fergus Ewing: Thank you for that introduction. In a moment, I will speak to the regulations, which will reinstate with backdated effect the payment for work in connection with bail appeals. The regulations make corrective amendments to the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. As the convener mentioned, I have only just seen and have not really digested the cabinet secretary's letter to the committee—the letter is, as it were, hot off the press—but I have a brief that I can speak to on the regulations. I will do my best to answer any questions and to secure any further information that may be needed thereafter.

Taking things in order—first things first—I will speak to the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2010 (SSI

2010/237). The principal objective of the regulations is to reinstate the fee payable to solicitors for criminal legal aid work done in connection with a bail appeal under section 32 of the Criminal Procedure (Scotland) Act 1995. The fact that the fee was no longer payable under the case disposal fee was an unintended consequence of the summary criminal justice reforms in 2008. The cabinet secretary agreed to reinstate the fee as a separate payment in December 2008. The regulations will apply to all cases begun on or after 5 July 2010. Regulation 2(2) provides for a measure of backdating so that the reinstated bail appeal payment can be made available in relation to proceedings commenced between 30 June 2008 and 5 July 2010, but only if the proceedings were continuing on the date on which the regulations were made, which was 10 June 2010.

The Subordinate Legislation Committee picked up a mistake in the drafting of regulation 2(2). It noticed that proceedings commenced between 10 June and 5 July 2010 would fail to satisfy the requirement of regulation 2(2) as drafted, because they would not be continuing as at 10 June. The Government is grateful to the Subordinate Legislation Committee for having picked up that point, and it has laid a correcting instrument, the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No 2) Regulations 2010 (SSI 2010/267), which will allow the reinstated payment to be made available in relation to proceedings commenced on or after 11 June 2010 and before 5 July 2010, provided that they are continuing as at 4 July.

It is estimated that the cost of the regulations will be circa £25,000 in respect of the retrospective provisions, if solicitors choose to claim the fee for cases that have not been concluded by 5 July 2010. Future full-year additional costs to the legal aid fund will be circa £100,000. Those costs have been budgeted for.

I will halt at that point, in case members have any questions.

The Convener: Let us deal with the regulations systematically. Do members have any specific questions?

James Kelly: May I raise a matter in relation to the cabinet secretary's letter, or do you want to deal with that separately?

The Convener: No, we will deal with that in a moment.

James Kelly: I have a question about the regulations. As far as the financial implications are concerned, can you confirm that account has been taken of the new guidelines that the Lord Advocate has issued, which will take effect on 8 July?

Fergus Ewing: I have just checked and my understanding is that the guidelines do not apply to the aspect that we are discussing, the substantive issue of which is bail appeals. As I understand it, the Lord Advocate's guidelines relate to a solicitor's provision of advice to an accused person in custody. It is our understanding that those are two unrelated matters that are not connected.

The Convener: They are not related. Having dealt with that, we will move on to the wider issue.

Fergus Ewing: I am aware that the committee has received a letter from the justice secretary, which was intended to give advance notice of changes that are to be made to the legal aid regime as a consequence of the Lord Advocate's recent guidelines on the right to have a solicitor present during police interviews. The letter also corrects two factual errors that were made during the evidence session on the Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2010 (SSI 2010/212).

I appreciate that committee members are concerned about the implications of the Cadder v HMA case and the guidelines that the Lord Advocate issued on 9 June. I make it clear at the outset that, like the regulations on solicitors' fees that the committee dealt with last week, SSI 2010/237 and SSI 2010/267 have no relation to Cadder.

Members will be aware that the cabinet secretary's letter to the convener notifies the committee that it was imperative to make one immediate and interim change to the advice and assistance regime as a result of the Lord Advocate's guidelines. Due to the short timescales, I am afraid that we have had to breach the 21-day rule to do so. The new regulations will cure the gap that would otherwise have emerged from 8 July, which is the date on which the guidelines will be rolled out to summary cases. That explains the emergency nature of the matter.

In summary cases, if a solicitor's travel time and attendance at a police station are more than two hours, that is classed as an exceptional police station visit and the solicitor can claim for that work in full, in addition to the fixed payment. However, if the attendance at a police station are under two hours and the solicitor subsequently hands the case to the accused's nominated solicitor, there is currently no provision in criminal legal assistance for the first solicitor to receive payment from the Scottish Legal Aid Board. The new regulations will resolve that by providing for payments to be deducted from the fixed payment made to the nominated solicitor. The regulations in themselves will be cost neutral to the legal aid fund, as the payment will be deducted from the fixed payment to the nominated solicitor. The Law

Society was consulted as far as possible, given the timescale. The situation will be kept under careful review over the summer.

The Convener: I take it that a further SSI on the more substantive issue will be coming our way.

Fergus Ewing: Yes. It will be laid shortly.

The Convener: And will presumably come before the committee in September or October.

Fergus Ewing: I expect so, convener, but I have given notice of what it sets out to do, why it is necessary and why there is the element of urgency.

James Kelly: The cabinet secretary's letter says:

"We are closely monitoring the possible implications of the guidelines including on the legal aid budget."

On 17 March, the First Minister—like the minister last week—was unable to give any specific information on the costings of the provision. The new guidelines will take effect on 8 July, which is next Thursday. That date is approaching fast, yet there is a lack of clarity from the Government on the costings. Will you indicate the number of cases that will be affected by the new guidelines between 8 July and the October judgment? What are the financial implications of that?

Fergus Ewing: We are not seeing any rise in costs so far. We can only monitor the situation.

James Kelly: Just to be clear, will there be a rise in the number of cases to which the provision will apply between July and October? You said that there would be no rise in costs.

Fergus Ewing: We are not seeing any rise in costs so far—that is all that we can say at present. We will see what happens after 8 July. We have taken appropriate action. The cabinet secretary is working extremely carefully and diligently on the matter. His dialogue with the Law Society was characterised by Oliver Adair as constructive. I hope that all members will welcome that.

James Kelly: You are saying that there would not have been any rise in costs at this time because the regulations do not come into force until 8 July. What I am driving at is whether, after 8 July, there will be an increase in the number of situations in which a lawyer will be required to be in attendance at a police station, and whether the consequence of that will be a rise in legal aid payments. What I cannot establish is whether the Government has tried to assess the increased number of cases and the consequent financial implications.

Fergus Ewing: I entirely reject Mr Kelly's assertions. The Government has been working closely with all bodies involved, including the Association of Chief Police Officers in Scotland, the Crown and the Scottish Legal Aid Board. The guidelines have already been introduced for solemn cases, so we can talk only about such cases. They will be introduced for summary cases on 8 July. I have explained that we are not seeing rises in the costs so far.

11:30

The wider political matters have been pretty well ventilated in the Parliament. The First Minister made clear the Government's position in relation to not introducing primary legislation to cater for a change in the law that has not yet happened.

In the case of McLean, which the First Minister referred to at First Minister's question time, seven senior judges in Scotland decided that our system is compliant with the European convention on human rights, for the reasons that I set out last week. Anyone who suggests that we should somehow make plans for contingencies that may not arise or, as Mr Baker has suggested, that we should set aside some fund just in case it might be required if the outcome of a court case goes a particular way, is not making a suggestion that we would recognise as prudent.

All that I can say is that, in the operation of the Lord Advocate's guidelines in relation to solemn cases, we have not seen a rise in costs thus far. I hope that committee members will accept the assurance that we are continuing to monitor the situation and work closely with all the relevant parties.

The Convener: Clearly, we will want to see updated figures when the regulations come back to the committee.

Maureen Watt (North East Scotland) (SNP): The issue is obviously new to me, but I understand from the cabinet secretary's letter that the payment due to the solicitor who starts off the case while the accused is in custody will be deducted from the fixed payment to the solicitor who is subsequently involved. Why, therefore, would there be any increase in costs?

The Convener: That is a question for the minister.

Fergus Ewing: Maureen Watt is right to point out that the changes will be cost neutral. The changes are necessary to allow a solicitor to be paid for work, but the payment will be made from a block fee that is payable at present, but to a different solicitor. That is the issue—the problem is technical—and Maureen Watt is right to point out that the changes are expected to be cost neutral.

The wider question is whether there will be a huge new flood of cases in which legal advice is sought. With respect, I do not think that anyone,

unless they are in possession of a crystal ball, can say with total certainty whether there will be a significant increase. At the moment, we can say only that, thus far, that has not proved to be the case for solemn cases, which are the serious cases. If we had expected a flood of additional cases in which legal advice is sought and legal aid is invoked, we might have expected it to happen in the most serious of cases—solemn cases—as people who are charged might well expect to be incarcerated if they are convicted. Such people would be expected to have a very good reason for seeking legal advice—more so than in some of the more minor matters that appear before justices of the peace.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I want to come back on the point that, according to the letter from Mr MacAskill, the Scottish Government is

"closely monitoring the possible implications of the guidelines including on the legal aid budget."

If you are closely monitoring the cases and the demand on the legal aid budget, why can you not tell us the number of cases that you expect to be affected?

Fergus Ewing: With respect to Cathie Craigie, I believe that I have made the position clear. Indeed, I have begun to repeat myself at the invitation of members, so I will happily do so again.

We are clear that the change in the advice and assistance rules, which the cabinet secretary has described as necessary, will be cost neutral for straightforward reasons, which I repeated a moment ago. That change will be cost neutral.

In the meantime, we are monitoring the impact of the Lord Advocate's guidelines as they apply to solemn cases, and we have not seen rises in legal aid fees thus far. The guidelines will apply to summary cases from 8 July. To reassure members, let me say again that we will monitor matters closely and that we will come back to the committee in September—as you have invited us to do, convener—to provide a further report. As soon as we have germane information that is of any value, we always seek to provide it to the committee. That is the Government's approach and practice, and it will be followed in this matter.

Robert Brown: I have considerable sympathy with the Government's difficulties in the matter. From representations that I have received, I understand that behind the technicality of the forthcoming regulations lie some quite complicated issues to do with the professional conduct rules of the Law Society of Scotland on things such as who instructs the solicitor—for example, whether the instruction comes from the police—the transfer of the case from one solicitor to another and the possible involvement of the Public Defence Solicitors Office. It seems clear that such things could have implications for the forthcoming legal aid advice and assistance regulations. Although it might be reasonable for the forthcoming regulations to deal with the immediate issue, I know that the Law Society and others have been keen to suggest a deferment, in so far as they refer to summary cases, of the operation of the rules that are due to come into effect on 8 July.

Can the minister give us some update on that background issue? Although that might not lie within his immediate knowledge, I think that that is actually the more important aspect, given the possible need thereafter for other tweakings of the legal aid rules as a consequence of what might emerge from the quite complicated discussions that are on-going.

Fergus Ewing: Mr Brown is quite right to raise those general issues about how the new guidelines will operate. What I can say is that discussions are on-going between the Law Society and the Crown on how the guidelines will be applied. As I said, the matters were considered—last Monday, I think—by the Law Society and the cabinet secretary in discussions that were described as constructive.

Plainly, much will depend on how matters operate in practice. When we return to the Parliament after the recess, we will have had the benefit of the operation of the guidelines in solemn and summary cases for a couple of months at least. I very much hope that we will then have a slightly clearer picture, albeit that two months is not a long time from which to draw any firm conclusion.

However, the sorts of issues that Robert Brown has raised are plainly the issues that are informing the discussions between the relevant parties. It is important to allow those discussions to take place between the representative bodies in a responsible way. I hope that the outcome of those discussions will be positive, but it is difficult for me to say much more beyond that. I thank Robert Brown for placing those matters on record.

Robert Brown: The essence of my point, I suppose, is that the summary cases will be much more significant in number than the solemn cases, so they might result in a much bigger problem. The legal profession appears to be expressing concerns that, because of the entanglement with professional conduct rules on how solicitors relate to each other, things are perhaps not quite ready to go for the date of 8 July, which is obviously almost upon us. Given the limited issue that is raised by the other legal aid regulations, I confess that there seems no particular reason why they should not come into force, as they seem reasonably straightforward. However, are the

minister and the Government satisfied that the procedures for summary cases can proceed on 8 July without raising complicated problems that a short delay might allow to be resolved? That is the essence of my point.

Fergus Ewing: We are working with all relevant parties to ensure the reasonable operation of the new guidelines, so we are reasonably confident that they should operate well.

To put the matter in perspective, I might remind the committee that Mr Kelly's suggestion last week that criminal legal aid applications had increased by more than 20 per cent in the past year was wrong. They actually increased by 3.8 per cent. I mention that simply to bring some perspective. There is no sign that the number of legal aid applications or the number of cases has increased astronomically over the past year, and we do not expect a deluge of additional people being charged with crimes and additional hordes of people in custody. We expect that broadly the same workload will require to be dealt with. Robert Brown will recall—as I do—that solicitors' advice is frequently sought and obtained at some point during the process of somebody being banged up in a cell. It may be simply that that advice will be sought at a different time. Therefore, there will not necessarily be an additional burden of time spent that will translate into an additional burden on the legal aid fund; it may simply be that the time at which the advice is sought changes.

The guidelines on ensuring access to a solicitor, which are the responsibility of the Lord Advocate, are now in operation in solemn cases and there has been no significant rise in the number of applications for legal aid for the reasons that I mentioned earlier. I would have expected there to be a significant rise in the number of applications relating to solemn cases rather than summary cases, although I take Mr Brown's point that, as there are more summary cases than solemn cases, there is potentially a greater volume of cases in which a different pattern could emerge. We cannot be sure of the implications, as it depends on how the police and the solicitors operate; nevertheless, we will do what we can to support the guidelines.

James Kelly: The minister asserts that the changes to date have been cost neutral, but that is based on his assessment of the number of solemn cases. As he has just acknowledged, and as Robert Brown has outlined, there is a danger of exposure given the greater number of summary cases. The Government must assess that closely over the summer, and I urge that committee members be kept updated on that.

The Convener: That is a fair point.

Fergus Ewing: The regulations that Mr MacAskill described as being necessary for technical reasons will be cost neutral for the reasons that I described. I think that Mr Kelly is alluding to the operation of the guidelines. I am happy to reassure him that we will keep the matter under close review over the summer months.

The Convener: I thank you and your officials for your attendance.

11:42

Meeting suspended.

11:43

On resuming—

Police Pension Account (Scotland) Regulations 2010 (SSI 2010/232)

The Convener: Item 4 is a negative instrument for consideration. I refer members to paper J/S3/10/22/2. The Subordinate Legislation Committee has not drawn any matters to the attention of the Parliament in relation to the regulations. Do members have any comments or are we simply content to note the regulations?

Maureen Watt: As someone who has served on the public protection committee of a council, I think that there will be a collective sigh of relief from committee members as we note that the pension account will come out of the operating budget. The issue has always exercised the minds of councillors and chief constables, and I am sure that it will be welcomed by justice committees across the country.

The Convener: Yes, I recall that it caused some excitement at the Strathclyde joint police board.

Robert Brown: I confess that I am not entirely sure how the full thing operates in practical terms. I get the implication that the risk of any fluctuations up or down is moved to central Government, but it is not a self-funded pension provision and it might be worth having a brief look at it during our budget discussion so that we understand the possible implications.

The Convener: It is certainly one of the items that we must consider. Can we note the regulations?

Members *indicated agreement.*

11:45

Meeting continued in private until 12:04.

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