The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 15 June 2010

Session 3

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JUSTICE COMMITTEE
20th Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

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

COMMITTEE SUBSTITUTES

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

*attended

THE FOLLOWING ALSO ATTENDED:

Fergus Ewing (Minister for Community Safety)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 15 June 2010

[The Convener *opened the meeting at 10:02*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to ensure that mobile phones are switched off, to avoid disruption. We have received apologies from Dave Thompson; Maureen Watt is attending in his place.

The committee is invited to decide whether to take item 4 in private. Is that agreed?

Members *indicated agreement.*

Subordinate Legislation

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

10:02

The Convener: Item 2 relates to subordinate legislation. There is only one negative instrument for consideration today. I draw members' attention to the Scottish statutory instrument and the cover note, which is paper J/S3/10/20/1. The Subordinate Legislation Committee has not drawn any matters to the Parliament's attention in relation to the instrument. Do members have any comments, or are they content to note the instrument?

Robert Brown (Glasgow) (LD): I am a little concerned about some of the press publicity that there has been on the issue, including an article in this morning's edition of *The Herald*, which indicates that the background to the instrument is the publication of new guidelines by the Lord Advocate's department. Those guidelines had still not been published by the time that the article appeared.

In addition, there are definite issues in relation to the terms of what seems to be a complicated instrument, which may have some effect on the new right to have a lawyer when one is facing questioning in a police station. I wonder whether it might be sensible to continue consideration of the instrument for a week, so that we can get more background information. We could ask the minister or Scottish Government officials to update us on the background details and the concerns that have been the subject of publicity.

The Convener: You have an advantage over me, as I have not seen this morning's press coverage.

James Kelly (Glasgow Rutherglen) (Lab): I support Robert Brown's move to continue consideration of the matter until next week. Some important issues require clarification. According to the Executive note that backs up the SSI, its financial implications are £900,000 for cases of this nature that may go back to April 2008 and in-year financial costs of £2 million. In my estimation, that could result in costs for this year of £2.4 million.

I am not aware that that has been budgeted for, so there are budgetary implications in addition to the points that Robert Brown raises about what has been discussed this morning and over the weekend in the newspapers about changes to access to solicitors for those who have been arrested. I am not aware that the SSI takes

account of those changes, which could mean further financial implications. The background note that we have been given states that the instrument relates to an increase in fees that was announced in November 2007 and that the backdating of the fees was announced in January 2009. I wonder why it has taken so long to bring the SSI to the Parliament.

There are a number of issues that I think need to be considered further and addressed again next week.

Stewart Maxwell (West of Scotland) (SNP): I am puzzled by James Kelly's comments on the instrument. I point him to the cover note, which clearly states under paragraph 2:

"If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Government"—

as Mr Kelly has just indicated—

"in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible, to allow sufficient time for a response to be received."

I do not believe that any of the questions that members have for the Government were passed to the committee clerks in advance of the meeting. It seems odd for members to wait until the committee meeting and then to ask for the committee's consideration of the instrument to be postponed to a future date. The procedure is clear: every committee member had the opportunity to read the papers and raise points of clarification in advance of the meeting. If members have not done that, I do not think that it is reasonable for them to come to the meeting and ask for further delay so that the points that they raise can be clarified.

The Convener: I take that point. However, I am concerned about the fact that external events may have overtaken—

Stewart Maxwell: I am sorry to interrupt, convener, but that is a different issue from the points that have just been raised.

The Convener: Yes.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): It is helpful for the clerks to state in any paper that comes before us that their door is open for discussion and clarification of any point. Nevertheless, I do not accept Stewart Maxwell's argument. This is the democratic table that we sit around when we come together as a committee, and any member at any time is entitled to ask questions in public. I have concerns about the instrument, especially in relation to the press coverage and the e-mails that some of us have received over the past couple of days. If we cannot get answers to those questions today, I support Robert Brown's suggestion that we continue our consideration of the instrument for a week.

The Convener: Thank you. Do members have any other comments?

James Kelly: I will deal specifically with the point that Stewart Maxwell raises. Members will be aware that the committee has had a heavy workload with the Legal Services (Scotland) Bill. In relation to this morning's agenda, my main focus was the bill. I looked at the instrument on the train coming through and did not have time to raise my concerns with the clerk. Nevertheless, my concerns are relevant and I am quite within my rights to raise them at the committee meeting and to ask for a continuation of the discussion.

The Convener: I do not think it appropriate to put the minister on the spot today, on the basis that he has come to deal with other matters. The proper course of action would be for the committee to continue its consideration of the instrument over the next seven days. There is no desperate urgency for us to come to a decision on it. We will have the appropriate minister before us next week in order to get explanations, particularly with regard to the latest events surrounding the appeal that was heard last week at the Supreme Court. Do members agree to continue our consideration of the instrument for seven days?

Members *indicated agreement.*

Robert Brown: I take it that there is a technical mistake on the front page of the briefing note. It talks about

"solicitors providing civil legal aid in relation to solemn proceedings".

I take it that that is a typo and that the reference should be to "criminal proceedings". That adds another layer of oddity to the matter.

The Convener: Yes. I noticed that. I think that it is a typo. Consideration of the matter will be continued for seven days.

Legal Services (Scotland) Bill: Stage 2

10:09

The Convener: We now turn to our principal item of business, which is the second day of stage 2 proceedings on the Legal Services (Scotland) Bill. The committee's consideration today will not proceed beyond the end of part 2. I welcome Fergus Ewing, the Minister for Community Safety, who, in accordance with usual practice, is accompanied by various Government officials who might alternate throughout this morning's proceedings.

For today's consideration, members should have with them their copies of the bill, the second marshalled list and the second groupings of amendments. I intend to proceed until about 11.30, when there will be a short break, and then to proceed until approximately 12.45 or 1 o'clock.

Section 5—Approved regulators

The Convener: The first group of amendments deals with the role of the Lord President. Amendment 4, in the name of the minister, is grouped with amendments 236, 5 to 7, 238, 8, 9, 240, 244, 14 and 272.

The Minister for Community Safety (Fergus Ewing): Good morning. Given that the Lord President already has an array of powers in respect of individuals having rights of audience in the Scottish courts, it was initially concluded that it would not be necessary for the bill to require the Lord President's approval of the regulatory regimes applicable to the alternative business structures that will employ such individual solicitors. Therefore, section 6 of the bill as introduced simply required the Scottish ministers to consult the Lord President, alongside others, in relation to an application from a body for a licence to be an approved regulator.

The Law Society of Scotland has advocated that the Lord President should be given a role that is equal to that of the Scottish ministers in approving applicants as approved regulators under section 6. Opposing views have been voiced by the consumer groups that want a more limited role for the Lord President, similar to that which he is given by the bill as introduced.

Following various representations made by those who gave evidence, the Justice Committee asked that further consideration be given to an enhanced role for the Lord President in the consideration of applications to be approved regulators. Given the concerns raised by various parties, I lodged amendments to section 6, which, if supported, will provide for such an enhanced role, so that the Scottish ministers cannot approve an application to be an approved regulator without the agreement of the Lord President. Effectively, that would give the Lord President a veto over who can become an approved regulator. The veto is appropriately limited to section 6(1)(a)(i), which relates to the matter of the applicant's expertise in the provision of legal services. That means that the Lord President would not have the power to veto an application from a prospective approved regulator under the grounds set out in section 6(1)(a)(ii) or (iii). That is sensible, given that those grounds cover, for example, a prospective approved regulator's financial viability, which, with the greatest respect to the Lord President, is not part of his remit.

Robert Brown's amendment 236 proposes to insert into section 6(1) an approval role for the Lord President equal to that of the Scottish ministers in determining who should be an approved regulator. The convener's amendment 238 proposes to insert into section 6(2) an approval role for the Lord President equal to that of the Scottish ministers in determining whether the approved regulator should be subject to conditions. Amendment 240, also in the convener's name, proposes to insert a new subsection after section 6(2) to provide an approval role for the Lord President equal to that of the Scottish ministers in determining whether to amend, add or delete any conditions imposed on an approved regulator. I do not support those amendments because I do not consider it appropriate for the Lord President to have the same broad approval role in relation to approving regulators.

The Scottish ministers are administrators in relation to the approval of regulators. Although the Lord President has an important role in the legal profession in Scotland, he is not simply an administrative functionary. In addition, the Scottish ministers, unlike the Lord President, are subject to the provisions in section 4 and so must act in a way that is

"compatible with the regulatory objectives"

set out in section 1 when exercising their functions under section 6.

In contrast, my amendments reflect the appropriate constitutional role of the Lord President and his important function in overseeing the legal profession. Those provisions will reduce the risk of duplicated effort and unnecessary work for the Lord President, given that he will not have decision-making authority in areas in which he has no current remit, such as consideration of a body's financial resources. However, given that section 6(3) gives the Lord President a wider consultation role in relation to the whole approval process, he

is bound to be consulted on such matters and proper account will be taken by the Scottish ministers of any comments made by him.

10:15

Amendment 244, in the name of Robert Brown, would insert a new subsection at the end of section 6 that would require the Scottish ministers to consult the Lord President before making regulations under section 6(7). I do not believe that that is required. Section 6(7) allows the Scottish ministers to make further provision about approval, which is properly an administrative matter for them. Furthermore, amendment 3, which has been accepted, provides that, where the Scottish ministers consider it appropriate,

"they must consult such persons or bodies as appear to ... have a significant interest".

Amendment 272, in the name of Robert Brown, would prevent the Scottish ministers from making regulations about the internal governance of approved regulators without the consent of the Lord President. As I said, I consider that the appropriate constitutional role of the Lord President lies in his consideration of an approved regulator's expertise as regards the provision of legal services. I do not consider that matters regarding an approved regulator's internal governance arrangements form part of such expertise. Of course, it should be noted that, in accordance with section 22(3), the Scottish ministers must consult approved regulators before making such regulations.

My amendment 4 will add to section 5(4) a reference to the Lord President's consideration of an application to become an approved regulator. The effect will be that an applicant to be an approved regulator must provide the Scottish ministers with any additional information that is required for the Lord President's consideration of the application.

Amendments 5 and 7 are drafting amendments. Amendment 6 deletes the words "the legal competence necessary" from section 6(1)(a)(i) and replaces them with the words

"the necessary expertise as regards the provision of legal services (including as deriving from that of the persons within it)".

The effect is to set out more clearly that applicants must satisfy the Scottish ministers that they have the appropriate legal knowledge and skill to function as approved regulators.

Amendment 8 will add to section 6 a new subsection—(2A)—which will require the Scottish ministers to impose on approved regulators conditions relating to expertise as regards the provision of legal services,

"as are reasonably sought by the Lord President".

Amendment 9 will insert into section 6 a new subsection that sets out when the Scottish ministers can remove or vary conditions that they impose on approved regulators. Amendment 14 will add a new section to enhance the Lord President's role in relation to the approval of approved regulators. The effect is that the agreement of the Lord President is needed before the Scottish ministers approve an applicant as an approved regulator. However, that will be limited by subsection (2) of the new section, which provides that

"that agreement may be withheld only if the Lord President is not satisfied that the applicant has"

the necessary expertise as regards the provision of legal services, as set out in section 6(1)(a)(i).

We listened carefully to what the committee said in its stage 1 report and we have produced a compromise. We believe that it is the right one and we recommend it to the committee. Accordingly, I invite members not to move their amendments in the group.

I move amendment 4.

Robert Brown: The debate is a legitimate one—there are no two ways about it—but, frankly, I do not accept the Government's position or its explanation of the Lord President's constitutional position. The amendments are important and relate to the independence of the legal profession. One reason why the role of the Lord President has come under such scrutiny and why such importance has been attached to it in the debate is that it provides an independent judicial barrier between Government and the legal profession. In the context of the bill, that is important.

Amendment 236 is the central amendment and is simply phrased. It requires the consent of the Lord President to the approval of regulators. That is right, and the involvement of the Lord President should not be limited in the way that the Government suggests. First, the Lord President's involvement with regulations that the Law Society of Scotland produces in similar situations is not limited in that way. Secondly, it is wrong to try artificially to put a limit on the Lord President's rights in the matter. No doubt, in 99 cases out of 100, the Lord President will follow the advice of the Scottish Government on such matters and will take account of the evidence that the Scottish Government provides. It is not necessary or contemplated that there should be duplication of work. However, the Lord President is entitled to have an overriding role in such matters.

The convener's amendment 238 extends the Lord President's role to the approval of the conditions that are to be imposed on a regulator. That falls into the same category, so I support

amendment 238. These amendments are essential if the Lord President is to become a constitutional buffer between ministers and approved regulators.

Last week, I touched on the Scottish Government's amendments 5 to 7, which add confusion and clumsiness to the definition of the expertise required, and I am opposed to them. How on earth is amendment 6 different from the bill as drafted? Instead of a relatively straightforward expression about legal expertise, amendment 6 talks about

"the necessary expertise as regards the provision of legal services (including as deriving from that of the persons within it)".

Some interpretation is required to understand what the Government is getting at in that amendment. The phraseology of the bill as it stands is superior.

The convener's amendment 240 and my amendment 244 seek to involve the Lord President in the approval of regulations. I am not as fussy about the Lord President approving them as I am about his being consulted on them, especially in relation to the more minor powers in section 6(7). However, it is necessary for the Lord President to approve conditions under section 6(2). For the reasons I gave earlier, I oppose amendment 14, which would limit the Lord President's involvement to one area only.

This is an important debate, and the Scottish Government has not got the balance quite right.

The Convener: I will speak to amendment 238 and to other amendments in the group in what is likely to be this morning's principal debate.

The minister is to be congratulated on realising that there was a difficulty with the issue, and I accept that he has attempted to find a constructive solution. Having said that, I believe that the minister's proposals do not go far enough. We probably all agree that there is an important issue around the separation of powers, which the minister has sought to remedy through his amendments. However, my arguments are largely the same as Mr Brown's: the minister has not gone far enough.

It is important to have a bulwark in the system, giving the Lord President some control over what happens under this very important heading. At last week's meeting, I took issue with the minister when he said that these amendments would mean that the Lord President would have the power of veto and, effectively, the same powers as Scottish Government ministers. That is not quite correct because any appointments, for example, would be at the instance of the Scottish Government, and it would bring forward nominees for such appointments. The Lord President would therefore require to make a determination on the individual application, not the generality. That covers that point.

There is not a great deal that divides us this morning. However, these are important issues, and I submit that the amendments in my name and in the name of Robert Brown seek to address them.

James Kelly: As the convener said, this is an important debate. I support the amendments lodged by Robert Brown and the convener. As drafted, the bill vests too much power in the hands of the Scottish ministers. It is important to reflect the split between the judiciary and ministers, and the amendments vest a correct amount of authority and power in the Lord President with regard to matters that are to be determined under the bill.

I listened carefully to the arguments of the minister and Robert Brown around amendments 5 to 7, and I am more persuaded by Mr Brown's argument that the amendments are unnecessary.

Fergus Ewing: I welcome the debate, which, as Mr Brown said, is a legitimate one. I am pleased that we are having it, given the concerns that have been expressed furth of this place, notably within the profession. It is appropriate that we should debate these important matters at stage 2. Our approach was to listen to what the committee said. Although the committee did not, in recommending that the Lord President should have a greater role, specify what that should be, nonetheless we considered the matter extremely carefully and liaised with the Lord President's office.

It is fair to say that one of the arguments that I advanced earlier is that there would be an element of duplication. Work that the Scottish ministers did in assessing the financial viability and financial robustness of applicants to become approved regulators would be duplicated by the Lord President. In these difficult times, I hope that we all agree that the Government does not wish to create laws that require the same work to be carried out twice if we can possibly avoid that. It was partly because we had in mind the avoidance of such duplication that we limited the Lord President's role. We did that also partly because the Lord President's role as the head of the legal profession in Scotland seems to be principally to regulate legal services and lawyers in Scotland. That is his job; it is not his job to be an accounts analyst. That is why we decided on the compromise that we reached.

Having said that, convener, I respect the views that have been put forward by colleagues and I understand entirely where you and your colleagues are coming from. I agree that it is perhaps not accurate to say that the Lord President and the Scottish Government will have

precisely the same powers. Of course, we will not propose individual regulators, as they will propose themselves, but the Government and the Lord President will, in effect, jointly dispose of those applications. The Lord President will have a veto in that respect, either in relation to matters relating to legal services only if our amendments are agreed to, or in relation to all matters if the other amendments in the group are agreed to. I am sure that we can live with whichever outcome. I wanted to make that clear to committee members.

The Convener: That is very helpful.

Amendment 4 agreed to.

Amendment 233 not moved.

Section 5, as amended, agreed to.

Section 6—Approval of regulators

Amendment 236 moved—[Robert Brown.]

The Convener: The question is, that amendment 236 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 236 agreed to.

Amendment 5 moved—[Fergus Ewing.]

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against

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

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

The casting vote goes in favour of Mr Ewing's amendment, because I consider that it improves the wording slightly.

Amendment 5 agreed to.

Amendment 6 moved—[Fergus Ewing.]

The Convener: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against

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

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

The casting vote goes with Mr Ewing's amendment, on the basis that it clarifies the wording.

Amendment 6 agreed to.

Amendment 237 moved—[Robert Brown.]

The Convener: The question is, that amendment 237 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 237 agreed to.

Amendment 7 moved—[Fergus Ewing]—and agreed to.

Amendment 238 moved—[Bill Aitken].

The Convener: The question is, that amendment 238 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 238 agreed to.

Amendments 8 and 9 moved—[Fergus Ewing]—and agreed to.

Amendment 239 moved—[Robert Brown].

10:30

The Convener: The question is, that amendment 239 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 239 agreed to.

Amendment 240 moved—[Bill Aitken].

The Convener: The question is, that amendment 240 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 240 agreed to.

The Convener: I point out that, if amendment 10 is agreed to, I will not be able to call amendments 241, 242 or 243, on the ground of pre-emption.

Amendment 10 moved—[Fergus Ewing].

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against

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

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

Amendment 10 disagreed to.

Amendment 241 moved—[Robert Brown].

The Convener: The question is, that amendment 241 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)
Watt, Maureen (North East Scotland) (SNP)

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

As there is an equality of votes for and against the amendment, I use my casting vote against it, on the basis that I do not consider it necessary.

Amendment 241 disagreed to.

Amendment 242 moved—[Bill Aitken].

The Convener: The question is, that amendment 242 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 242 agreed to.

Amendment 243 moved—[Robert Brown].

The Convener: The question is, that amendment 243 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)
Watt, Maureen (North East Scotland) (SNP)

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

As there is an equality of votes for and against the amendment, I use my casting vote against it, on the ground that I do not consider it necessary.

Amendment 243 disagreed to.

Amendments 11 and 12 moved—[Fergus Ewing]—and agreed to.

Amendment 244 moved—[Robert Brown].

The Convener: The question is, that amendment 244 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 244 agreed to.

Section 6, as amended, agreed to.

After section 6

The Convener: I invite the minister to move amendment 13, which has already been debated with amendment 235.

Fergus Ewing: In the light of the decision on amendment 236, I will not move amendments 13 or 14. However, I may need to consider the Government's position as far as stage 3 is concerned.

The Convener: That is respected.

Amendments 13 and 14 not moved.

Section 7—Authorisation to act

The Convener: Amendment 15, in the name of the minister, is grouped with amendments 16 to 18.

Fergus Ewing: Amendments 15, 17 and 18 are principally drafting amendments. In discussion with the Scottish Government, the Law Society of Scotland argued that the Scottish ministers should be required to set out their reasoning when refusing to authorise an approved regulator or applicant or when imposing conditions on authorisations. Although it is unlikely that the Scottish ministers would take such action without giving an explanation, amendment 18 will ensure that such an explanation will be given.

Amendment 16 relates to the power in section 7(10)(b). In its stage 1 report, the Subordinate Legislation Committee raised concerns about the extent of the power, given that it could be used to alter the criteria for authorisation. On further reflection, I feel that the power is unnecessary. Amendment 16 will therefore remove the relevant paragraph from the bill.

I move amendment 15.

Amendment 15 agreed to.

Amendments 16 and 17 moved—[Fergus Ewing]—and agreed to.

Section 7, as amended, agreed to.

After section 7

Amendment 18 moved—[Fergus Ewing]—and agreed to.

Section 8—Regulatory schemes

The Convener: Amendment 169, in the name of the minister, is grouped with amendments 261, 170, 171, 171A, 172, 268, 210 and 211.

Fergus Ewing: There have been calls from all quarters, including the committee, for the bill to contain compensation arrangements for those who receive legal services from a licensed provider and who suffer loss because of dishonesty within that

provider. The consensus is that a person who suffers such loss should have recourse to the same level of compensation arrangements as are provided for by the guarantee fund. I agree that there should be such equality of protection for clients of licensed providers. As I recall, I said that when I gave evidence at stage 1.

In the Legal Services Act 2007—the equivalent legislation in England and Wales—approved regulators must have a compensation arrangement whereby grants or other payments are to be provided in cases of fraud. However, I understand that it is not yet clear whether implementation of that will provide clients of licensed bodies there with equivalent protection to that of clients of traditional firms.

I considered a number of options, including insurance cover and loans. However, it is not possible to take out insurance cover against one's own fraud, and it might be difficult for approved regulators to afford loans equivalent to the amount in the guarantee fund, especially if they regulate only a small number of licensed providers. Nevertheless, approved regulators will be able to set up their own funds if they choose to do so. Amendments 261 and 268, in the name of Robert Brown, provide for practice rules to ensure that licensed providers are responsible for compensation arrangements.

Given the difficulties that approved regulators are likely to face in finding resources to set up equivalents to the guarantee fund, I consider that it would be almost impossible for a single entity to do so. Therefore, it is clear to me that in order to ensure that consumers who use licensed providers have the same protection as those who use traditional firms, provision must be made to ensure that they can also be covered by the existing guarantee fund.

The guarantee fund is a statutory fund that stands alone and does not form part of the administrative costs of the Law Society of Scotland. Persons providing legal services, such as incorporated practices and principals in solicitor firms, must pay into it. It is administered by the Law Society—that will not change.

I consider that allowing licensed providers to use the guarantee fund will reinforce the fund. It will increase payments to the fund by entities that, in my view, pose little risk. It may even lead to reduced payments for incorporated practices and principals in solicitor firms, although that is obviously a matter for the Law Society.

A call has been made for equality of protection. Using the same fund and the same rules for claims and grants will ensure parity of protection in a way that no other option can. Having considered the matter, I have lodged amendments that will ensure that those who suffer loss owing to fraud in a licensed provider will have parity of protection with those who suffer loss owing to fraud in a traditional solicitor practice or an incorporated practice.

I turn now to the individual amendments. Amendment 169 requires approved regulators' regulatory schemes to contain compensation rules. Amendment 170 requires all approved regulators to have arrangements in place to compensate the clients of licensed providers in the event of fraud. There is a choice for approved regulators in how they achieve that. If an approved regulator is able to set up its own fund, it may do so. Such a fund must be held for the same purpose and must be administered on the same basis as the guarantee fund. Alternatively, the approved regulator may cause the guarantee fund to be administered as respects its licensed providers.

Amendment 171 provides that the compensation rules for an approved regulator that chooses to administer its own fund must state the purpose of the fund and the minimum monetary amount to be contained within it. The compensation rules must also set out how the fund is to be administered, the criteria for qualifying for payment out of the fund, the procedure for making such payments and determining claims, the scale of the contributions into the fund and provision for its destination or distribution, should the approved regulator cease to act.

An approved regulator that decides to use the guarantee fund must make rules about contributions to the fund, which must be consistent with the scale of contributions for incorporated practices as is referred to in schedule 3 to the Solicitors (Scotland) Act 1980.

Amendment 171A, in the name of Robert Brown, amends amendment 171 in respect of an approved regulator that decides to use the guarantee fund. It provides that, in such a case, the compensation rules that are made by the approved regulator relating to the contributions that are to be made by the licensed providers to the guarantee fund must be approved by the council of the Law Society of Scotland, after the fairness of the arrangements is confirmed by an actuary. I do not support that amendment.

As I have mentioned, amendment 171 provides that compensation rules must require the making of contributions into the fund, which must be consistent with the scale for incorporated practices, as set by the council of the Law Society. Approved regulators would be bound by that amount, so there is no need for the Law Society to approve the compensation rules. It should be remembered that the compensation rules that will

form part of the approved regulator's application will be subject to approval by the Scottish ministers following consultation with, among others, the Lord President.

Amendment 172 has the effect of, first, allowing approved regulators to make further compensation arrangements should that be considered necessary or expedient; and, secondly, allowing the Scottish ministers to make further provision by regulations, should that be considered necessary.

Amendment 210 amends section 43 of the 1980 act, which makes provision for the guarantee fund. The amendment allows the guarantee fund to be used in respect of the clients of licensed providers where the approved regulator has chosen not to maintain a compensation fund of its own, and regardless of whether or not it is regulated by the Law Society.

Amendment 211 amends schedule 3 to the 1980 act, which makes further provision for the guarantee fund. The amendment will ensure that licensed providers who are covered by the guarantee fund contribute to the fund according to the same entity-based model as applies to incorporated practices.

I move amendment 169, and I invite Robert Brown not to move his amendments.

Robert Brown: It is in the public interest for there to be a guarantee fund-type of arrangement to safeguard clients against fraud by their legal advisers. I pay tribute to the minister for his efforts in that regard. The Scottish Government proposes that a regulator can choose to set up its own fund or latch on to the Law Society's one. I have strong concerns about the idea that other regulators should be entitled to tap into the Law Society guarantee fund—which I think has accumulated about £3 million or £4 million—not least in a situation in which the Law Society itself neither regulates the entity concerned nor has any form of regulatory control over the risk. It seems a totally bizarre arrangement, for which I struggle to think of a parallel.

There is much talk about the need for a level playing field, but we have a level playing field. If the proposed regulator does not have the resource to support a guarantee fund, perhaps the proper conclusion is that it ought not to be a regulator. Last week, I expressed my strong reservations about the idea of regulatory competition in any event, and I think that some of my concerns about that are shared around the committee table.

10:45

The minister said that the statutory fund stands alone. He is obviously right to say that, but the contributions come from members of the Law Society against a risk base that has been established over a number of years. He also said that the proposed entities would pose little risk, but, to be frank, I do not know how he knows that. The committee has had great difficulty in understanding what sort of entities they would be, in what situations they would operate and what the background to their arrangements would be. There is also an issue about who the regulators are to be. The only suggestions that we have had are regulation by the Law Society or regulation by the Institute of Chartered Accountants of Scotland, which presumably has some resource in that regard.

In short, it seems that, if somebody wants to be a regulator, they ought to establish their own guarantee fund or the equivalent, and my amendments 268 and 269 propose just that. I ask the committee to support them. If, despite my views, the committee is attracted to the idea of using the Law Society guarantee fund, it will be necessary to tighten the circumstances. Amendment 171A therefore gives the Law Society an option as to whether to offer the arrangement to entities that it does not regulate and in relation to which it does not have control over the risk, and it seeks to provide a mechanism for checking its actuarial fairness. I am open to more expert views than mine on whether an actuarial valuation or some other procedure would be appropriate, but I believe that my proposal is an important safeguard.

It is also important to recognise that, under the current arrangements, extended protection is provided by the professional indemnity insurance scheme—under the master policy—along with the guarantee fund. That point was made to me by a number of senior solicitors in discussions about the bill. The two things work together. I think that I am right to say that there is no such protection in the accountancy profession or, indeed, anywhere else.

On the detail, although the Scottish Government's amendment 169 amends a different section, it does the same job as my amendment 261. However, if members otherwise support my proposition, they should vote against amendment 169, which contains the Government's proposal, and against the other Government amendments in the group. The implications of the Government's approach to this important matter have not yet been teased out. I hope that the committee will support my principled amendments on it.

The Convener: There being no other contributions on the matter, I will make one myself.

This is indeed an important debate. The minister is correct to identify the fact that, when he gave evidence, he stressed the vital importance of ensuring that an appropriate compensation system

is in force in case things go wrong. Fortunately, things do not go wrong often—it is important to stress that. That said, we have to give some thought to what the best scheme would be. On the basis of what Robert Brown has said, there is an arguable case that, if the existing Law Society scheme, which is in significant surplus, is incorporated, we cannot expect the Law Society to be in a position where it has limited or no control over what happens.

I pay tribute to the minister for, once again, recognising that there is a problem and seeking to deal with it. There are real merits in his arguments. On balance, however, I am persuaded at this stage that Robert Brown's proposal is the best way forward. However, in inviting the minister to wind up, I indicate to him that I am still open to persuasion on the matter.

Fergus Ewing: Thank you, convener. I listened to what Mr Brown said. I think that we all recognise that it is essential that, whatever other changes are made to the bill, it contains proper provision to protect the public. It is not about lawyers, accountants, the Law Society or ICAS; it is about protecting the public—clients and consumers—from the possibility of fraud. I am pleased to say that, across the professions, fraud has occurred in Scotland relatively rarely, but nonetheless it does occur.

I think that we all accept that that principle is fundamental. I opined to that effect at my first meeting on the bill with my officials and made that principle clear at stage 1 when I gave evidence to this committee. That said, turning that objective into practice has not been easy, as I think all members recognise. We searched long and hard and looked very closely at alternatives. We looked extremely closely at the possibility of loans, fidelity insurance and other types of insurance and other provision, but we concluded that such proposals would simply be unworkable. Either we have the protection of the guarantee fund or we do not have protection of the public—frankly, it is as simple as that.

I welcome debate on Mr Brown's amendments, because it is important that a debate takes place. However, the guarantee fund and the indemnity fund are entirely separate things. The indemnity fund is for professional negligence, mistakes and blunders—errors that we can all make—that are made through a lack of sufficiently high standards of legal service, whereas the guarantee fund is for fraud and dishonesty, such as dipping into the client's account. The indemnity fund and the guarantee fund are therefore entirely separate and should be considered separately.

Equally, Mr Brown referred to tapping into the Law Society's fund, but it is not the Law Society's fund: the guarantee fund is a statutory fund that the Law Society administers. The Law Society does not own the fund, which exists because a previous Parliament recognised that there had to be a fund to protect the public against fraud for the very reasons, I imagine, that I have sought to outline briefly today. With great respect to Mr Brown, to view the fund as a Law Society fund is a misconception; it is a statutory fund that was set up by the 1980 act to protect the public, and it is the 1980 act that we are now amending.

Mr Brown also said that he was not aware of why I opined that the contributions that ABS providers would make to the fund might have a beneficial effect. I made that point for a very simple reason. I have not made a professional study of all the claims that have ever been made on the fund, but the proposition that is put to me by those who have studied the matter is quite simple. Sadly, it is the small practitioners, principally sole practitioners, who have had claims made against them to the guarantee fund. Perhaps they have succumbed, for whatever reason, to the temptation to dip into their clients' funds when, for example, hundreds of thousands of pounds of mortgage funds have been provided. A solicitor commits a fraudulent, criminal act by dipping into such funds. The record shows that that has occurred far more frequently and is far more likely to occur in single-partner practices or small practices than in large firms. I make that point as a former sole practitioner myself and with no pride. Sadly, it is simply a matter of fact that it has been small firms that have abused the system and committed what are very serious crimes.

I think that we all accept that, although we do not have mathematical certainty about how ABS will develop, it is nonetheless likely that the big four—the larger firms—will most avail themselves of the opportunities. However, it must be said in favour of the larger firms that there has been hardly any instance of their resorting to the guarantee fund, perhaps for a number of reasons that it would not be helpful of me to opine on too readily. Indeed, some may say that I have already opined too widely and too long on this matter. However, it is clear to me that, if large firms take advantage of the provision, they will contribute more money to the fund through creating new business structures. If the future replicates the past, there will be fewer claims from those firms, therefore there will be more money in the fund and the potential for a significant benefit to the fund from those contributions, without a consequential reduction from the fund, given the lower likelihood of claims. For those reasons, and having considered the matter long and hard, I strongly recommend to the committee the amendments in my name.

The Convener: The question is, that amendment 169 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against

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

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

Amendment 169 disagreed to.

The Convener: The next group is on regulatory schemes. Amendment 247, in the name of Robert Brown, is grouped with amendments 248 to 250.

Robert Brown: Amendment 247 relates to supervision of licensed providers and to record keeping. In my view, it is important to ensure that approved regulators maintain a comprehensive record of the performance of the legal services providers that they regulate. Given that designated persons might not be members of professional bodies and so might not otherwise be monitored individually, in order to avoid the possibility of a designated person who has been disciplined by one legal services provider moving to another without their new employer being able to check his or her disciplinary background, it is important that a record is maintained. Although heads of legal services will be members of the Law Society of Scotland and will therefore be regulated on a personal basis, amendment 247 will ensure that the performance of heads of legal services is monitored both at an individual and at an entity level.

Amendment 248 essentially sets out that the primary duty on the regulator is to ensure adherence to the professional principles and the furtherance of the regulatory objectives. It seems a little odd that the duty is not already referred to, although I appreciate that, in what is a complex bill, I might have missed a reference to that in some other provision further down the line.

Amendment 249 relates to the regulatory scheme. Section 8(3) provides that

"The regulatory scheme may ... relate to ... one or more categories of licensed provider"

and

"some or all legal services".

Section 8(5) empowers the Scottish ministers to make regulations to enable regulatory schemes to deal with the provision by their licensed providers of non-legal services. However, it is not clear what that is intended to achieve. If it is necessary to authorise the inclusion of such matters in a scheme, such a power should surely be included in section 8(3).

Amendment 250 relates to the Lord President's consent to amendments to the regulatory scheme.

Amendments 247 to 250 are all relatively technical and mostly come from the Law Society, to which I am grateful for suggesting them. However, the amendments raise some not insignificant issues.

I move amendment 247.

The Convener: If no members wish to speak to the amendments, I will briefly say that amendment 250, which is in my name, is based on a principle that has already been established. I will simply adopt Robert Brown's arguments to avoid taking up too much time.

Fergus Ewing: Amendment 247, in the name of Robert Brown, would require that the regulatory schemes for approved regulators

"include provision to ensure that legal services provided by the licensed provider are adequately supervised".

Amendment 55, which is in my name, does something similar, but goes even further, by making the head of legal services responsible for ensuring that designated persons who carry out legal work are adequately supervised and by ensuring that only designated persons can carry out legal work within a licensed provider. Robert Brown's amendment 247 would also require that the regulatory schemes

"include provision to maintain a record of any disciplinary action taken against the Head of Legal Services or any designated person within the licensed provider".

I do not consider that provision necessary. All good regulators will already be expected to keep such records without specific provision being required in the bill.

Amendment 248, in the name of Robert Brown, would require that regulatory schemes of approved regulators

"further the regulatory objectives and ensure that licensed legal services providers adhere to the professional principles."

However, section 62(4) already provides that

"The approved regulator must seek to ensure that its licensed legal services providers have regard to the regulatory objectives."

Under section 38, on key duties, subsections (1)(a) and (1)(b) provide that a licensed legal services provider must

"have regard to the regulatory objectives"

and

"adhere to the professional principles".

Amendment 248 is therefore unnecessary.

Amendment 249, in the name of Robert Brown, would allow the regulatory scheme to

"include any provision authorised by regulations under subsection (5)".

Those regulations can confer authority for the regulatory schemes of approved regulators to deal with the provision of services other than legal services. Therefore, amendment 249 is unnecessary, as authority contained in regulations under section 8(5) would be sufficient to enable an approved regulator to make any necessary changes to its scheme.

Amendment 250, in the name of Robert Brown and supported by Bill Aitken, seeks to amend section 8(4)(b) by omitting the reference to the Scottish ministers consulting the Lord President and replacing it with the requirement that

"the Lord President has consented"

to what is being suggested. As I have already made clear, the Lord President should be consulted on such matters, so I hope that the bill already strikes the right balance.

I invite Robert Brown to withdraw amendment 247 and not to move his other amendments.

11:00

Robert Brown: I accept the minister's comments on the first part of amendment 247. On the issue of disciplinary action and the maintenance of a record, it is important that a record be maintained. However, if the minister is prepared to nod to the effect that that might be covered by the rules, I will be happy to seek to withdraw amendment 247.

On amendment 248, while I appreciate that there is a slightly different provision later in the bill, it is fair to say that the amendment relates particularly to regulatory schemes. It is quite important that there is a requirement up front that regulatory schemes adhere to the regulatory objectives. Amendment 248 goes further, and in a slightly different context, than the section that the minister mentioned.

I am prepared to accept the minister's assurances on amendment 249. We debated amendment 250 with respect to the Lord President, so I have nothing further to say about it. I seek to withdraw amendment 247.

The Convener: For the sake of clarity, Mr Ewing, can the committee assume that you nodded in that direction?

Fergus Ewing: I said in my opening remarks that that is already the case, so I am happy to nod in that direction.

Amendment 247, by agreement, withdrawn.

Amendment 248 moved—[Robert Brown].

The Convener: The question is, that amendment 248 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)
Watt, Maureen (North East Scotland) (SNP)

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

Although amendment 248 has merit, I do not think that it is necessary, so I use my casting vote against it.

Amendment 248 disagreed to.

Amendment 249 not moved.

The Convener: We come to amendment 250, for which I claimed credit but which is in the name of Robert Brown. Do you wish to move the amendment, Mr Brown?

Robert Brown: I am happy to give you the credit and to move the amendment.

Amendment 250 moved—[Robert Brown].

The Convener: The question is, that amendment 250 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 250 agreed to.

Section 8, as amended, agreed to.

Section 9—Reconciling different rules

The Convener: Amendment 19, in the name of the minister, is grouped with amendments 252 and 20.

Fergus Ewing: Amendments 19 and 20 are minor drafting amendments that improve the clarity of the bill. Amendment 252, in the name of Robert Brown, and supported by the convener, seeks to prevent the Scottish ministers from making regulations under section 9(3) without the consent of the Lord President. I do not consider that necessary. Amendment 3 has already provided for consultation where appropriate. In addition, that is essentially a fallback provision, with the general approach being that it is for the approved regulator to resolve regulatory conflict. However, if the use of the power becomes necessary due to unforeseen regulatory problems, it is likely that the Scottish ministers will have to act quickly and decisively to resolve the issue. It may not be possible to obtain consent from the Lord President as quickly as may be necessary. In that respect, and for that reason, amendment 252 is impractical, and I invite Robert Brown not to move it.

I move amendment 19.

Robert Brown: I have no objection to amendments 19 and 20, but I am not sure that the minister's submission about acting speedily and how that would be prevented by requiring the Lord President to consent stands up. We are talking about matters for which regulations would have to come before the Parliament, and therefore the kind of principled, relatively high-level issues for which the consent of the Lord President would be appropriate.

Amendment 19 agreed to.

Amendment 252 moved—[Robert Brown].

The Convener: The question is, that amendment 252 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 252 agreed to.

Amendment 20 moved—[Fergus Ewing]—and agreed to.

Section 9, as amended, agreed to.

Section 10—Licensing rules: general

The Convener: The next group is entitled "Reference to non-solicitor investors". Amendment 98, in the minister's name, is grouped with amendments 101, 103, 105, 107, 109, 111, 112, 115, 116, 176, 121 to 127, 178, 129 to 131, 145, 146 and 167.

Fergus Ewing: In stage 1 evidence sessions, committee members and witnesses asked questions about the potential for criminals or other inappropriate individuals to gain control of licensed providers. Organisations that include the Law Society of Scotland and the Scottish Law Agents Society acknowledged that the fitness-for-involvement test in the bill appeared to be suitable, but the committee stressed the importance of the test being as robust as possible and asked the Scottish Government to consider the matter further, which we were happy to do.

As a result of the definition of an outside investor in section 52, individuals who are designated to undertake legal work in a licensed provider are not subject to the fitness-for-involvement test. That is a concern in relation not to solicitors, who can already own law firms, but to non-solicitors such as paralegals, who can also be designated to do legal work. Individuals who might otherwise be found to be unfit might attempt to avoid the fitness test by being designated under section 47. I therefore decided to lodge an amendment to ensure that all non-solicitor investors in a licensed provider are subject to the fitness test, whether or not they are also designated persons.

Amendment 176 will replace the term "outside investor" in section 52(4)(b) with the term "non-solicitor investor", which will cover individuals who are not qualified to practise as solicitors in Scotland, England and Wales or Northern Ireland or as registered European lawyers. In conjunction with the relevant consequential amendments, that will make non-solicitor investors subject to all the provisions, such as the fitness-for-involvement test, to which outside investors are subject.

I move amendment 98.

The Convener: The Government has done well to respond to a clear concern.

Amendment 98 agreed to.

The Convener: The next group is on exemption from the fitness test. Amendment 21, in the minister's name, is grouped with amendments 99, 108 and 132.

Fergus Ewing: Amendments 21 and 99 deal with drafting. Amendments 108 and 132 relate to the fitness-for-involvement test for investors in licensed providers that sections 49 to 52 deal with. The bill currently imposes the fitness test on every outside investor, regardless of their share of the business. Paragraph 1(2) of schedule 8 also requires that an applicant to be a licensed provider give standard information to the approved regulator, which includes the name and other details of every outside investor or prospective outside investor.

However, the imposition of the fitness test and the supply of the standard information might be impractical if a licensed provider floated on the stock exchange, for example, as it might have an extremely large number of investors. In theory, some investors might have only one of millions of shares. Such small investors would not have control or anything that approached control of the licensed provider.

It is not appropriate or practicable to make such small investors subject to the same fitness-for-involvement test as are investors with larger stakes in the licensed provider. Amendment 108 will therefore insert a new section after section 49 to provide for some exemptions from the fitness-for-involvement test that section 49 sets out. The amendment provides that an approved regulator is not required to satisfy itself as to the fitness of any exemptible investor to have an interest in a licensed provider and is not required to monitor that fitness under section 49(1).

Investors are exemptible if they have less than a 10 per cent stake in the ownership or control of a licensed provider, although the amendment gives the approved regulator the power to apply a threshold below 10 per cent, if it wishes. Licensing rules created by the approved regulator must explain the circumstances in which the approved regulator will apply an exemption and its reasons for so doing. The licensing rules must also explain any threshold for exemption that the approved regulator may apply that is lower than 10 per cent.

Amendment 132 makes changes to the notification requirements in schedule 8, allowing the approved regulator to waive the requirements for licensed providers to give it standard information in relation to exemptable investors. The approved regulator's ability to impose the fitness-for-involvement test on investors with less than a 10 per cent stake is important. That flexibility may be required, as different approaches may be required in relation to different types of licensed provider. For example, large licensed providers that float on the stock exchange could have an extremely high number of investors, each with a very small stake in the business. The risk of criminal influence on such providers is small, so the 10 per cent threshold may be appropriate for them. It is arguable that smaller licensed providers could be more at risk of control by questionable investors, so the approved regulator may believe that it is appropriate to set a lower threshold for them and to apply the fitness-for-involvement test to those with less than 10 per cent ownership or control.

In summary, we have set a threshold of 10 per cent ownership or control but have allowed the approved regulator to set a lower threshold for exemption in its licensing rules. The approved regulator has the discretion to require any outside investor to be subject to the fitness test.

There may be some concerns about the potential for investors of ill repute to use such a threshold to bypass the fitness test. For example, a group of criminals might attempt to control a licensed provider collectively, while individually holding a share of less than 10 per cent. That scenario may not be unfamiliar to the convener and other members.

To address such concerns, I refer first to the approved regulator's ability to use discretion in relation to the application of the threshold. If it believes that it is necessary to apply the fitness-for-involvement test to all investors, regardless of their individual share, it can do so. Secondly, amendment 175 will allow the Scottish ministers to set out what interests are relevant with regard to a particular percentage of ownership or control, and what interests count towards such a stake, including family, business or other associations. The amendment provides the Scottish ministers with the ability to amend, by regulation, the percentage relating to exemptible investors. That will give us the flexibility to deal with the potential situation that I have described—for example, by setting out that criminals who try collectively to control a firm are to be subject to the fitness test by virtue of their associations with one another.

I move amendment 21.

Amendment 21 agreed to.

Amendment 99 moved—[Fergus Ewing]—and agreed to.

The Convener: Amendment 254, in the name of Robert Brown, is grouped with amendments 22, 256 and 23.

Robert Brown: Amendment 254 relates to the provisions that deal with licensing rules. The rationale for the amendment is simple. Licences to providers should normally last a year, as do practising certificates for solicitors—at least, they did when I had one. That arrangement provides a routine check on the set-up, the situation of outside investors and whether their stake has increased. Although there is an obligation to report

such changes, general experience is that that does not necessarily happen, so the annual review and renewal provides a useful opportunity to catch up.

Amendment 256 widens the circumstances in which the regulator should have concerns about the effect on the provision of legal services of approving an entity, and requires the regulator to bring in the Office of Fair Trading. Section 11(2) refers to competition being reduced or distorted. My amendment adds the issue of reduced standards of competent service to that consideration and raises the bar with regard to service quality, which is highly appropriate. That is the nub of a lot of the concerns about the bill, and it is important that we have a robust and substantial requirement on the regulators in that regard.

I move amendment 254.

11:15

Fergus Ewing: Amendment 254, in the name of Robert Brown, relates to section 10, which sets out that licensing rules made by approved regulators are rules about, among other things, the renewal of licences. As the licensing rules are part of the regulatory scheme, the Scottish ministers would review them as part of the process of approving regulators and would not approve the scheme if they felt that the rules on the renewal of licences, including the interval at which renewal should take place, were inappropriate. That is in keeping with the general approach of the bill, whereby approved regulators are free to develop their own rules and procedures within the strict framework that is set out in the bill and subject to the oversight of the Scottish ministers. The amendment would provide that licensed providers' licences would be subject to renewal on an annual basis. Setting that out in the bill would remove any flexibility on the part of the approved regulator to set the renewal interval at a period that it considered to be appropriate, subject to the approval of the Scottish ministers. I therefore do not support amendment 254.

In response to Mr Brown's remarks, I add that it will remain the case that any solicitor who is licensed to conduct legal services by the Law Society of Scotland will continue to apply for his or her practising certificate from the Law Society of Scotland each year as an individual solicitor; we are talking about renewal of the licence of the licensed provider, not of the individual solicitors within it.

Amendment 256, in the name of Robert Brown, relates to section 11, which states that licensing rules made by the approved regulator under section 10

"must provide for ... consultation with the OFT"

when it believes that the granting of a licence application

"may have the effect of ... preventing competition within the legal services market, or ... significantly restricting or distorting such competition."

The amendment would add to the circumstances in which the approved regulator should consult the OFT when it believed that the granting of an application would have the effect of

"reducing standards of competent service within the legal services market".

I have two main issues with the amendment. First, it is unclear what

"reducing standards of competent service within the legal services market"

means. I suspect that the aim is to capture a situation in which the granting of a licence to a body would result in the provision of significantly substandard legal services. However, I would welcome some clarification on that point from Mr Brown, as I do not think that he addressed that in his opening remarks. Secondly, assuming that the intent is roughly as I have suggested, I would argue that the OFT is not an appropriate body to consult. Section 11 relates specifically to issues of competition and the availability of supply, both of which are within the OFT's remit. It is, however, ill-suited as a regulatory body to assess whether standards within the legal services market are likely to drop as a result of the granting of a licence to a particular body. In addition, I suggest that, if an approved regulator felt that a potential licensed provider would provide such a poor service, it would simply refuse to issue a licence. I therefore do not support amendment 256.

My amendment 22 is a drafting amendment.

My amendment 23 adds the word "relevant" to section 12(1)(b)(ii), which clarifies the fact that licensing rules may allow for the full effect of a provisional licence to be conditional only on relevant and not unrelated matters in addition to being conditional on the licensed provider transferring to the regulation of the approved regulator. I assume that that is clear.

I invite the committee to agree to amendments 22 and 23, and I invite Robert Brown to withdraw amendment 254 and not to move amendment 256.

Robert Brown: On amendment 254, the minister talked about the removal of flexibility. That is entirely the point—flexibility should be removed and that should be done in the bill. We are introducing new procedures and new circumstances and are going into uncharted territory in many regards. I accept the distinction between entity licensing and individual solicitor licensing, but nevertheless yearly renewals would

be a useful check. I therefore intend to press amendment 254.

On amendment 256, I do not think that the phrase

"reducing standards of competent service"

is particularly obscure or opaque, but I can give an example. The situation in a rural town might well be adversely affected by a provider coming in in a particular way. In those circumstances, that is a competition issue that the Office of Fair Trading and others, including the regulator, not only should be entitled to have regard to, but should have regard to. One fear that has been expressed about the bill has been about the effect of competition on standards in rural parts of Scotland, so we need a fairly high bar. The phrase

"reducing standards of competent service"

is a fairly obvious and straightforward statement about what ought to be considered.

The Convener: The question is, that amendment 254 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)
Watt, Maureen (North East Scotland) (SNP)

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

There is a parity of votes. I use my casting vote against the amendment, the reason being that the annual renewal requirement in respect of individual solicitors' certificates deals with the matter and the amendment would detract from the flexibility of the proposed system.

Amendment 254 disagreed to.

Section 10, as amended, agreed to.

Section 11—Initial considerations

Amendment 22 moved—[Fergus Ewing]—and agreed to.

Amendment 256 moved—[Robert Brown].

The Convener: The question is, that amendment 256 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)
Watt, Maureen (North East Scotland) (SNP)

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

My casting vote goes against the amendment, as I have difficulties with the definition of the term "competent service". I consider that the amendment is not entirely necessary, albeit that the point is arguable.

Amendment 256 disagreed to.

Section 11, as amended, agreed to.

Section 12—Other licensing rules

Amendment 23 moved—[Fergus Ewing]—and agreed to.

Section 12, as amended, agreed to.

Section 13 agreed to.

Section 14—Practice rules: general

The Convener: We turn to practice rules. Amendment 260, in the name of Robert Brown, is grouped with amendments 24, 262, 25 and 26.

Robert Brown: Beginning at section 14, the bill deals with practice rules. My amendment 260 raises the matter of conflict of interest, which is a challenge that the Law Society has tackled over the years in the solicitor profession. It is not an easy challenge—actually, it is fairly complex—but it is much enhanced when different professionals are joined together. For example, a surveyor in partnership with a conveyancing solicitor might reasonably be said to have a conflict of interest if he is asked to produce a single seller survey for a house sale in which the solicitor is acting for the seller. It seems obvious that the practice rules, as well as covering accounting practices, professional indemnity and standards, should be required to cover conflicts of interest and to regulate them accordingly.

Amendment 262 would enable an approved regulator to apply sanctions in appropriate cases in which a licensed provider fails to meet its obligations under the practice rules. The bill lacks adequate provisions for sanctions to be imposed when a licensed provider fails to meet its obligations. Amendment 262 would address that by providing for performance targets, directions,

censures, fines and amendment or revocation of a licence.

I move amendment 260.

Fergus Ewing: Amendment 260, in the name of Robert Brown, provides that practice rules should also contain material about the avoidance of conflicts of interest. I am sure that, like me, Mr Brown recollects that that issue is already dealt with in the rules and codes of practice of all professional bodies. The professional principle in section 2(f), which requires that providers of legal services

"meet their obligations under any relevant professional rules",

is sufficient to deal with the issue. Furthermore, section 8(2)(b) and section 9 make provision for reconciling different sets of regulatory rules. Therefore, although I understand the importance of dealing with conflicts of interest, I respectfully suggest that they are already dealt with substantially and in principle by the provisions to which I have alluded.

Robert Brown's amendment 262 specifies the measures that may be taken by an approved regulator in relation to a licensed provider if there is a breach of the regulator's scheme or a complaint is upheld. It would have the effect of restricting the types of measure that could be taken by an approved regulator to those that are set out in the amendment. I consider that such provision should not be set out in the bill, so that an approved regulator may consider other measures, so I do not support amendment 262.

In addition, it is not clear under paragraph (a) of the new subsection of section 14 that amendment 262 proposes, which envisages "setting performance targets", what "performance" refers to or what targets might be set. The proposed provision seems vague.

I turn to my amendments. Amendment 24 is a drafting amendment. Amendment 25 relates to the financial penalties that can be imposed on licensed providers.

Section 15(3)(a) provides that a financial penalty that is imposed under section 15

"is payable to the approved regulator".

In its stage 1 submission to the Justice Committee, the Law Society of Scotland raised concerns that that provision allowed an approved regulator to impose and to retain a fine. Further consideration was given to the appropriateness of allowing approved regulators to impose and to retain a fine, and to whether that might encourage regulators to impose fines, by giving them a perverse financial incentive to do so, because they could keep the money. I have decided that it would be more appropriate for a financial penalty that is imposed under section 15 to be paid to the Scottish ministers than to the approved regulator. Amendment 25 provides for that, and will allow the approved regulator to collect the money on behalf of the Scottish ministers.

I turn to amendment 26. The Law Society raised concerns that the provision in section 16(1)(b)(ii) is too broad. It provides that practice rules

"must include provision that it is a breach of the regulatory scheme for a licensed provider to ... fail to comply with its ... duties under any other enactment."

Such a failure by a licensed provider could lead to the imposition of a financial penalty by virtue of section 15.

As the Law Society pointed out, such failures could include failures under companies or health and safety legislation, which might already provide for financial penalties for failure to comply. It does not seem right that the licensed provider could also be subject to a penalty from the approved regulator, which would be additional to those penalties that are envisaged under laws such as health and safety legislation, which, as members know, rightly provide for appropriate penalties to be issued where there is contravention.

Therefore, amendment 26 seeks to qualify the phrase "any other enactment" so that it refers only to enactments that are specified in the regulatory scheme. It would allow the approved regulator to specify relevant enactments, which the Scottish ministers would consider after consulting, among others, the Lord President, when they decided whether to approve an applicant as an approved regulator under section 6.

Accordingly, I invite the committee to approve amendments 24 to 26, and I invite Robert Brown to withdraw amendment 260 and not to move amendment 262.

Robert Brown: I will press amendment 260. The minister is right to say that there are general references to avoiding conflicts of interest elsewhere in the bill, but section 14 includes provision on professional indemnity, accounting and auditing and complaint handing, which could be said to be covered by professional standards elsewhere. The issue is the importance of conflict of interest rules. It seems to me that conflict of interest rules are important and, as I said, they are super-important when different professions are being mixed up. It is therefore appropriate for that to be recognised in the bill in section 14.

I take the minister's point about amendment 262. I intended to broaden it the scope of section 14, but the minister's point, that amendment 262 would narrow it down slightly, is valid. Also, I see a horrendous misspelling of the word "licence" in

paragraph (e) of amendment 262. I will not move it.

11:30

The Convener: That shows a refreshing degree of honesty, Mr Brown, if I may say so.

The question is, that amendment 260 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)
Watt, Maureen (North East Scotland) (SNP)

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

There being parity of votes, I use my casting vote against the amendment, because I consider the avoidance of conflict of interest to be inherent in legal or any other professional practice.

Amendment 260 disagreed to.

Amendment 24 moved—[Fergus Ewing]—and agreed to.

Amendment 261 moved—[Robert Brown].

The Convener: The question is, that amendment 261 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 261 agreed to.

Amendment 262 not moved.

The Convener: That brings us to the end of that grouping and an appropriate point at which to suspend for five minutes.

11:31

Meeting suspended.

11:40

On resuming—

The Convener: The next group is on a ban for improper behaviour. Amendment 100, in the name of the minister, is grouped with amendments 106, 114, 117 and 147 to 150.

Fergus Ewing: Amendment 100 is a drafting amendment. Amendment 114, which will introduce a section with the encouraging title “Ban for improper behaviour”, relates to sanctions on investors.

As you know, the regulation relating to licensed providers in the bill is essentially at entity level. Most of the sanctions that are available are also aimed at entities rather than individuals. Practice rules that are created by approved regulators must set out sanctions that can be imposed at entity level, should the licensed provider breach the regulatory scheme, including by virtue of the actions of connected individuals such as investors. In addition, licensing rules must set out among other things the circumstances in which licences may be revoked or suspended. Therefore, the ultimate sanction for which the bill provides is suspension or revocation of a licensed provider’s licence, which has the effect of preventing an entity from operating as a licensed provider.

At present, section 49(2)(b) requires that licensing rules must provide that, where an approved regulator determines an investor to be unfit for involvement in a licensed provider, it must not issue a licence to the provider and must revoke or suspend the licensed provider’s licence if that has already been issued. In its stage 1 report, the committee expressed some concern about that requirement and the lack of sanctions that can be used against individual investors. The committee suggested that we consider a more targeted approach to sanctions relating to outside investors, which in some circumstances might involve sanctions against the offending individual rather than the entity.

Therefore, as part of my series of amendments to provide even more robust safeguards in respect of external ownership, I have lodged amendments to disqualify investors who have behaved improperly. I am grateful to the committee for making the suggestions that it did at stage 1, which we have acted on.

Amendment 114 will introduce a new section entitled “Ban for improper behaviour” following section 50. That will have the effect of requiring the approved regulator to disqualify a non-solicitor investor from acting in that capacity in relation to

every licensed provider should they contravene section 51(1) or 51(2), which prohibit improper behaviour by investors, who will therefore be banned from involvement in any licensed provider should they be banned from one. Amendment 114 sets out that such disqualification can be permanent or for a fixed period; that the approved regulator must allow the investor in question to make representations to it; that the approved regulator must make certain practice rules relating to disqualification; and that a person who has been disqualified can appeal to the sheriff.

Amendment 114 is part of a package, so certain other amendments should be noted. Amendment 106 will add a new subsection to section 49, which will have the effect of allowing the approved regulator not to act as required by rules that are made under section 49(2)(b) if the licensed provider demonstrates that an investor who has been disqualified no longer has an interest in the business. As I have explained, the rules that are made under section 49(2)(b) require that the approved regulator, on determining that an investor is unfit for involvement, must not issue a licence to be a licensed provider or must revoke or suspend such a licence if it has already been issued. Amendment 106 will not remove the approved regulator's ability to do that but will give it the discretion to decide, having disqualified the misbehaving investor, whether it is appropriate also to revoke or suspend the relevant licensed provider's licence. The amendment can be seen as an extra tool that may be used alongside or instead of those that already exist in the bill.

Amendment 147 will insert a new paragraph into section 68(3), which will have the effect of requiring the approved regulator to keep a list of persons whom it has disqualified as investors under the new section that is introduced by amendment 114. Amendments 148 and 149 are consequential on amendment 147.

In summary, this package of amendments will require the approved regulator to disqualify non-solicitor investors when they contravene section 51(1) or 51(2) and will give it the discretion to choose not to revoke or suspend a licensed provider's licence once the disqualification has taken place. That means that there are powers to punish the right person and not the wrong one.

11:45

Amendment 117 is consequential on amendment 176, which introduces a new category of "non-solicitor investor" to replace "outside investor" in section 52. Amendment 117 inserts the word "improperly" into section 51(2)(a), which prohibits outside investors from interfering with the provision of legal services by a licensed provider. The amendment has the effect of ensuring that investors are prohibited only from interfering improperly in the provision of legal services. Designated persons could otherwise be inadvertently prohibited from carrying out legitimate legal work with the licensed provider that could potentially be classed as interference.

Amendment 150 provides that individuals who have had their disqualification or determination as an unfit person reversed on appeal, or to whom the relevant categories no longer apply for any other reason, are not kept on the list specified under section 68.

I move amendment 100.

Stewart Maxwell: I welcome amendment 100 and the rest of the amendments in the group. I raised this matter when we were discussing our stage 1 report. In effect, the bill contains only the "nuclear option", as I think we described it. In other words, the entire licence would be revoked, rather than the individual outside investor who was causing the problem being targeted. I am delighted that the minister has lodged these amendments, which provide a much more appropriate approach. The bill contains much more flexibility as a result, and I am more than happy to support the amendments.

The Convener: I am grateful to the minister for having addressed a number of the concerns that various members raised previously. It is important to stress that Mr Maxwell was probably in the vanguard in that respect.

Amendment 100 agreed to.

Section 14, as amended, agreed to.

Section 15—Financial sanctions

Amendment 25 moved—[Fergus Ewing]—and agreed to.

Section 15, as amended, agreed to.

Section 16—Enforcement of duties

Amendment 26 moved—[Fergus Ewing]—and agreed to.

Section 16, as amended, agreed to.

Section 17—Performance report

Amendment 101 moved—[Fergus Ewing]—and agreed to.

Section 17, as amended, agreed to.

Sections 18 and 19 agreed to.

After section 19

Amendment 170 moved—[Fergus Ewing].

The Convener: The question is, that amendment 170 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against

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

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

Amendment 170 disagreed to.

Amendment 171 moved—[Fergus Ewing].

Amendment 171A not moved.

The Convener: The question is, that amendment 171 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against

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

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

Amendment 171 disagreed to.

Amendment 172 moved—[Fergus Ewing].

The Convener: The question is, that amendment 172 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against

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

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

Amendment 172 disagreed to.

Amendment 268 moved—[Robert Brown].

The Convener: The question is, that amendment 268 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)
Watt, Maureen (North East Scotland) (SNP)

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

There being equality in votes, my casting vote goes against the amendment.

Amendment 268 disagreed to.

Sections 20 and 21 agreed to.

Section 22—More about governance

Amendment 272 moved—[Robert Brown].

The Convener: The question is, that amendment 272 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 272 agreed to.

Section 22, as amended, agreed to.

Section 23—Regulatory and representative functions

The Convener: Amendment 27, in the name of the minister, is grouped with amendments 274, 28, 29, 278, 30, 279 and 31.

Fergus Ewing: Amendment 274, in the name of Robert Brown, would leave out the wording in brackets in section 23(3). The effect would be that, if the regulatory functions of an approved regulator were prejudiced by its representative functions, the Scottish ministers would be powerless to act. The bill provides that the Scottish ministers cannot interfere with an approved regulator's representative functions unless there is a risk that such functions will prejudice its regulatory functions. Were such prejudice to occur, the Scottish ministers must be allowed to interfere to protect the robust regulation for which the bill provides. Furthermore, they would be under a duty to do so in accordance with the regulatory principles. Therefore, I oppose amendment 274.

Amendment 278, in the name of Robert Brown and supported by the convener, requires that the Scottish ministers must have the consent of the Lord President before making provision by regulation to confer additional functions on approved regulators. As I said earlier, I consider that the appropriate constitutional role of the Lord President lies in his consideration of an approved regulator's expertise in the provision of legal services. I do not consider that conferring additional functions on an approved regulator forms part of that expertise. If it did, the Scottish ministers would consult the Lord President in accordance with section 26(2)(b). Therefore, I cannot support amendment 278. Amendment 279, in the name of Bill Aitken, is consequential on amendment 278.

Amendment 31, in my name, leaves out words in section 27(1) to ensure that guidance on functions that is issued by the Scottish ministers under that section is issued to all approved regulators and may not be issued to individual approved regulators. It appeared to the Subordinate Legislation Committee from the manner in which section 27(1) is expressed that guidance could be issued to a particular approved regulator or to approved regulators generally. The Scottish Government does not intend that guidance should be issued to a particular approved regulator—it should always be issued to every approved regulator. Amendment 31 clarifies that issue. Amendments 27 to 30 are drafting amendments.

I move amendment 27 and invite members not to move the amendments in their names.

Robert Brown: As the minister said, section 23(3) provides a safeguard to prevent the Scottish ministers from interfering in an approved regulator's representative functions, but it is qualified by the bit in brackets at the end. The minister says that there is already a duty under the regulatory objectives at the beginning of the bill but, if our positions were reversed, he might be telling me that the bit in brackets is therefore unnecessary. However, the more substantial point is that there is not much clarification of or information about the grounds under which interference by ministers in the regulatory function might arise or be permitted. Although I appreciate that there is always a desire to have a last reserved power in that regard, the minister should be under a duty to give us some information about the circumstances in which he thinks the need to use such a power might arise. It seems that two separate things are proposed, but I cannot quite see how one will affect the other, particularly if, as he says, the situation is already covered by the duty in the first part of the bill.

The Convener: I see no need to reiterate my previous arguments on amendment 279. I adopt those that I advanced earlier.

Amendment 27 agreed to.

Amendment 274 not moved.

Section 23, as amended, agreed to.

Section 24—Assessment of licensed providers

Amendments 28 and 29 moved—[Fergus Ewing] and agreed to.

Section 24, as amended, agreed to.

Section 25 agreed to.

Section 26—Additional powers and duties

Amendment 278 moved—[Robert Brown].

The Convener: The question is, that amendment 278 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 278 agreed to.

Amendment 30 moved—[Fergus Ewing] and agreed to.

Amendment 279 moved—[Bill Aitken].

The Convener: The question is, that amendment 279 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 279 agreed to.

Section 26, as amended, agreed to.

Section 27—Guidance on functions

Amendment 31 moved—[Fergus Ewing]—and agreed to.

Section 27, as amended, agreed to.

Before section 28

The Convener: The next group is on the performance of approved regulators. Amendment 32, in the name of the minister, is grouped with amendments 33, 283, 284, 34, 288, 289, 291 to 293, 35 to 37, 296, 298, 299 and 286.

Fergus Ewing: In order to support the oversight role of the Scottish ministers in the regulatory framework and to ensure that approved regulators are operating effectively, it will be useful for approved regulators to be required to undertake an annual internal review of their operation as such and to send a report to the Scottish ministers along with their annual accounts. I have therefore lodged amendment 32 to insert a new section before section 28 in which the Scottish ministers require an approved regulator to "review annually its performance". Amendment 32 requires that a report on the review be submitted to the Scottish ministers, who must lay a copy of the report before the Parliament, and it allows the Scottish ministers to make further provision by regulation about both the review and the report.

Amendment 33 is a drafting amendment. Amendment 34 amends section 29(6), which allows the Scottish ministers to make further provision about the measures that they may take in relation to approved regulators that ministers feel are not performing adequately. Given the potential impact of the regulations, the Law Society of Scotland expressed concern that such regulations could be made without approved regulators being consulted. I agree that consultation is appropriate. Amendment 34 therefore requires that Scottish ministers

"must consult every approved regulator"

before making regulations under section 29(6). I am grateful to the Law Society for the suggestion.

Amendment 35 is a minor change, but it will ensure that the approved regulator is not liable for a penalty that is imposed under schedule 4 before being informed that a determination has been made.

Amendment 36 relates to the appeals process. Following the introduction of the bill, the Sheriff Court Rules Council made representations to the Scottish Government in which it suggested that the Government should specify exactly what a sheriff can do with regard to the various rights of appeal. That has been set out for appeals to a sheriff in amendments 66 and 162 and, for consistency, amendment 36 sets out the position for an appeal to the Court of Session under schedule 4. Furthermore, we consider it appropriate that the court's decision should be final and that no further appeal should be possible. I am grateful to the Sheriff Court Rules Council for those suggestions. Amendment 37 is a drafting amendment.

12:00

I turn to the non-Government amendments. Amendments 283 and 284, in the name of Robert Brown, and amendment 291, in the name of Bill Aitken, prevent the Scottish ministers from acting under paragraphs (a), (b), (e) or (f) of section 29(4) or section 29(6) without the Lord President's consent. Amendments 288, 289, 292, 293, 296, 298 and 299 make changes that are consequential on amendments 283 and 284.

As I have stated, the appropriate constitutional role of the Lord President lies in his consideration of an approved regulator's expertise as regards the provision of legal services. I do not consider it appropriate for the Lord President to have the same role as the Scottish ministers, as that would require his office to go through the same thorough decision-making process as the Scottish ministers, with consequent resource issues and duplication of work. I think that I mentioned that earlier. On amendment 284, amendment 34, in my name, provides for consultation with every approved regulator before regulations are made under section 29(6). That might go some way to address concerns about the matter. I therefore do not support the non-Government amendments.

Amendment 286, in the name of Robert Brown, would require the Scottish ministers to report annually to the Scottish Parliament any influence that the existence of approved regulators and

licensed providers was having on competition and the quality of legal services in the market. I suspect that that has been proposed to allow some monitoring of how the regulatory framework is operating and what effect it has had on the legal services market. I believe that the amendment is unnecessary. Amendment 32, in my name, requires approved regulators to review their performance annually in relation to, among other things, the exercise of their regulatory functions. A report must be submitted to the Scottish ministers, who must then lay it before the Parliament. Although the report does not explicitly cover the areas that are mentioned in amendment 286, it will give an excellent idea of how the regulatory framework and alternative business structures as a whole are operating.

On the competition aspect, it should be noted that the Scottish Legal Aid Board is given a duty under section 96 to monitor the availability and accessibility of legal services in Scotland and to give the Scottish ministers advice on that. The provision was drafted to ensure that the Scottish ministers are made aware of any negative impact on access to justice and to allow them to take action if necessary. Therefore, I do not support amendment 286.

I move amendment 32 and invite members not to move the amendments in their names.

The Convener: I call Robert Brown to speak to amendment 283 and the other amendments in the group. He will, no doubt, bear it in mind that some of the arguments on the matter have been well rehearsed this morning.

Robert Brown: Yes. I was not going to repeat any points on the Lord President's powers. We have been there before. I will simply make a couple of observations on amendment 286.

I am grateful to the minister for his comments. There are two differences between amendment 286 and amendment 32. One is that I put the obligation on the Scottish ministers to report to the Parliament, and the other is that amendment 286 specifically refers to effects on

"competition and quality of service in the legal services market".

I do not propose to press amendment 286, but I would be grateful if the minister would confirm that he is happy to have further discussions on the detailed operation of the system. With that assurance, I will be satisfied with the minister's amendment.

The Convener: Again, in respect of amendment 288, I am simply going to adopt previous arguments. The same arguments apply in respect of other amendments in the group.

As no other member wishes to contribute, I invite Mr Ewing to sum up and address the point that Mr Brown made.

Fergus Ewing: I simply say that I am happy to have further discussions with Mr Brown should he feel that we need to consider lodging further amendments at stage 3. I am grateful to him for his comments.

Amendment 32 agreed to.

Section 28—Monitoring performance

Amendment 33 moved—[Fergus Ewing]—and agreed to.

Section 28, as amended, agreed to.

Section 29—Measures open to Ministers

Amendment 283 moved—[Robert Brown].

The Convener: The question is, that amendment 283 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 283 agreed to.

Amendment 284 moved—[Robert Brown].

The Convener: The question is, that amendment 284 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 284 agreed to.

Amendment 34 moved—[Fergus Ewing]—and agreed to.

Section 29, as amended, agreed to.

Schedule 1 agreed to.

Schedule 2—Directions

Amendment 288 moved—[Bill Aitken].

The Convener: The question is, that amendment 288 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 288 agreed to.

Amendment 289 moved—[Bill Aitken].

The Convener: The question is, that amendment 289 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 289 agreed to.

Schedule 2, as amended, agreed to.

Schedule 3—Censure

Amendment 291 moved—[Bill Aitken].

The Convener: The question is, that amendment 291 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 291 agreed to.

Amendment 292 moved—[Bill Aitken].

The Convener: The question is, that amendment 292 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 292 agreed to.

Amendment 293 moved—[Bill Aitken].

The Convener: The question is, that amendment 293 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 293 agreed to.

Schedule 3, as amended, agreed to.

Schedule 4—Financial penalties

Amendments 35 to 37 moved—[Fergus Ewing]—and agreed to.

Schedule 4, as amended, agreed to.

Schedule 5—Amendment of authorisation

Amendment 296 moved—[Bill Aitken].

The Convener: The question is, that amendment 296 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 296 agreed to.

Schedule 5, as amended, agreed to.

Schedule 6—Rescission of authorisation

Amendment 298 moved—[Bill Aitken].

The Convener: The question is, that amendment 298 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 298 agreed to.

Amendment 299 moved—[Bill Aitken].

The Convener: The question is, that amendment 299 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 299 agreed to.

Schedule 6, as amended, agreed to.

After section 29

Amendment 286 not moved.

Section 30 agreed to.

Schedule 7 agreed to.

Sections 31 to 34 agreed to.

Section 35—Step-in by Ministers

The Convener: Amendment 38, in the name of the minister, is grouped with amendments 38A and 307. If amendment 38 is agreed to, amendment 307 is pre-empted.

Fergus Ewing: Section 35 provides for the unlikely event in which no approved regulator is able to regulate some or all of the licensed providers. In such a case, I consider it important that regulation does not cease, so a step-in process is essential. However, the Scottish ministers would step in only if it was necessary to ensure the continued regulation of licensed providers, either by ministers acting as a regulator themselves or by ministers establishing a new body with the intention of it becoming an approved regulator.

The committee and the Law Society raised concerns about Scottish ministers' step-in powers. The committee wrote in its report:

> "The Committee notes that the step-in power is only intended to be used as a last resort but agrees with the Law Society that the Bill should detail when this provision might be used."

Consequently, amendment 38 amends section 35(4) to make it clear that no regulations are to be made unless the Scottish ministers believe that their intervention is necessary as a last resort.

Amendment 38A, in the name of Robert Brown, would amend amendment 38 so that the Scottish ministers could intervene only if they reasonably believed that their intervention was necessary as a last resort. The amendment is unnecessary. The Scottish ministers must act reasonably.

Amendment 307, in the name of the convener, requires that the Scottish ministers must have the

consent of the Lord President before making regulations about stepping in if an approved regulator ceases to regulate. Stepping in must be necessary and the last resort in accordance with the regulatory principles, and may require to be done quickly in an emergency situation. Therefore, I do not consider it appropriate for the consent of the Lord President to be required; furthermore, that may lead to delay, which would not be acceptable in an emergency.

I move amendment 38 and invite members not to move amendments 38A and 307.

Robert Brown: Amendment 38A is a minor amendment, which is designed to qualify ministers' powers slightly more objectively. People are concerned about not going too far in that respect. While it is important that the consent of the Lord President be required in this matter, I am aware of the pre-emption, which probably requires us to deal with amendment 38 and come back later to the matter of the Lord President. I would be interested in other members' views on that.

I move amendment 38A.

The Convener: In speaking to amendment 307, I see no need to rehearse the previous arguments, which have been debated ad nauseam.

Nigel Don (North East Scotland) (SNP): If I have this right, amendment 38 is a fallback, last-resort, emergency power. On that basis, I disagree with the convener. It does not help any minister to have to consult or get permission from anyone else. As I understand it, the amendment is the nuclear option.

Fergus Ewing: I agree with Mr Don, who has succinctly set out the basis for supporting amendment 38, but I remind members that we are talking about a highly unlikely scenario. Nonetheless, for the reasons that Mr Don has just articulated, I urge members to support amendment 38.

The Convener: The question is, that amendment 38A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 38A disagreed to.

The Convener: The question is, that amendment 38 be agreed to. Are we agreed?

Members: No.

The Convener: 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)
Watt, Maureen (North East Scotland) (SNP)

Against

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

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

Amendment 38 agreed to.

Section 35, as amended, agreed to.

Section 36—Licensed providers

The Convener: Amendment 39, in the name of the minister, is grouped with amendments 40 to 43 and 94 to 96.

12:15

Fergus Ewing: Amendment 39 adds the important qualification "valid" to "practising certificate" in section 36(2). The effect is that the licensed provider must have within it at least one solicitor who holds a valid practising certificate. Amendment 40 makes changes to section 36(2) to ensure that a practising certificate must not be subject to conditions imposed by the Scottish Solicitors Discipline Tribunal under section 53(5) of the Solicitors (Scotland) Act 1980. The Law Society suggested the amendment.

Amendments 95 and 96 are drafting amendments, and amendment 41 is consequential to those.

Amendment 42 makes changes to section 37(6). It follows comments from the Subordinate Legislation Committee, which expressed concerns with the first element of the delegated power in section 37(6)(a), which permits further provision to be made about eligibility to be a licensed provider. The amendment splits into two parts the power in section 37(6)(a). The first part will consist of a power to make further provisions setting out additional categories of body that might or might not be eligible to be a licensed provider. That could be used to make fairly substantive changes to the eligibility criteria, so amendment 94 ensures that regulations that are made under it will be subject to affirmative procedure. The second part will consist of a more general power to make

further provision about eligibility criteria. In contrast with the first part, the second part will be used within the context of the criteria that are already set out in section 37 rather than to make any substantive changes. As such, regulations made under the second part of the power will remain subject to negative procedure.

Amendment 43 adds a requirement that the Scottish ministers must consult every approved regulator before making regulations under section 37(6)(b).

I move amendment 39.

Amendment 39 agreed to.

Amendment 40 moved—[Fergus Ewing]—and agreed to.

Section 36, as amended, agreed to.

Section 37—Eligibility criteria

The Convener: Amendment 310, in my name, is grouped with amendments 311 to 315, 317 and 378.

Amendment 310 concerns one of the principal issues in the bill, which has attracted considerable controversy, as we are all aware. It has been necessary for the committee to give the fullest consideration to the matter on the basis that the legal profession is clearly divided about the best route forward.

We have had a choice of options. The option as outlined by the Government in the bill as introduced is the one that is on the table today. Some have taken the view that there is no place for alternative business structures in the Scottish legal profession. One amendment was disposed of last week, after being lodged by Mr Kelly. Another amendment, which is before us today, represents one view that has been given by the legal profession and which is encapsulated in the amendments in the group.

We have to listen to the arguments carefully. One of the principal arguments that has been advanced throughout the bill process surrounds outside investment and the degree of independence, and how they might impinge on the Scottish legal profession. On that basis, after the fullest consideration, I think that amendment 310, as it might be augmented later, would enable the Scottish legal profession if not whole-heartedly to support it, at least to recognise that it allows a way forward.

It must be remembered that the bill is permissive. There is no compulsion on any practitioner or group of practitioners to avail themselves of the powers that the bill confers on them. It will be interesting to see, some years down the road, how many have availed themselves of those opportunities. I suspect that, at the end of the day, not all that many will do so. However, it is important that those who wish to make use of such opportunities should have them. At the same time, I recognise that it is essential that the majority control and ownership of any legal entity or any entity that puts itself forward as a provider of legal services should be vested in legal practitioners. That is the basis on which I lodged the amendment.

I move amendment 310.

Robert Brown: With great respect, convener, I dissent from your suggestion that the bill is permissive. In technical terms, it is, but in practical terms, it is likely to alter substantially the environment in which the legal profession operates. It is, therefore, slightly tautologous to say that the bill is permissive. Otherwise, I agree with your comments.

Amendment 317 is designed to ensure that there is a majority holding in the hands of solicitors or other regulated professionals. It is the compromise position that was debated and supported by the Law Society of Scotland. I hope that it has the merit both of being reasonable and, as the convener indicated, of being common ground on which the profession can regroup, to some extent.

I do not pretend that it is the perfect solution—there are issues with all the potential solutions—but it provides further protection against outside control, which is, rightly, of concern to many solicitors. Last week we debated issues relating to the rights of minority investors. It is certainly the case that influence is as relevant as control. Nevertheless, amendment 317 would put a brake on the extent to which law firms can be taken over by outside interests. The committee should apply that brake.

A useful distinction that the Government may believe has merit in this context is that between professional ownership, whether of solicitors or of other professionals, about which there is less controversy, and ownership by outside commercial interests. Broadly, there is support for the concept of multidisciplinary practices, but there is far less support for the idea of outsiders—Mr Big Money or Mr Mega Corporation—taking control of legal firms. That is not the basis for amendment 317, but it may be worth exploring further the proposal that commercial as opposed to professional interests be allowed a smaller stake, at least in the beginning.

Government amendment 378 is relevant in that context, because it allows the Scottish ministers to amend by statutory instrument the percentage that is specified in the section on majority ownership, assuming that the amendments are passed, or to

repeal the section. Regulations to make such amendments can be made only if they are

"compatible with the regulatory objectives, and ... appropriate in any other relevant respect."

Scottish ministers are required to consult the Lord President, the Law Society, other approved regulators, the OFT and

"such other person or body as they consider appropriate."

I am minded to support amendment 378, but the provision should be seen as a long stop rather than something to be rushed into too quickly. The Scottish ministers have free rein to alter the percentages, subject to approval of the regulations by Parliament. In the view of the Law Society, that could act as a disincentive to investors in licensed providers. It reduces the confidence that those investors might have and introduces a measure of uncertainty. More important, it is not clear under what circumstances the powers would be exercised and what the criteria would be. That is not specified in the bill or in any of the minister's amendments. I invite the minister, when he replies, to satisfy the committee on those points, which apply regardless of whether the amendments are agreed to.

The Convener: This is an important issue in the bill.

Stewart Maxwell: We discussed the issue at length last week, although with a different percentage figure in mind. I accept that the figure that is proposed is better than that of 25 per cent, but I continue to hold the view that it is wrong for us to go down this road, for a number of reasons.

First, as members are aware, the bill is permissive. It allows those who wish to enter a structure of the type that is proposed to do so, but it forces no one to do anything. I disagree with Robert Brown on that point.

Secondly, as we discussed last week and at previous committee meetings, there is a fundamental point here about the ability of the regulator—for example, the Law Society—to regulate the profession. It seems rather perverse to impose a cap of any sort on the percentage of an ABS that non-solicitors could own. It would be for the regulator to decide whether 49 per cent was appropriate or whether it should be a different figure. That is a matter for the profession. We often talk about the independence of the legal profession but, in this case, we seem to be interfering with that independence in a rather odd way.

However, my main objection to amendment 317—although I am also talking about amendments 310 to 315—is that, if it were passed, that would eliminate the opportunity for small firms and sole practitioners in particular to become ABSs because of the requirement for a 51:49 split. I will give an example. If two individuals—an accountant and a solicitor—wished to go into practice together in an ABS, they could not have an equal partnership because the solicitor would need to have a 51 per cent share. Equally, if three accountants and a solicitor wished to join together, they could not form such a practice, as the solicitor would need to have a 51 per cent share—there would be no equality in the ownership of the firm. That is why I cannot support the amendments.

James Kelly: The central issues that the committee and the Parliament have grappled with in considering the bill are the independence of the legal profession and how we can modernise that profession in order to gain the boost to the Scottish economy that might result from new business structures. In examining the issues, we have considered the 25:75 ownership split that was suggested by my colleague, Bill Butler, last week, although that proposal was defeated. We have another proposal on the table today for a 51:49 ownership split, the merits of which I recognise. I am not whole-heartedly behind it, as I have some reservations about it, particularly given that the 51 per cent share could be held by members of other regulated professions. However, I recognise that it is an improvement on the 100 per cent ABS position that was put forward by the Government. As I outlined last week, the desire is to protect the independence of the Scottish legal profession while opening up economic opportunity to legal firms. Therefore, I support the amendment at this stage although I will seek to amend the provision at stage 3.

I do not think that Stewart Maxwell's point about small businesses being unable to be ABSs is valid. He said that the amendment would not allow an accountant and a lawyer to join together. However, when businesses were formed, that could be done on the basis of share ownership. As I understand it, under company law, a business could be set up in which the lawyer had the majority share of ownership under the terms of the amendment and that would still allow small businesses of accountants and lawyers to come together, which is one of the bill's objectives.

I support amendment 378, in the name of the minister. There has been an element of our feeling our way through the subject. We have argued for and against different percentages, but the reality is that there has been a lack of evidence to demonstrate substantially how either of the suggested percentages would work in practice. Therefore, it is correct that there should be a stipulation to allow an appropriate SSI to be produced at a future date if it is felt that the percentage that is set is inappropriate. Nevertheless, I agree with Robert Brown that that

should be a last option and that ministers in any future Administration should not propose it lightly.

12:30

Fergus Ewing: The amendments in the group are at the heart of stage 2 consideration of the bill. I welcome the debate and the tone in which all members have conducted it. I particularly welcome the clarification that the bill is permissive—it is not compulsory and does not require solicitors to take advantage of ABS. Many members have made that important point.

I emphasise that the bill contains a particularly Scottish solution. We have devoted much time today to the small print of the regulatory regime—at times, members might have felt that watching paint dry would have been a diverting alternative for interest. It is important that we have a robust regulatory regime. I can recall having been involved in debating no more robust regulatory regime as a member of the Parliament for the past decade.

That regime will also be obtained at virtually no expense to the taxpayer. That contrasts with the position down south, where the Legal Services Board's implementation costs to 31 December 2009 were £4.58 million and its budget for running costs in its first full year, which began in April 2010, is £4.74 million. Similar costs here would not be as high as that, but would be comparable. I hope that the Chancellor of the Exchequer is listening. He might be urged to borrow the Scottish system in considering how measures operate down south. Who knows?

Press reports about the bill have almost invariably dubbed it "Tesco law". However, as far as I am aware, Tesco has expressed no interest in undertaking Scottish legal work, perhaps because it is probably much easier for Tesco to continue to make huge profits by selling vast quantities of food and drink. "Tesco law" is a misnomer for the bill. That misnomer has fostered misunderstanding and engendered a misapprehension that might cause Scotland to miss out on an unparalleled opportunity to create jobs and to grow the economy at virtually no cost to the Scottish taxpayer.

Some of the wilder arguments that have been made against the bill have more to do with superstition than with supermarkets. It would be more accurate to call the bill the Scottish legal enterprise and jobs bill or SLEJ, if members wish. Even if Tesco and its rivals were interested in taking on Scottish legal work, should Scottish solicitors be afraid? Absolutely not. Lawyers provide services; supermarkets sell goods. If lawyers provide a good service, as I believe they do in the main in Scotland, they have nothing to fear from any supermarket or from anything else.

I firmly believe that the model of external ownership in the bill offers significant benefits to legal professionals and consumers. The full ABS system, with the possibility of 100 per cent ownership by external investors, will allow firms to develop innovative new business models, to go into partnership with other professionals and to raise external capital to support their development and expansion. Consumers will have access to the new business models and will benefit from an increasingly competitive legal services market that is populated by traditional firms, law firms that operate under the new business models and new entrants.

I understand the concerns about such an increase in competition, but I am confident in Scottish firms' ability to innovate and thrive in such an environment, and to take full advantage of the new flexibility that the bill will offer. That approach was endorsed, albeit narrowly, by the legal profession in a recent referendum of the entire membership. It was also supported at stage 1 by the Justice Committee, which acknowledged in its report that

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

I respectfully agree with that conclusion, which was reached by the committee and is set out in its stage 1 report.

Amendment 317, in the name of Robert Brown, would impose a cap on the percentage of ownership or control that an external investor could have over a licensed provider. Only solicitors or members of other regulated professions would be able to own a majority share of such a firm. Amendments 310 to 315 are consequential on amendment 317.

Although amendment 317 would maintain some of the benefits of the bill—for the reasons that the convener and Mr Brown have set out—I respectfully suggest that there are some significant downsides to it. Significant restrictions on the type of business model that legal services could adopt would remain, thereby limiting the flexibility that the current provisions allow. Solicitors would continue to hold an unnecessary monopoly of the ownership of firms that provide legal services, which would undermine one of the key concepts behind the bill—that one should not have to be a solicitor to own a firm that provides legal services. As Mr Maxwell pointed out in the stage 1 debate, one does not have to be a pilot to own an airline, nor should one have to be. The

ability of firms to access external capital would be restricted, which could affect their ability to compete with firms in England.

There would be fewer new entrants to the legal services market, because few—if any—non-legal firms would meet the ownership criteria. That would largely remove the potential increase in competition in the legal services market, with the resulting impact on the benefits to consumers. The 51 per cent solicitor-ownership requirement would prevent a solicitor from entering a partnership with, for example, an estate agent or paralegal, and would restrict options for sole practitioners. Those are arguments that I have advanced and which Mr Maxwell has repeated today.

Finally, the proposed compromise—which was, in large part, designed to reunite the legal profession, which is a worthy objective and something that we all want to see, as far as it is possible—may, unfortunately, fail. It must be recognised that that has been demonstrated in the numerous votes and meetings that have taken place over the past few months. Many solicitors feel strongly that the bill should not be passed and are unlikely to be won over by the compromise.

For those reasons, I am unable to support amendment 317 and the related consequential amendments as they stand. Nevertheless, I recognise the breadth of opinion on the issue and respect the views of those who have argued for a more restrictive model of external ownership. I have met many of the people who have concerns about the external ownership aspects of the bill, including individual solicitors such as Walter Semple and Craig Bennet. I respect them and others whom I have met for their sincerity and their commitment to the protection of both the profession and the consumer: that commitment is in no doubt whatever.

Over the past few months, we have tried to maintain a listening approach, which has resulted in a great many of the amendments that we have lodged and discussed this morning and last Tuesday. Those have included the enhancement of the role of the Lord President and the introduction of regulation for non-lawyer will writers—an issue that we will come on to consider.

Therefore, although I maintain that the bill as drafted represents the best approach, I place on record that I understand the concerns of those who disagree, including the convener and other committee members. I feel that it is important that we continue to work together to find a way forward that is acceptable to all concerned. It is crucial that all parties be able to have their say, and that the legal profession is given the opportunity to reflect fully on the various arguments that have been put forth. There will be a long period for reflection over the summer, when that reflection will, no doubt, take place. If amendment 317 is agreed to, I will need to consider in detail whether there are any issues regarding how it will affect the bill as a whole, and whether amendments will be required at stage 3 to ensure that everything will operate as it should. I suspect that such amendments may be technical in nature.

Amendment 378 seeks to add to the bill a section that would allow the Scottish ministers, after consultation of relevant bodies, to make secondary legislation—which would be subject to the affirmative procedure—to alter the percentage that is specified in subsection 1(a) of the new section that amendment 317 proposes, or to remove that proposed new section altogether.

I will say a bit more about that, in response to the points of Mr Brown and Mr Kelly. First, I stress that amendment 378 is not an attempt to negate amendment 317, should it be agreed to. Rather, it is a measure to ensure that we retain flexibility, the need for which Mr Kelly emphasised and to which Mr Brown alluded. An unforeseen change in circumstances may require an increase or decrease in the percentage that is stated in amendment 317. We simply cannot predict the future with certainty.

Similarly, if the protection that is offered by a cap on external ownership becomes an obstacle instead of an aid, we may well need the ability to revisit it or to remove it altogether, if necessary. The large firms have stressed that although they could live with such a compromise, it is crucial that we maintain flexibility. If full ABS—which will soon be possible in England—is a success, the proposed compromise may at some point hinder the ability of Scottish firms to compete on a level playing field. Were that to happen, we would need to be able to consider the situation and, if there was sufficient evidence, to take action. If we could not do so, we could be returned to the position in which such firms threaten to leave Scotland in order to take advantage of the business structures that are available south of the border. Ian Smart, a former president of the Law Society of Scotland, estimated that such a move might cost the Scottish economy £500 million and would seriously imperil the viability of the guarantee fund.

As there has been some discussion around the issue, I should add that no one is suggesting that the firms in question would physically move to England; the suggestion is that they would register their solicitors there and that those solicitors would continue to work in Scotland, but as foreign lawyers.

As I said, regulations that were made under amendment 378 would be subject to the affirmative procedure and could be made only following consultation of various bodies if it was believed that such action was

"compatible with the regulatory objectives, and ... appropriate in any other relevant respect."

I feel that amendment 378 will be crucial if amendment 317 is agreed to; otherwise, amendment 317 would lock us into an unproven business model and would give us little ability to change it at short notice should problems arise.

In conclusion, I was encouraged to hear Mr Brown, the convener and Mr Kelly express their support for amendment 378. That is appreciated, as is the tone and substance of the debate, which has been extremely useful and which I hope will be read carefully by all the people outwith the Parliament who have taken a close interest in the bill's proceedings. I invite the convener to seek to withdraw amendment 310 and not to move amendments 311 to 315, and I ask Robert Brown not to move amendment 317. If, however, those amendments are agreed to, I invite the committee to agree to amendment 378.

The Convener: Thank you very much indeed.

Despite the minister's occasional lapse into hyperbole, there was much in what he said with which we could all empathise. It is important to stress that, in my view, the Government has done everything possible to achieve a reasonable outcome on this aspect of the bill, which is clearly the part of it that has attracted the greatest degree of controversy and concern.

As I see it, there are three principal arguments at stake, the first of which is economic. Our not introducing some form of ABS in Scotland would present clear risks. The second argument is about the independence of the legal profession, which I hope we can address through the amendments in this group and the various changes in regulation that we have sought to implement. The third is about the regulatory steps that we have taken in themselves, which I think are constructive.

It has been unfortunate that we have not been given a clear lead by the legal profession. I could comment that we would require the wisdom of Solomon to make a determination. We do not have that wisdom, so we can simply do our best. We have listened to the arguments with great care and have debated the matter as thoroughly as we can.

Accordingly, given the offer that is on the table, I will seek the committee's permission to withdraw amendment 310 and, in deference to Robert Brown's amendment 317, I will not move amendments 311 to 315.

12:45

I have also listened carefully to, and have been persuaded by, the arguments that have been put forward by the minister in respect of amendment 378. If we are to proceed with this matter—I think that the view will be that we should—we must do so with caution. We must leave open various options for the future, in case such options require to be implemented.

I thank everyone around the committee table for the civilised way in which this fairly fraught debate has been conducted; it has been conducted in a professional manner. On that basis, I seek the committee's approval to withdraw amendment 310.

Amendment 310, by agreement, withdrawn.

Amendments 311 to 313 not moved.

Amendment 41 moved—[Fergus Ewing]—and agreed to.

The Convener: We now turn to the issue of will writers, which I think will be fairly straightforward. Amendment 173, in the name of the minister, is grouped with amendments 179 and 180.

Fergus Ewing: The regulatory model for non-lawyer will writers, which will be debated later, is based on the model that has been proposed for confirmation agents in part 3 of the bill. Although some provisions are replicated in appropriately modified form for the purposes of regulating will writers, the sections to which the amendments relate will simply be modified to apply to both confirmation agents and will writers.

Amendments 173, 179 and 180 will add references to will writers in addition to confirmation agents in various sections of the bill. The effect will be to make the provisions in sections 37, 57 and 58, relating to confirmation agents, also applicable to will writers.

Amendment 173 will add "will writer" to the definition of "individual practitioner", which is contained in section 37(5) of the bill, and will mean that an entity is eligible to be a licensed provider if it has a solicitor and will writer within it.

Amendment 179 will prevent licensed providers from employing as a designated person an individual who has been prohibited from acting as a will writer.

Amendment 180 will make it an offence for an individual who has been prohibited from acting as a will writer to seek or to accept employment by a licensed provider without informing that employer of the debarment. The amendments are all consequential on the new provisions relating to regulation of non-lawyer will writers in part 3 of the bill.

I move amendment 173.

Amendment 173 agreed to.

Amendment 314 not moved.

Amendment 42 moved—[Fergus Ewing]—and agreed to.

Amendment 315 not moved.

Amendment 43 moved—[Fergus Ewing]—and agreed to.

Section 37, as amended, agreed to.

After section 37

Amendment 317 moved—[Robert Brown.]

The Convener: The question is, that amendment 317 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)
Watt, Maureen (North East Scotland) (SNP)

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

Amendment 317 agreed to.

Section 38 agreed to.

The Convener: At this stage, I propose to conclude the public part of the meeting. We will resume consideration of the bill next week. I thank everyone for their contribution to what has been a fairly hard-working morning.

12:49

Meeting continued in private until 13:06.

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