Justice Committee

Scottish Court Service recommendations for a future court structure in Scotland

Written submission from Sheriff Braid

Response prepared by Sheriff Peter Braid, Haddington Sheriff Court.

Introduction

[1] I was appointed as a sheriff in 2005, spending the first year or so as a floating sheriff in Tayside Central and Fife, in the course of which I sat in all ten sheriff courts in that sheriffdom, including a three-month stint in Dunfermline (a busy court). Following almost five and a half years in Kirkcaldy (also a busy court), I then transferred to Haddington, where I have sat as the sole resident sheriff since June 2011. I therefore consider that I am uniquely qualified to comment on the nature, and volume, of business at Haddington and to compare it with that in other courts. As a general opening observation, I have not sat in a more efficient court than Haddington. There are no significant delays in fixing routine business; and the programme and accommodation are flexible enough to accommodate urgent business which arises from time to time, usually, but not always, in relation to children. A further general comment, since recent public statements have been made suggesting that the court is not busy, is that in terms of shrieval time on the bench, Haddington stands favourable comparison with most courts in Scotland. SCS for some reason no longer makes these statistics generally available but for the last period for which I have been able to find the figures, the average court time per day spent on the bench was higher in Haddington than in Edinburgh. This bears out my practical experience, which is that my average day is at least as busy in Haddington as it was in Kirkcaldy.

[2] It is also worth stressing at the outset that although I am the sole resident sheriff, Haddington is not truly a one-sheriff court. It has two court rooms, and on many days both are in operation. In the year 2011/12 it had 312 shrieval sitting days, which equates almost exactly to 1.5 sheriffs (it being assumed that a sheriff sits on 205 days per annum, after due allowance for leave, training and sickness).

[3] It is unfortunate that in some recent pronouncements on the level of business in the court, the impression has been given that the court is not busy, by statements such as that there are “only” 55 summary trials. As the simple statistic in the last paragraph shows, it is a busy court which takes up a considerable amount of shrieval time. I do not wish to get bogged down at this stage in a discussion about the statistics, but I would make the point that it is misleading, in forming a clear picture as to how busy the court is, to focus only on one particular kind of work, or one particular stage of the summary crime process, which does not provide a reliable indicator of the volume of work, or people, passing through the court. I refer to Appendix 1 to this submission, in which I correct certain statements about the nature of the business in Haddington, so as to ensure that any decision which is reached is not based upon any misconceptions. Thereafter, I refer to Appendix 2, in which I set out my own estimate of the number of people attending the court annually, based
upon my observations over two years, and my knowledge of the numbers of people in fact appearing before me.

The bigger picture

[4] In order to test the validity of the current proposals, including that to close Haddington Sheriff Court, it is instructive to have regard to the SCS consultation document shaping Scotland’s court services issued in September 2012. The context in which change was said to be necessary included a need to save costs, in the face of a reduction in budget, and other on-going reforms to the justice system including the recommendations for civil justice reform proposed by Lord Gill and for the conduct of sheriff and jury business, recommended by Sheriff Principal Bowen. At the same time, it was stated that SCS “look for opportunities to share facilities with other justice sector organisations”, with Livingston being held up as an example of the “arrangement to which we aspire”, the court facility forming part of the civic centre which houses the local authority, police, procurator fiscal and other agencies.

[5] It is worth stating at this stage, in light of my opposition to the proposals, that I acknowledge wholeheartedly that there is a need for change, and that there will be imminent, and necessary, changes in the manner in which justice is delivered in Scotland. As stated, those changes will be both to civil and to criminal justice, and they are likely to be far reaching. The changes will include the likely introduction of summary sheriffs, in implement of the proposal in the Gill report (at paragraph 176) that the new judicial office of district judge be created, to deal with summary criminal business, civil claims of a modest value and certain family actions. This was said to promote specialisation at shrivial level “while maintaining, where practicable, the principle of access to local justice.” Those proposals are of course now themselves the subject of consultation (Making Justice Work) but it is not unreasonable to surmise that they will be enacted in something akin to what is proposed, resulting in the creation of a third-tier judiciary and the transfer to the sheriff court of many cases currently pursued in the Court of Session, following the increase in the exclusive competence of the sheriff court to £150,000. Those, and other, changes are bound to have significant impact on the workload of the sheriff court.

[6] Unless there is a financial imperative, it is illogical and irrational to take decisions to close courts, particularly busy courts, before it is known what impact the other likely changes will have on the business in both those courts, and the courts which will require to receive their business. In the particular case of Haddington/Edinburgh, for example, for the reasons which I outlined in some detail in my response to the consultation shaping Scotland’s court service (an edited version of which is reproduced as Appendix 3), I do not consider that Edinburgh will be able to cope with the considerable influx of Haddington business; or, at the very least, I consider that the SCS projection that it can is over-simplistic and flawed. In summary, SCS has stated simply that it has reached the conclusion that Edinburgh can cope, by comparing the number of court days available with the number of court days actually used in the two courts, but that is a very theoretical approach which pays no regard to the practicalities of programming business into the future; and also fails, significantly and fatally, to make any attempt to predict what the future business will be in light of the other justice reforms. In Edinburgh’s case, that will include the introduction of personal injury business, as well as much civil business which is currently litigated in the Court of Session, of which one would imagine there is a
significant amount. I am not alone in holding the view that Edinburgh cannot cope. I am aware that others who have experience of both Edinburgh and Haddington, and are aware of the current business passing through both courts on a daily basis, share that view. The reliance which can be placed on SCS’ assertion that Edinburgh can cope is further weakened by the fact that significant swathes of work have simply been ignored, at least in their public pronouncements on the issue. In particular, no mention is made of cases involving children, which form a significant part of Haddington’s workload, or of permanence and adoption cases. To the best of my knowledge, SCS does not maintain statistical records of such actions and is accordingly not in a position to state how many there are, and how long they currently take to be dealt with. The view that Edinburgh can cope with Haddington’s business is, with respect, no more than a guess.

[7] In summary, the short answer to the SCS proposals to close courts is that no decisions can rationally be taken about closures until it is known what impact the other proposed changes will have. Once that is known, and the level of future, as distinct from past, business can be predicted, then and only then can a proper decision be taken as to where courts should be situated, and what tier(s) of judges should sit in those courts.

Haddington

[8] Turning next to consider the specific proposal to close Haddington, I comment in Appendices1 and 2 on the current levels of business. Suffice to stress here that it is a busy court. It is important to have clearly in mind that, unlike some of the courts proposed for closure, Haddington is not proposed for closure through lack of work but simply because it lies within 20 miles of Edinburgh. It has always been accepted by SCS, therefore, that, but for geography, Haddington’s existence as a viable sheriff court would not be under threat. It is no part of the SCS case for closure, and never has been, that Haddington is not a busy court, or that it is a lack of business which makes it unviable.

[9] The nature of the business in general terms comprises a significant amount of summary crime, which in very broad terms takes up an average of three days per week; a significant amount of family cases, including child welfare hearings, permanence and adoption cases, and referrals and appeals from the children’s panel; and miscellaneous other work including solemn crime, and civil work of various types including what might loosely be categorised as housing cases.

[10] Without in any way detracting from the high quality of work which passes through Haddington, including complex and high-value civil cases, and its fair share of heavy-duty crime, it is evident from what I have said thus far that Haddington is precisely the sort of court which might be considered suitable to be presided over by a summary sheriff, with jurisdiction to hear summary crime, housing cases and family actions. While I am unwilling to concede without further debate that that would be appropriate or desirable, I do consider that there is a debate to be had, particularly in light of the desideration in Gill that the new third tier judiciary would dispense justice locally. (Further, lest it be thought that my opposition to the closures is out of self-interest, I further acknowledge that if the view were taken that Haddington should become a summary sheriff court, I would co-operate in any transfer to allow that to
happen sooner rather than later, although my deployment is ultimately outwith my control in any event.)

[11] Yet, despite the arguments which could clearly be deployed in support of Haddington becoming a summary sheriff court, it seems that that debate is not even to be had, despite the fact that it would both result in a saving of costs (summary sheriffs being cheaper), and avoid the risk of closing the court and transferring all business to Edinburgh only to find that Edinburgh is not, after all, able to deal with that business as efficiently as at present. Why can that be?

[12] It cannot be because local justice would still be achieved. In fact, the proposal contravenes two acknowledged principles (D and H) of the Principles for the Provisions of Access to Justice, which are respectively: that it is desirable that criminal justice be delivered locally; and that it is important that courts provide information about their work to communities or individuals with particular interest in given cases and to the public more generally.

- By no stretch of the imagination will East Lothian be receiving local justice if in future all cases are heard in Edinburgh. Not only will the ability to drop into the court to observe cases of interest be lost, but the reporting of all but the most serious cases is likely to end. Whereas the local paper currently can keep the local community well informed about who is appearing in court, what offences they have committed and how they are dealt with – which serves both to inform the community and to act as some form of deterrence – by attending the main criminal court on a Wednesday, that facility will be lost. There will in future be no East Lothian Court. Offenders will appear across a variety of courts in Edinburgh, on every day of the week, subsumed into the general, and much greater, populace of Edinburgh.
- There will be a loss of the greater consistency of approach which is inevitably taken by a single resident sheriff, as well as the ability to send a message to the local populace regarding certain types of offending behaviour.
- Also lost will be the holistic approach which a resident sheriff in a local court can take, having regard to the cross-over between civil and criminal cases. A criminal case can inform the approach taken, say, to a family action; and vice versa, resulting in a better informed and therefore higher quality of justice all round.
- Journey times in general will be longer and more difficult – more witnesses and accused persons are likely to fail to attend, leading to increased delays and costs.
- A local court is much better placed to round up recalcitrant or forgetful witnesses, without the need to adjourn, or worse still, desert the case. Only this week, some witnesses did not attend at the due time for a jury trial. In Edinburgh, a warrant would no doubt have been sought, and the case delayed for at least a day, possibly longer, at cost to the public purse. What actually happened was that local police officers visited the witnesses and “reminded” them to attend voluntarily, which they did later that morning with the result that the trial was able to start. This is not atypical, and a benefit of local justice which should not be underestimated.
- No account is taken of the special needs of the elderly and infirm, many of whom do attend court for (eg) guardianship hearings and who are likely to find
the journey to Edinburgh Sheriff court (with limited parking available) difficult or in some cases impossible. Haddington for the avoidance of doubt has disabled access.

- The ability to obtain advice locally is likely to be impeded as fewer solicitors will find it viable to trade within East Lothian.
- Now that Alloa is to remain open, East Lothian will be the only local authority area in Scotland to have no court of its own, but, ironically, also the only local authority area whose population is projected to increase.

[13] Nor can it be because there is a financial imperative. In fact, relatively paltry recurring sums would be saved. Further, since the SCS proposals were announced, East Lothian Council has made no secret of its willingness to contribute to, or meet in their entirety, those running costs reducing still further the costs of keeping the court open. In addition, SCS have stated that there are one-off maintenance costs to be incurred of £471,000. But as I understand it, were the court to remain open, that expenditure is neither planned nor seen as necessary. Rather it includes sums which might be spent in an ideal world with no shortage of money, but not otherwise. Not to spend that money does not amount to a saving in the true sense of the word. If I decide not to purchase a new car at a cost of £31,500, that does not mean that I have saved £31,500. I have simply chosen not to spend my money in that way. So, I submit that there is no financial imperative, or at any rate, not one which has been demonstrated by cogent and robust analysis.

[14] Against all that background, the decision to close Haddington at this time appears all the more untenable when one considers the location of the court. In a broad sense, it lies within the heart of the area which it serves and is therefore reasonably easily accessible by all residents of the county (and not just by those who happen to live in the west of the county, that is, in the part closest to Edinburgh). Although it was built in a bygone age, it is hard to fault the modern-day logic of situating it in the centre of the county rather than at one of its outer reaches. However, it is also important to appreciate where the court lies in relation to court users and agencies. The social work department shares the building (and I understand that the local authority is prepared to work in collaboration with SCS to improve still further the facilities which might be offered, if the present arrangements are considered unsatisfactory)\(^1\); the police station is about 150 yards along the road in one direction and the procurator fiscal’s office about the same distance away in another. While not on all fours with Livingston, is this not the very sort of arrangement to which SCS tells us it aspires?

[15] The risks of transferring the business to Edinburgh and then finding that Edinburgh cannot cope cannot be overstated. The business could no doubt be accommodated at some level, but the critical question is whether it could be accommodated without a significant loss of efficiency. At a time when it is universally acknowledged that cases involving children should be dealt with more quickly and efficiently than has happened in the past, it is counter-productive and potentially damaging to the children involved, to transfer cases from a court which is currently able to manage the case load effectively and within the statutory time limits, to a court which may not be able to do so. Even if Edinburgh currently deals with that

\(^1\) Such as by offering a room for child witnesses: see Appendix 1
level of business as efficiently as Haddington – which cannot be verified as no statistics exist, but anecdotally, it does not – there is no guarantee that it could cope with the additional level of business. Per head of population, Haddington currently deals with a greater number of adoption and permanence cases than Edinburgh. To put this in context, in the year to October 2012, 11 adoption petitions and 21 petitions for permanence orders were presented to Haddington Sheriff Court. 2 adoption proofs proceeded (although many more were fixed, the remainder settling before proof). This trend has continued with a further four-day proof taking place in November 2012, another five day proof in April/May 2013 and yet another one due to take place in August. Note that during those days, Haddington will be running two courts. These allocations are typical of the minimum required in such cases (where the sheriff principal’s practice note, soon to be replaced by more rigorous case management rules, requires sufficient time to be set aside for the proof to be heard at one continuous sitting). It is common to allocate five days for a proof. As a percentage of total business, Haddington deals with many more of such cases than does Edinburgh. Such cases take up a considerable amount of court time. Apart from the proof, they have to be judicially managed, taking up further shrieval time (both in terms of preparation, and on the bench, that is, in an available court room). At a bare minimum, at least two additional hearings per case are required whenever a case is opposed (the preliminary hearing and at least one pre-proof hearing) but typically, to ensure proper judicial control, a minimum of four or five hearings take place. Do not underestimate the difficulty of fitting such business into Edinburgh, or the consequences of failing to do so, against a backdrop in which the Supreme Court has made it clear that in future, cases involving children must be dealt with efficiently. It should finally be noted that if there are future delays in Edinburgh caused by the influx of Haddington cases, it is not just East Lothian children who are at risk of suffering from increased delays but all children in adoption and permanence cases passing through the court, including those who reside in Edinburgh.

**Conclusion**

[16] In conclusion, I do not consider that it can be said that the case for closing Haddington Sheriff Court has been made out, on the information currently available. It is illogical and undesirable to close a court which:

- goes a long way to meeting the model to which SCS itself expires,
- would on the face of it, if nothing else, be a possible candidate for justice to be dispensed by a summary sheriff;
- is currently busy;

all for the sake of:

- relatively insignificant savings;

when there must on any view be a serious risk that:

- access to local justice will be impaired.

Sheriff Peter J Braid,
Haddington Sheriff Court

17 May 2013
APPENDIX 1

I think it important to quash several misconceptions about the nature/level of business in Haddington:

- “Haddington “only” hears 41 summary trials with evidence per year”

  The figure quoted by SCS was 55, whereas in Parliament the Justice Secretary stated that in 2102 only 41 summary trials proceeded with evidence. I confess that I do not know where that figure came from – certainly not from any published statistics which I have seen. In 2012, the actual number of trials which proceeded was in fact 52 (out of 440 fixed). In 2013, the number of trials is running at around seven per month. However, the number of summary trials with evidence is no barometer of how busy a court is, or indeed, how many witnesses are required to attend court. In fact, some six to ten trials are called every Thursday. You will not see this reflected in the statistics for 2011, but in the last year the volume of business was such that Thursday diets alone were insufficient to cope, hence why trials are also set down for certain Fridays. Of course, as is the case in every court, only a relatively small percentage of those trials actually proceed to hear evidence. It does not follow that witnesses are not required to attend court in the cases which do not proceed to trial. Very often a plea of guilty is tendered only when the accused sees that the witnesses are present. In other cases, there may be a witness who has failed to turn up, (or sometimes, it is the accused who fails to appear, although in fairness that is less prevalent in Haddington than in, say, Kirkcaldy).

  A far better barometer of how busy the court is, and how many people would be affected were the business transferred to Edinburgh, is the number of witnesses who actually attend the court. The best estimate (by the witness service) is that, on average 18 witnesses per week attend. Allowing that summary trials are set down for, say, 44 weeks in the year (excluding Christmas/New Year and, say, six weeks of jury sittings) that means that approximately a minimum of 800 witnesses attend court each year, for summary trials alone. Indeed, since the number of Friday sittings is increasing, the true figure is likely to be closer to 1000.

  These statistics bear out my general impression of sitting in Haddington, which is that, per court room, it is every bit as busy as every other court in which I have sat. There is no evidence to suggest that the number of trials proceeding, as a percentage of trials fixed, is any less than in any other court. It is important to appreciate, too, that even when no trials proceed, the court time taken to deal with all the cases which require to call is significant. It is rare for a trials court to be finished much before lunch time (bearing in mind, too, that unlike in Edinburgh, our trials/intermediate diet court commences at 9.30) and very often trials continue until 5.00pm or later.

- “Many trials scheduled for Haddington go to Edinburgh, especially those involving children”

  This is simply not the case. Many child witnesses give evidence at Haddington, with the use of special measures, which in the majority of cases, consists of screens and a supporter. Haddington also has the necessary technology to enable evidence to be given by video link from a remote location, where that is necessary, and evidence is from time to time given in such a manner. The only situation in which it has been necessary, on a very small number of occasions, to transfer cases with child witnesses to Edinburgh is where the child wishes to give evidence by video link but
from within the court building. In terms of the relevant legislation, this is a measure allowed only in exceptional cases, usually where the child’s mother or father wishes to be present and is also a witness. In the last two years, I can recall only some three cases being transferred to Edinburgh for this reason. Even allowing that I may have forgotten one or two, we are still talking of a statistically insignificant number of cases – per year, even fewer than the number of seasons. Even this figure should be reduced to zero, as the local authority has recently indicated its willingness to make a room available so that children can in future give evidence remotely from a room within the building.

- **“Haddington only does three jury cases per year”**
  In 2011 only three jury trials proceeded with evidence. However the business has increased since then. As with summary trials, the number of cases with evidence is not the best gauge of how busy the court is, or how many witnesses/jurors are required to attend. On average, a one-week jury sitting takes place every seven or eight weeks – say six or seven sittings per year. Typically, six or seven cases are indicted for each sitting. In some sittings, no trials may proceed, for a variety of reasons, including pleas of guilty. In others, two trials might (and often do) run. Each is likely to involve, say, six to ten witnesses. However, approximately 70 to 80 potential jurors will have had to attend court, only 30 of whom will have served as jurors but the ballot has to take place from a large enough pool to ensure a random selection. That is, say, 400 to 500 potential jurors per annum who have to attend. Note that in the first four months of this calendar year, four jury trials have proceeded, with another two likely to take place in the May sitting. In addition, probably four times that number of accused persons plead guilty and fall to be sentenced in Haddington.

- **“many jury cases go to Edinburgh”**
  Very few of the cases indicted in Haddington are transferred to Edinburgh. Last year, two were – both, because they were scheduled to last several weeks, which Haddington cannot cope with as it would be too disruptive of other business (and in one of the cases, many documents were involved, Haddington not having the facility to display these electronically to 15 jurors). In addition, the Crown for whatever reason, chooses to indict some East Lothian cases in Edinburgh. But that leaves a significant number of juries which do proceed, dealing with a variety of crimes from concern in the supply of drugs, to assault, to historic sex abuse.

- **“Haddington only does five civil ordinary proofs per year”**
  That statement is accurate insofar as it goes (which is not very far). To look only at the number of ordinary proofs is to disregard a significant portion of the civil work which Haddington deals with – most notably, applications for adoption orders, and applications for permanence orders, but also summary cause and small claim proofs – which, no less than proofs in any other kind of action take up court time, and require the availability of both a sheriff and a court room. The “economies of scale” argument can be taken only so far, since it is not yet possible, even through the use of IT, to run more than one proof in the one court room at the same time. In relation to adoptions and permanence orders, SCS does not maintain any statistical information about such applications. In 2012, 67 proofs or debates called. The majority (in keeping with courts elsewhere) did not proceed but the twelve which did took up 34 days of evidence.
On almost all of those days, they were held in court 2 while other business was being dealt with in court 1.

APPENDIX 2

A Typical Week In Haddington Sheriff Court

<table>
<thead>
<tr>
<th>Day</th>
<th>Type of work</th>
<th>No of public attending</th>
<th>Yearly total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monday am</td>
<td>Civil court</td>
<td>20 to 30 – say, 25 ²</td>
<td>1000²</td>
</tr>
<tr>
<td>Monday pm</td>
<td>Custodies</td>
<td>6 accused + 3 “supporters” ⁴</td>
<td>450⁴</td>
</tr>
<tr>
<td>Tuesday am</td>
<td>Child welfare hearings</td>
<td>18⁸</td>
<td>720</td>
</tr>
<tr>
<td>Tuesday pm</td>
<td>Custodies</td>
<td>3 + 1 supporter</td>
<td>200</td>
</tr>
<tr>
<td>Wednesday am</td>
<td>Criminal court</td>
<td>50⁷</td>
<td>2500</td>
</tr>
<tr>
<td>Wednesday pm</td>
<td>DTTOs</td>
<td>4⁸</td>
<td>160</td>
</tr>
<tr>
<td>Thursday</td>
<td>Intermediate diets Trials</td>
<td>Say, 20 accused⁹ Say, 6 accused and 18 witnesses¹⁰</td>
<td>800 960</td>
</tr>
<tr>
<td>Friday</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

APPENDIX 3 – EXTRACT FROM RESPONSE TO shaping Scotland’s Court Services, December 2012

The following extract from my submission to the consultation document contains my detailed argument as to why the projections that Edinburgh can cope with Haddington’s business do not stand up to detailed scrutiny. I am not aware that SCS has ever answered the points made, beyond re-asserting its starting position that Edinburgh can cope.

² For summary cause/small claims, generally party litigants; repossession cases (both landlord tenant and mortgage repossessions, all of which must now call in court; bankruptcies; time to pay applications; children’s referrals; miscellaneous other)
³ Assumes 40 Monday sittings per year, the other 12 being either juries (no civil court) Monday holidays, etc
⁴ Mondays are generally the busiest day for custodies. The figure of 6 is an attempt to strike an average. I have assumed that half have “supporters” – very often, three or four family members turn up to support one accused.
⁵ Assuming 50 Mondays or equivalent per year
⁶ The number of child welfare hearings is usually between 10 and 15. In theory both parties require to attend but sometimes for a variety of reasons, they do not. I have assumed that in 9 cases, on average, both parties attend. The yearly total corresponds closely to the known annualised figure of . Again, I have assumed 40 child welfare courts per year.
⁷ Conservative. Generally, at least 35 accused persons appear. Many of them have family/friends in attendance. In addition, some usually appear from custody.
⁸ Sometimes there are no DTTOs, but mostly numbers range from 2 to 8. A social worker is also present.
⁹ Conservative. Numbers can be over 20. Some cases have 2, 3, 4 or even 5 accused.
¹⁰ The figure off 6 is conservative. The 18 witnesses per court is based on an estimate by the witness service.
"SCS has apparently been able to reach the view that Edinburgh will be able to accommodate Haddington’s business. There is a distinct lack of transparency in the consultation document as to precisely how this exercise has been carried out but I understand that the sheriffdom business manager, in conjunction with the sheriff clerks, has conducted a theoretical exercise based upon historical case loads. This has involved comparing the number of actual sitting days in the two courts over a historic period with the number of court days available in Edinburgh in the course of a year (arrived at by multiplying the number of courts, by the number of sitting days in a year). The result of that exercise is that the number of theoretical court days available exceeded the number of court days actually used. Consequently, so it is said, Edinburgh has the capacity to absorb Haddington’s business. The many flaws in this approach are as follows:

(a) The methodology used is conceptually wrong. First, it involves looking at court usage after the event, and stating, with the benefit of hindsight, that court rooms were under-utilised. However it does not follow that other court business could have been programmed for those days, since business must be programmed weeks or months in advance, and it is never possible to tell which business will collapse and which will not. By way of example, if a two-week jury sitting “goes down”, that will result in the allocated court room lying vacant for those two weeks. But it would not have been possible to allocate a two week proof to that court, because (in the absence of crystal ball gazing, not always a reliable barometer) it was not known that the jury would collapse. It is never possible to predict what business will not proceed, or for what reasons. Second, the SCS “projections” look at court utilisation on an annual basis. The projections take no account of the peaks and troughs in court business. Court business does not arise evenly throughout the year, whereas case involving children are time-critical. In other words, it is of little comfort to know that court time might be available in (say) November, if a case has to be heard in June. A much more sophisticated and complex modelling exercise would require to be carried out before it could be stated that Edinburgh could cope with Haddington’s business.

(b) Empirical evidence which is available does not suggest that Edinburgh has much excess capacity. In the past year, two jury cases (a mere fraction of Haddington’s work load) were transferred to Edinburgh. It was made very clear that there was no capacity for any further cases to be transferred in. This does not inspire confidence that, even with the (unlikely) recovery of court 12 (see the next paragraph), Edinburgh would be able to cope with the influx of all of Haddington’s current business.

(c) It has always been made clear that the assumption that Edinburgh can accommodate Haddington’s business is predicated on another assumption, namely, that court 12, currently used for High Court business, will be given up by the High Court. I am told that there is no likelihood of that happening in the foreseeable future. Even if there were to be a shift in work from the High Court to the sheriff court (eg, by increasing sheriffs’ sentencing powers), court 12 is still likely to be required for jury sittings (the more so, if Edinburgh becomes a jury centre).

(d) Aside from being conceptually flawed, the calculation that Edinburgh has sufficient capacity is already out of date, being based on historic information, rather than the most recent figures of volume of business. Additionally, not one
of the SCS senior executive directors has visited Haddington Sheriff Court to see how busy it currently is on a day-to-day basis, or to inquire what level of business is undertaken outwith normal court hours. In this context, it should be noted that a considerable amount of business is undertaken at 9.30am or earlier, not all of it in chambers (ie, much of the pre-10.00am business takes place in court, which by definition requires the availability of a court room (cf the assumption in the paper that the court day normally starts at 10.00.am)).

(e) The calculation takes no account of the fact that certain levels of business are increasing, in particular, family cases (a theme to which I will return). (By family cases, I mean, both, (i) cases where a party is seeking an order under section 11 of the Children (Scotland) Act 1995, which generally means that there is a dispute over contact or, less commonly, residence; and (ii) applications for permanence or adoption orders). Remarkably, the consultation paper makes no mention of the current volume, let alone the likely future volume, of such cases, nor does it even show any appreciation that such cases exist. No attempt has been made to predict the future volume of work generated by such cases, or to plan for how such cases might be accommodated. Similarly, in the year to October 2012, 347 child welfare hearings took place. I would suggest that this is higher than any figure on which the projections are based. It has not been shown how Edinburgh (which currently deals with only five or six child welfare hearings each day) would cope with this influx.

Aside from the failure adequately to project how Edinburgh would cope with existing business, no attempt has been made to project how it would cope with other future business which it might undertake. For example, no account has been taken of the impact of the transfer of all personal injury actions to Edinburgh; to the impact of Edinburgh becoming a sheriff and jury centre; or, indeed, to the demands on court space of any new shrieval appellate court. This is a remarkable omission given the assumption (at paragraph 1.19) that these proposed changes (among others) will take effect."