OFFICIAL REPORT
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Justice Committee

Tuesday 5 September 2017

Session 5

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JUSTICE COMMITTEE

25th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Maurice Corry (West Scotland) (Con)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Hamish Goodall (Scottish Government)
Greig Walker (Scottish Government)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 5 September 2017

[The Convener opened the meeting at 10:02]

Interests

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's 25th meeting in 2017. There are no apologies.

Agenda item 1 is declarations of interest. I welcome Maurice Corry and Liam Kerr, who are two new members of the Justice Committee, and ask them to declare any interests.

Maurice Corry (West Scotland) (Con): I have no interests to declare.

Liam Kerr (North East Scotland) (Con): I have no interests to declare. I refer members to my entry in the register of members' interests.

Decision on Taking Business in Private

10:02

The Convener: Under agenda item 2 we will decide whether to take items 5, 6 and 7 in private. Item 5 is consideration of the written evidence received and potential witnesses for stage 1 scrutiny of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, item 6 is consideration of the written evidence received and potential witnesses for stage 1 scrutiny of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill, and item 7 is consideration of our work programme. We will also decide whether future consideration of a draft stage 1 report on the Domestic Abuse (Scotland) Bill should be taken in private at future meetings. Do we agree to take those items in private?

Members *indicated agreement.*

Petitions

Justice for Megrahi (PE1370)

10:03

The Convener: Agenda item 3 is consideration of public petitions. The committee is asked to consider and agree what action, if any, it wishes to take on the petitions. Possible options are outlined in paragraph 5 of paper 1, which is a note by the clerk. I refer members to that paper. I remind members that, if they wish to keep a petition open, they should indicate how the committee should take it forward, and that, if they wish to close a petition, they should give reasons for that.

The first petition, which is on an independent inquiry into the Megrahi conviction, is discussed on page 2 of the clerk's paper. I invite members' views on the petition.

Liam McArthur (Orkney Islands) (LD): We should be consistent with the decision that we took the last time that we considered the petition. Operation Sandwood continues and, in light of that, we have no option but to keep the petition open. I am very happy to do that.

The Convener: Do members agree that we should keep the petition open pending the completion of operation Sandwood?

Members *indicated agreement.*

Self-inflicted and Accidental Deaths (Public Inquiries) (PE1501)

Fatalities (Investigations) (PE1567)

The Convener: Petitions PE1501 and PE1567, on investigating unascertained deaths, suicides and fatal accidents, are discussed on pages 3 and 4 of the clerk's paper. I invite members' views on both the petitions. Who wants to kick off?

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Both petitions have run their course. I note the additional contribution at annex C from James Jones. I am not inclined to regard that as changing my view that we have reached the point at which we should close the petitions, but it is worth saying why that is the case.

Mandating something in the past, which is essentially what is being asked for, ought not to be necessary. It is possible for a fatal accident inquiry to be held in the circumstances addressed by Mr Jones. We do not need to take any action here for that to be the case. The usual way to make assessments is entirely proper.

It was perfectly proper for the two petitions to be brought here, but they have run their course and we should draw them to a conclusion.

The Convener: There has certainly been a lot of correspondence from the Crown Office and Procurator Fiscal Service and satisfactory answers seem to have been given to the petitioners. We have had no further communication from the petitioners. Mr Jones is a third party, and he is moving off the petition ever so slightly.

Is it the committee's view that it is time to close the petitions and that they have been dealt with satisfactorily?

Members *indicated agreement.*

Emergency and Non-emergency Services Call Centres (PE1510)

Inverness Fire Service Control Room (PE1511)

The Convener: Petitions PE1510 and PE1511 are on police and fire service control rooms. The two petitions are discussed on pages 5 and 6 of the clerk's paper. I invite members' views on both petitions.

John Finnie (Highlands and Islands) (Green): In the letter of 31 August on petition PE1511, the author has strayed considerably from the original intention of the petition. The letter includes gratuitous comments and factual inaccuracies. For example, with regard to the first paragraph 4, there are more middle managers in the Highlands and Islands than was previously the case.

The second paragraph 7 refers to morale. I am always interested in how morale is gauged, because it is a personal rather than a collective matter. It also comments on retirements, but the situation is entirely in line with the profile of the service and is consistent with the position across Scotland. In addition, there is enhanced training in the islands.

I would be happy to ask the Scottish Fire and Rescue Service for its views on the issues, but the letter strays way beyond the initial lines of the petition.

The Convener: That is helpful.

Liam McArthur: I agree with John Finnie's point about asking the SFRS for a response to the points made. Perhaps it might want to limit itself to the points relating to the petition, but I would leave that open to the service to determine.

The letter raises issues on which it would be helpful to get a response from Scottish ministers. Therefore, I would support inviting them to respond on the same basis.

The Convener: A lot of issues have been raised and it is only fair that the service gets a chance to respond to them. Are we all of a mind to keep the petitions open? An added complication is that the Scottish Police Authority still needs to look at the interim arrangements for Inverness. Do we agree to keep the petitions open and to ask for responses from the SFRS and the Scottish Government?

Members *indicated agreement.*

The Convener: Thank you very much. I suspend the meeting briefly to get the witnesses in for agenda item 4.

10:09

Meeting suspended.

10:10

On resuming—

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Stage 1

The Convener: Agenda item 4 is an evidence-taking session with the Scottish Government bill team for the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I welcome Hamish Goodall, who is from the civil law and legal system division, and Greig Walker, who is a solicitor in the directorate for legal services.

I refer members to paper 2, which is a note by the clerk, and paper 3, which is a private paper, and I invite Hamish Goodall to make an opening statement.

Hamish Goodall (Scottish Government): The bill will deliver a manifesto commitment and increase access to justice by creating a more accessible, affordable and equitable civil justice system for Scotland. It will make the cost of civil action more predictable, increase the funding options for pursuers of civil actions and introduce a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.

The bill provides the legal framework to implement a number of key recommendations in Sheriff Principal James Taylor's 2013 "Review of Expenses and Funding of Civil Litigation in Scotland". Sheriff Principal Taylor made 85 recommendations, at least half of which will be taken forward in rules of court to be made by the Lord President, on the recommendation of the Scottish Civil Justice Council.

Some of Sheriff Principal Taylor's recommendations have already been implemented by the Courts Reform (Scotland) Act 2014, such as those on sanction for counsel. Some of his recommendations on claims management companies and referral fees will be considered by the review of the regulation of legal services, which is being led by Esther Roberton, the head of NHS 24.

Part 1 of the bill includes legislative measures that will introduce sliding caps for success fee agreements, which are more commonly known as no-win, no-fee agreements. There will be sliding caps for success fee agreements in personal injury and other civil actions in order to make the costs of civil litigation more predictable. Part 1 will also allow damages-based agreements to be enforceable by solicitors. Currently, damages-based agreements can be used only by claims management companies. Under the proposal, the solicitor's fee will be allowed to be taken as a percentage of the damages awarded by the court or agreed between the parties.

Section 8 introduces qualified one-way cost shifting, otherwise known as QOCS. I had better explain what qualified one-way cost shifting is, because it is not an easy concept. It is proposed that the process will apply only in personal injury cases and associated appeals. The parties to a personal injury action are, usually, the pursuer, who is a private individual, and the defender, which is an insurance company. Sheriff Principal Taylor thought that there was an imbalance there—an inequality of arms between the pursuer and the defender. One of the problems is that, if the pursuer were to lose the action, they might become liable to pay the expenses of the defender. Sheriff Principal Taylor pointed out that, in England, only in 0.1 per cent of cases will a successful defender pursue the pursuer for their expenses. He has therefore recommended that qualified one-way cost shifting should be introduced, whereby, if the pursuer is unsuccessful, they will not become liable for the expenses of the defender, which is usually a large insurance company. We will no doubt return to the subject of qualified one-way cost shifting later.

Other parts of the bill make the auditor of the Court of Session, the auditor of the Sheriff Appeal Court and sheriff court auditors salaried posts within the Scottish Courts and Tribunals Service, under a new statutory governance framework.

Part 4 allows for the introduction—for the first time in Scotland—of a class action procedure, to be known as "group procedure". That is otherwise known as a multiparty action.

10:15

In general, the bill is designed to balance the needs of pursuers and defenders in personal injury actions. The potential costs involved in civil court action can deter many people from pursuing legal action, even when they have a meritorious claim. The proposals in the bill for sliding caps on the amount that can be taken from an award of damages under success fee agreements will mean that the cost of what the client must pay his own lawyer is predictable. Success fee agreements, I should explain, include both speculative fee agreements and damages-based agreements.

The proposals on QOCS in personal injury cases will protect the pursuer from paying the defender's expenses if the case is lost. As I said, defenders are almost invariably well-resourced insurance companies that rarely claim their expenses when they successfully defend actions. However, the benefit of QOCS will be lost to the

pursuer if there is fraudulent or unreasonable behaviour, or any other behaviour that

"amounts to an abuse of process."

We appreciate that this is not easy stuff and we are very happy to answer questions.

The Convener: Thank you very much. It is helpful to have had that brief introduction.

Two of the recommendations implemented in the bill come from the Gill review's report, which was published in September 2009, and the rest come from the Taylor review's report, which was published in September 2013. Is there not a danger that the bill and those recommendations are already out of date?

Hamish Goodall: The proposals on auditors of court and group proceedings were not included in the Courts Reform (Scotland) Bill because that was already huge. There have been proposals on group proceedings in Scotland for many years. The Scottish Law Commission looked at group proceedings 20 years ago, I think, so the provision for them that is now being made is long overdue. It has simply been a case of finding the correct legislative vehicle to include those matters.

As far as Sheriff Principal Taylor's review is concerned, there have been quite a lot of intervening pieces of legislation on the civil justice side, including the large Courts Reform (Scotland) Act 2014 and the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, which you will remember, convener. It is not as if we have been doing nothing. Various pieces of legislation in the civil justice area have been introduced, and it is now the turn of Sheriff Principal Taylor's review.

The Convener: I suppose that the question then is whether you have looked at that legislation and compared it with the recommendations to see whether something is out of kilter now that that new legislation and procedures are in place.

Hamish Goodall: Do you mean the courts reform legislation?

The Convener: I mean everything that has happened in civil litigation legislation since the reviews that might have impacted on their recommendations.

Hamish Goodall: Sheriff Principal Taylor's review grew out of the Gill review. When the Gill review was on-going, it was realised that the issues of expenses and funding of civil litigation were too big to be dealt with in that review, which is why it was dealt with separately by Sheriff Principal Taylor. It was a conscious decision to take the two matters separately. It is completely separate from the courts reform agenda.

The Convener: I understand that, but I am asking about the recommendations that have been adopted in the bill, given that the law evolves over the years. What cognisance has been taken of the changes that have taken place during the interim period?

Hamish Goodall: The Government consulted on the proposals in 2015 and we have been meeting stakeholders since the beginning of the year, so we think that we are fairly well in tune with what stakeholders believe.

Greig Walker (Scottish Government): I can give a concrete example of something that we have added that goes beyond the Taylor review. There is nothing in the Gill or Taylor reports about the auditor of the Sheriff Appeal Court, because that court did not exist at the time. The bill makes provision for the new office of auditor of that court, which has come in since the Courts Reform (Scotland) Act 2014. That illustrates the fact that we have looked at the Taylor and Gill reports critically in 2017 to come up with a bill that is fit for the justice landscape now.

The Convener: Thank you for that.

Providing access to justice is the bill's main objective. What does the Scottish Government think that the practical effects of the bill will be on lawyers and the court system, particularly in view of the criticism that has been expressed that it could lead to a compensation culture?

Hamish Goodall: As far as lawyers are concerned, the bill will permit solicitors to offer damages-based agreements, which will increase competition among solicitors. As far as the court system is concerned, the advent of group proceedings should have a beneficial effect, because it will mean that, instead of a large number of similar cases being dealt with separately, it will be possible for them to be dealt with in one action—one set of group proceedings—and there should be economies for the court system in that.

The thrust of the bill is to provide more access to justice for people who have a claim and are concerned about what it will cost them from the point of view both of what they will have to pay their own lawyer and of what they might have to pay the other side if the other side wins and they lose.

The Convener: Other members have more in-depth questions. Liam McArthur has a supplementary.

Liam McArthur: Thanks, convener. I want to follow up on your point about the time that has elapsed between Sheriff Principal Taylor's report and recommendations and the introduction of the bill, as well as your point about a compensation culture.

As I understand it, in making his recommendations, Sheriff Principal Taylor drew on figures from the Department for Work and Pensions that suggested that, between 2008 and 2011, the number of personal injury claims in Scotland rose by about 7 per cent, whereas south of the border the increase was around 23 per cent. However, between 2011 and 2016, the rise in the number of personal injury claims in Scotland more than doubled to 16 per cent, while the figure south of the border reduced to around 4 per cent. That does not suggest to me that there is an issue with access to justice in relation to personal injury claims; it suggests that the introduction south of the border of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 might have had a bearing on the number of personal injury claims that are made there. What assessment has the Scottish Government carried out of the impact that that legislation is having south of the border?

Hamish Goodall: The English system is completely different. We are implementing Sheriff Principal Taylor's recommendations.

Liam McArthur: But you are doing so based on data that seems to me to be rather out of date.

Hamish Goodall: Sheriff Principal Taylor did not think that a compensation culture of the kind that he thought existed in England existed in Scotland.

In 2015-16, 8,766 personal injury actions were raised in Scotland. Only 99 of those received legal aid, so the vast majority of the rest of them must have been funded by some kind of success fee agreement. The bill will build on the popularity of the use of such funding mechanisms to enable people to take forward cases. Somebody who is not eligible for legal aid therefore needs some other means to take forward their case. Sheriff Principal Taylor thought that there was an excluded middle who are not eligible for legal aid and who might therefore not take forward—

Liam McArthur: You talked about success fees. The figures that I quoted earlier of a jump from a 7 per cent increase in the period 2008 to 2011 to a 16 per cent increase between 2011 and 2016 suggest that the system seems to be working relatively well, and there is a question as to whether we want to accelerate the increase by making further changes. I do not doubt that the evidence before Sheriff Principal Taylor did not point to the sort of compensation culture that appears to exist south of the border. I am saying that, since then, there has been a dramatic reduction in the rate of increase in cases south of the border but a doubling in the increase in the number of cases in Scotland. That begs the question whether the recommendations still stand and what assessment the Scottish Government has done of the relevance of those recommendations now rather than when they were made.

Hamish Goodall: As I say, we have spoken to various stakeholders. If there has been an increase in the number of claims, that has not really been raised with us, has it, Mr Walker?

Greig Walker: No.

John Finnie: Forgive me if I have picked you up wrongly, Mr Goodall, but I think that you said that 99 per cent of cases—

Hamish Goodall: No—

John Finnie: Sorry, it was 99 cases that were legally aided.

Hamish Goodall: Yes, it was 99 cases.

John Finnie: How do you describe the others?

Hamish Goodall: On the basis that very few people have the personal financial resources to finance a case, we assume that most of the other cases have been funded either by speculative fee agreements with solicitors or by damages-based agreements through claims management companies.

John Finnie: Does that not discount the significant role that trade unions and staff associations play?

Hamish Goodall: Yes, indeed. In some cases, people may have been assisted by trade unions.

John Finnie: Thank you.

Liam Kerr: In your answers to Mr McArthur and Mr Finnie, you said that Sheriff Principal Taylor "thought" that there was an excluded middle, that the cases "must have been" funded by a particular arrangement and that you "assume" that very few people can fund a case and so are running with speculative fee agreements or other agreements. Does it not concern you that you cannot say what the situation is or provide objective data on which you have based the proposed legislation?

Hamish Goodall: I may have used the wrong language. Those are the conclusions that Sheriff Principal Taylor came to in his review, which took two and half years.

Liam Kerr: But it was based on data from about 10 years ago.

Hamish Goodall: I assume that Sheriff Principal Taylor will give evidence to the committee, so—

The Convener: We should remember that we have the bill team in front of us today and that we will have the minister in to account for why he still thinks that it is good to go ahead with the bill. However, those are fair questions.

Is there anything that you would like to add, Mr Goodall?

Hamish Goodall: We have also produced a business and regulatory impact assessment for the bill.

The Convener: Okay. Thank you for that.

Why does the bill not regulate claims management companies?

Hamish Goodall: That is simply because the review of the regulation of legal services, which was announced in April, will consider the regulation of claims management companies.

The Convener: This might again be more of a policy issue, but perhaps you could provide some information on that. There is a real fear that, in the interim, there might be a displacement of claims companies to Scotland from England and Wales, where stricter regulations have been in place since 2007. I suppose that that builds into the claim culture fears. Did you consider including the issue in the bill?

Hamish Goodall: As I understand it, the review will report a year from now, and it will be followed by legislation. Therefore, if there is a gap, I hope that it will not be a very long one.

We have heard that concern, because, as you say, some of the English claims management companies are moving to do business in Scotland because of the stricter financial regime south of the border. They will still be subject to United Kingdom regulation. There may be a gap before legislation is introduced, but I think that it will be a short one.

10:30

The Convener: I realise that that is as much as you can answer. The Government has had the opportunity for the 10 years since 2007 to move to a much more relaxed regime, but that is a policy matter.

My final question is on success fee agreements based on fee uplift. They are subject to general regulation under the bill's provisions, when they appear to have been operating satisfactorily, according to the market, without regulation. Will you tell us the thinking behind that?

Hamish Goodall: That is correct. Speculative fee agreements have been in place for just over 20 years.

All that the bill does in relation to speculative fee agreements is to cap the success fee in the same way as the success fee for a damages-based agreement will be capped. Sheriff Principal Taylor devoted separate chapters in his review to speculative fee agreements and damages-based agreements. He came to the same conclusion on both: that the success fee should be capped so that the cost of civil litigation would become more predictable to the clients.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I want to follow up on what you said about the capping of success fee agreements. Can you give us more detail of when the full information will be available?

Hamish Goodall: As is set out in the policy memorandum, our current intention is that we will go with the levels of cap that Sheriff Principal Taylor recommended. Those caps will be set out in regulations that will follow the bill. The idea is that, if the caps are put into regulations, they can be amended up or down depending on experience.

Greig Walker: Those would be affirmative regulations, so the committee would have the opportunity to debate them.

Rona Mackay: Is there a risk that the bill might make it uneconomical for solicitors to offer some services on a no-win, no-fee basis? Would they back off from some cases?

Hamish Goodall: I am not sure why that would be the case. Under the provisions of the bill, in personal injury actions, the successful pursuer solicitor will be able to recover expenses from the losing side. They will also get the success fee, so they will get two payments.

Balanced against that, however, is the fact that they will be liable for all the outlays that are paid out in the course of the action. If they have taken the decision to engage counsel, for example, they will have to pay for that. If they have had to get an expert opinion, that will also have to be paid as part of the outlays.

We do not see that this is likely to make it less economical for solicitors. In fact, Sheriff Principal Taylor said in his review that he thought that they would still get a good return from raising such actions.

Rona Mackay: I am sure that they will.

The Convener: On the risk factor, one of the submissions pointed to the fees far outweighing the compensation and expenses. Would that not be the element of risk that a solicitor would have?

Hamish Goodall: The fees—

The Convener: What had been incurred in fees.

Hamish Goodall: We have raised that issue with various bodies. One of the comments was that the solicitor is the gatekeeper to the system of personal injury litigation. If his or her professional judgment is that they need to employ counsel or get an expert opinion, they will do that. If, at the

end of the day, something strange goes wrong in the case and due to contributory negligence or perhaps because it is discovered that there is a pre-existing condition, the damages that are awarded are not what was expected, that is just the fortunes of war—as someone once said. One big firm said that it would simply absorb that loss. That is the professional risk.

The Convener: We will probably get into that further as we go on.

Rona Mackay: Do you think that damages-based agreements will become the norm if the bill is passed? Will there still be a role for other forms of success fee agreements?

Hamish Goodall: I suspect that damages-based agreements will become more and more popular because of their simplicity. Some firms of solicitors will undoubtedly have a business model in which they prefer to go with speculative fee agreements, based on fee uplifts, but that is a matter for them.

Rona Mackay: I want to move on to compensation for future loss and the fact that care costs, lost earnings and so on are obviously speculative. Should such compensation be entirely excluded from the success fee calculation, given the importance of the award to the pursuers?

Hamish Goodall: That is what has happened in England, but Sheriff Principal Taylor specifically rejected that view. Under the bill's provisions, if the future element of damages is to be paid as a periodical payment order, it will automatically be excluded from the calculation of the success fee. If the future element of the damages is to be paid in a lump sum, Sheriff Principal Taylor has quite a lot to say on the matter. He thought that if the damages are under about £500,000 it is unlikely that they would be intended to include a future element. If the damages are above £500,000, under the provisions on the cap on success fees, only 2.5 per cent would be payable on that element of the award.

There are further safeguards in sections 6(5) and 6(6) when the future element is to be paid as a lump sum. If the money has been awarded by a court, the court must agree that it is awarded as a lump sum, rather than as periodical payments. If it is part of a settlement, the matter should be referred to an actuary.

Liam Kerr: I have a brief question. Do you consider that there might be a risk of inflation of court awards as a result of such funding arrangements? For example, if a court knows that X represents the appropriate level of damages, but also knows that 20 per cent will be taken away by the solicitor or representative, is there a risk that the court might overaward, so that the pursuer gets the full entitlement for their current and future loss?

Hamish Goodall: I do not think that that is a risk because, as I said, if the award is more than £500,000 the cap is 2.5 per cent. That is a very small proportion. The court will award damages based on the law of damages, not on the law of expenses.

Liam Kerr: However, the court will also know that a proportion of the appropriate damages will be taken off the pursuer. Is that not the case?

Hamish Goodall: I do not think that a court would consider that.

Greig Walker: As Hamish Goodall has said, the court is required to award damages based on the compensatory principle. As he has said, success fee agreements in one form or another are not new, so if that approach is a risk it is not a new one. I do not think that Sheriff Principal Taylor identified any evidence or likely risk that that would happen.

Rona Mackay: Just two brief questions are left for me. You mentioned a figure of £500,000. Do you envisage protection ever being expanded to above £500,000? Is that likely?

Hamish Goodall: We will be very interested to hear what evidence is given to the committee, particularly by Sheriff Principal Taylor. We are quite open to that option.

Greig Walker: The figures in section 6 can be amended by regulations in the years ahead.

Rona Mackay: The figure is not set in stone.

You mentioned an actuary. Who would pay for advice from an actuary?

Hamish Goodall: Sheriff Principal Taylor recommended that the solicitor would pay for an actuary, so that would be one of the outlays.

John Finnie: Mr Goodall, I do not know whether I can get used to QOCS at all, but when qualified, one-way cost shifting was introduced in England, it was accompanied by measures to discourage spurious claims. Is there any intention to have a similar arrangement in Scotland?

Hamish Goodall: We think that four factors will mitigate against spurious claims in Scotland. First, as Sheriff Principal Taylor pointed out in his review, it is not worth a solicitor running a case on a no-win, no-fee basis if there is not a good chance that they will win. If it is an unmeritorious case, they will not run with it because they will not get paid.

Secondly, as I mentioned, claims management companies are to be the subject of consideration by the review of regulation of legal services, so we

suspect that they are likely to become regulated in the future and therefore there will be a provision that states that they should not run actions that have little chance of success.

The third factor is that a new compulsory pre-action protocol was introduced into the sheriff court last November for personal injury actions of less than £25,000. The effect of a pre-action protocol is that it front-loads the whole process, so it should become apparent at a very early stage if a case does not have merit.

The fourth and last factor is the provisions in section 8(4), which outline the circumstances in which the benefits of QOCS may be lost. It basically provides that that may happen if there is fraudulent or unreasonable behaviour that

"amounts to an abuse of process."

John Finnie: I want to ask about the term "unreasonable". One of the written submissions to the committee suggests that the level of unreasonableness that is described in subsection 8(4)(b) is less than the Wednesbury test of unreasonableness that was recommended by Sheriff Principal Taylor. Is that the case?

Hamish Goodall: We think that what is in the bill is tantamount to or analogous to the Wednesbury test. We have had a lot of discussions with stakeholders about the provision. You will perhaps not be surprised to hear that those who represent insurers think that the test is already too high and those who represent pursuers think that it is not high enough, so we therefore think that it is maybe about right. We certainly think that some clarification is needed around section 8(4). We will listen with interest to what witnesses say to the committee.

John Finnie: Thank you.

Has the Scottish Government considered limiting the benefit of QOCS to situations in which the defender is insured or a public body?

Hamish Goodall: I think that the Faculty of Advocates has given evidence on that. We can have a look at the matter and will listen to the evidence that the committee receives. It would be quite harsh if an uninsured person who did not have the benefit of having an insurance company behind them would not have the benefit of QOCS, but we can look at that in future.

10:45

John Finnie: Other members have questions on this section, but I have a final question. Does the Scottish Government intend to implement the changes to the tender process that Sheriff Principal Taylor recommended?

Hamish Goodall: I will defer to my legal friend here on that, but I understand that most of the law of tendering is in common law and that what is not in that is in subordinate legislation and not in primary legislation, which is why it is not in the bill. Is that right?

Greig Walker: Yes, absolutely. The language is quite confusing, but a tender is really an offer in the course of proceedings to set up a formal offer. As Hamish Goodall said, it is largely common law, but it is possible for acts of sederunt—rules of court—to modify the process, which can be done by the Scottish Civil Justice Council. A recent example of that is pursuers' offers, which were reintroduced to Scottish practice by act of sederunt. The general principle is therefore that changes to the tender process would be for rules.

Section 8(6) provides that QOCS is subject to any further fine details that might be in rules. Essentially, we are proposing the key policy things on unreasonable behaviour and fraudulent behaviour in section 8(4), which you mentioned, but the fine detail of interaction with other rules of court—and tenders in particular—would be in rules of court under section 8(6). I think that we might have put in the policy memorandum—it is certainly in the Scottish Parliament information centre briefing—that it is the cost and funding committee of the Scottish Civil Justice Council that is looking at this field.

The Convener: A number of members indicated that they had supplementaries. Liam McArthur is first, followed by Stewart Stevenson, then Liam Kerr.

Liam McArthur: I will follow up on John Finnie's line of questioning and the safeguards that you have outlined, which return us to the point around the lack of regulations under the bill on claims management companies. However, I think that I heard Hamish Goodall suggest that he anticipates such regulations coming through from the review that is under way. To me, that rather suggests that there is recognition that that sort of regulation is needed, which begs the question why, given the time that has elapsed since Sheriff Principal Taylor's report, steps were not taken to include the regulations in the bill. Provisions of that nature could have gone out for consultation, as appropriate, and could have been included in the bill. Is that not a reasonable conclusion to draw from what you have said?

Hamish Goodall: The starting point is that Sheriff Principal Taylor did not think at the time of his review that the claims management companies in Scotland caused a difficulty. However, the reason why regulations are not in the bill is that the matter is being considered. The range of regulation of legal services in Scotland is being considered in the review that is being taken

forward by Esther Roberton. It seems more appropriate that they are considered in that context.

The Convener: I remind Liam McArthur that that matter is probably a policy decision for the minister.

Liam McArthur: I appreciate that comment, convener. We might need to come back to that with the minister, because early indication of the Government's likely intentions in that area might stave off some of the concerns that have been coming through in the written submissions. However, I appreciate that that is not something for officials to address.

Again, earlier on Mr Goodall was talking about—

The Convener: We are actually on the section on QOCS.

Liam McArthur: Yes. Mr Goodall, I think that you said that the number or proportion of cases where defenders would pursue the pursuer for legal costs was a fraction of 1 per cent.

Hamish Goodall: Yes.

Liam McArthur: Does that not open up the question as to why there seemed to be a problem that needs to be addressed? If those are the figures and there is a disincentive to pursuing a valid case or claim, there does not seem to be evidence to suggest that someone would hold off making a claim because of a threat that they would be pursued for the defender's legal costs.

Hamish Goodall: But the pursuer might not know that.

Liam McArthur: But the claims management companies would, and the solicitors who act in this area would certainly know those figures or have a general sense of them.

Hamish Goodall: QOCS has been in place in England and Wales for some time, hence Sheriff Principal Taylor's recommendation that we should also have it in Scotland.

Liam McArthur: Finally, in relation to the financial memorandum and the safeguards running alongside QOCS, you were talking about the unlikelihood of vexatious speculative cases being brought and the likelihood that, if they were brought, they would be triaged out at an early stage. I note that paragraph 59 of the financial memorandum says:

> "Defenders will have to balance the cost of going to court with the risk of losing a case. For example, if expenses in a case exceed the expected payout, insurers may settle rather than go to court even if they consider it likely that they will be successful in the case."

That seems to go against what you have said and it goes against what is set out in paragraph 60, which is that

> "Pursuers are unlikely to raise actions with little prospect of success and the Bill provides protections for defenders where the pursuers have acted inappropriately."

I am finding it difficult to square those two statements, which are right next to each other in the financial memorandum.

Hamish Goodall: Sorry, which paragraphs?

Liam McArthur: I am talking about paragraphs 59 and 60 in the financial memorandum. The memorandum does not quantify the likely number of cases where defenders may just decide to pay out, but it suggests that there is a recognition that a risk certainly exists and that even where defenders are confident that they would be successful in the case, they will choose to pay out rather than to go through a court process.

Hamish Goodall: This may be a matter that you would really need to raise with—

Liam McArthur: The minister.

Hamish Goodall: Not only the minister; I am sure that you will be taking evidence from representatives of pursuers and defenders, so you can see what they say.

Liam McArthur: I take that point, although this is the Government's financial memorandum for its bill so, in a sense, it is the Government that is stating this, rather than those acting for either pursuers or defenders.

Greig Walker: The only point that I would add is that there are weak cases, there are very strong cases and there are the ones in the middle. Perhaps that is how paragraph 59 is to be read—it is not about defenders feeling boxed in to settling what they think are very weak cases; it is about the ones in the middle.

Stewart Stevenson: Where is the definition of "personal injury"? I do not see it in the bill so I assume that it is elsewhere.

Greig Walker: It is in the bill. I will find it if you give me a second. It is in section 6(9).

Stewart Stevenson: If it is there, that is fine.

Greig Walker: I think that we have put in the explanatory notes that it is the same definition that applies to the personal injury court. We are not creating a new definition.

Stewart Stevenson: Okay. We will move on to something a bit more substantial. The assumption is that QOCS is about rebalancing power between a well-endowed defender and a relatively impoverished pursuer. Let me just posit an example.

There is a cyclist in a cycle lane; up against the left of the cycle lane is a wall. A Rolls-Royce draws up; the passenger, who is a half billionaire, opens the rear door into the path of the cyclist. The cyclist has no option but to hit the door and, in the process, to injure the half billionaire. The cyclist is a professional person, aged 55, with a house in Edinburgh that is worth £750,000. They have not paid off their mortgage. They are running down their career, so they are working part time. They have an income of £40,000 a year. They are in that middle ground.

Each person, it would seem, might have a case against the other. There might be two cases, because the multimillionaire might have experienced permanent physical damage as a result of the cyclist hitting them and the cyclist might also have experienced such damage from the door. Do they each have the ability to benefit from QOCS, given that the multimillionaire has, for legal purposes, unlimited resources to pursue the case and recover their legal costs if and when, which they might do, and given that the cyclist is uninsured?

Hamish Goodall: Who is the pursuer?

Stewart Stevenson: They both are. There are two cases. The cyclist is suing the multimillionaire for opening the door and injuring him; the multimillionaire is suing the cyclist—

Hamish Goodall: So it is a counterclaim.

Stewart Stevenson: —because the design of the cycle created particular injuries of the multimillionaire that were not reasonable.

Hamish Goodall: Well, it sounds like a rather fanciful example. However, as the bill is drafted, the pursuer would have the benefit of QOCS unless they had behaved inappropriately.

Stewart Stevenson: That is, if their behaviour had been fraudulent, unreasonable or an abuse of court. However, I assume that that would not apply to both claims.

Greig Walker: That would depend on the facts and circumstances. It is very difficult for us to address such a detailed scenario.

Stewart Stevenson: I am making a general point. Let us not labour it, as we are looking at the construction of the bill. The general point is that the assumption that the defender will be the wealthy one and the pursuer will be the impoverished one is surely not sustainable in all circumstances, as the opposite may be true. Is that a fair comment and something that you have considered in constructing the bill?

The Convener: Would the pursuer who brought the first claim be the only beneficiary of QOCS or would the person who brought the counterclaim have the same rights?

Greig Walker: The narrow point about a rich pursuer and a poor defender is linked to the point that has been made about whether the bill team is going to consider the application of QOCS to uninsured persons, and the answer is yes. As I said earlier, the fine detail can be left to rules of court. However, if the committee believes that the finest detail needs to be included in the bill, we will consider that.

Stewart Stevenson: Let me close the discussion off without going too far. Are you saying that it is reasonable for us to consider that that particular kind of case could be dealt with under rules of court?

Greig Walker: Absolutely. In that sort of case, there will be detailed counterclaims and so on, whereas we are legislating for the standard case involving a pursuer and a defender.

Stewart Stevenson: I may have made the scenario more complex than I should have. The basic point is that there could be a case in which there is a wealthy pursuer and a defender who is impoverished and uninsured but asset rich and therefore worth pursuing.

Greig Walker: That is on the officials' radar.

Stewart Stevenson: They might be income poor and uninsured but asset rich.

Hamish Goodall: Yes. The Faculty of Advocates has raised the point that the defender might be uninsured and might not be a public body. We can consider—

Stewart Stevenson: The bottom line is that there is a way forward in the legislative process in the round, not just in the bill, that deals with that situation.

Greig Walker: Yes.

The Convener: Stewart Stevenson makes a good point. As always when we are scrutinising legislation, it is not totally satisfactory that so many questions are left to guidelines and so on.

Hamish Goodall: Yes. Some bad cases make bad law.

The Convener: Yes.

Liam Kerr: I have a brief question for Mr Goodall. You said that there are four reasons why there will not be a rise in the number of unmeritorious claims, the first of which is that the solicitor operating under a no-win, no-fee agreement would have no incentive to pursue an unmeritorious claim because they would be unlikely to get paid at the end of the process. That stacks up—I accept the point—but would it not be

open to a no-win, no-fee solicitor to insure against that loss so that they would get paid anyway?

Greig Walker: You can put such questions to the representatives who come before you. None of the claims management companies—or funding companies, as they are sometimes described—works in exactly the same way. They are private business arrangements and the full details have not been given to us because they are commercially confidential, but you can ask such questions of the other witnesses.

Liam Kerr: That may be more appropriate, but it feels as though the bill ought to have taken account of that. The point was made that there could well be a rise in the number of unmeritorious claims, and I suggest that such a funding arrangement, which already exists, means that the reason that Mr Goodall gave for there being no increase in the number of unmeritorious claims might not be entirely valid.

11:00

Hamish Goodall: Professional ethics come into play here, quite apart from the economic arguments. Solicitors are bound by their professional rules—I do not know exactly what the professional rules would say about that.

Greig Walker: One possible impact of the bill is that firms that have a claims management company or funding company will feel that they no longer need it, because they can fold all those activities within the firm, which is under Law Society regulation. The Law Society can always promulgate new practice notes and guidelines, as no-win, no-fee agreements become more of a thing in Scotland.

Liam Kerr: Okay, but that suggests a need for more stuff after the event, as Mr Stevenson proposed.

I might have missed this in the papers. What estimates have been made or modelling done of the impact of the bill on the number of claims?

Hamish Goodall: It is impossible to estimate that. We simply do not know. Those who wish to offer their services under success fee agreements might have an estimate, but it is impossible to say.

Liam Kerr: You are saying that we do not know the impact of the bill on the number of claims. No modelling has been done.

Hamish Goodall: No. We cannot know how many claims there might be.

Greig Walker: The best estimates are in the financial memorandum.

Liam Kerr: Thank you.

Mary Fee (West Scotland) (Lab): I want to ask about third-party funding. In England, a market is emerging in which investors with no direct interest fund claims in return for a share of the compensation. Sheriff Principal Taylor argued that that should be an additional option.

The bill will enable a third-party funder with a financial interest in the outcome of the proceedings to be found liable for the winner's expenses if the case is lost. The policy memorandum refers to "commercial third party funders" being caught by the provision, and the financial memorandum suggests that claims management companies that operate no-win, no-fee arrangements could be caught. Some evidence that we received suggests that trade unions could also be caught by the provision, as could insurers or solicitors who pay an initial fee to get a claim going. Will you clarify the situation?

Hamish Goodall: Certainly. Section 10, "Third party funding of civil litigation", is intended to catch only commercial third-party funders. It is not intended to catch trade unions or trade associations. We are aware that there has been some confusion about whether section 10 should apply to lawyers. We intend to clarify section 10 to make it clear that what it is about is completely separate from qualified one-way costs shifting. Sections 8 and 10 are completely separate.

Mary Fee: It will be made clear that only commercial organisations, and no one else, will be liable.

Hamish Goodall: Yes.

Mary Fee: Does the bill conflate the two separate Taylor recommendations on liability for expenses and transparency of funding arrangements? Will you explain how qualified one-way costs shifting and third-party funding will sit together?

Hamish Goodall: We intend to amend section 10 to separate the two issues—disclosure and liability for expenses—to make that clear. As I said, the provisions on third-party funding are intended to catch only commercial third-party funders and not lawyers under success fee agreements. We need to clarify that.

Mary Fee: That is helpful, thank you.

Liam Kerr: There is a proposal to change the employment status of the auditors of the courts. Why does the Scottish Government consider that having the auditors employed by the Scottish Courts and Tribunals Service is a better guarantor of independence than the self-employment model?

Hamish Goodall: The auditor of the Court of Session was salaried until 1997 or 1998, when the arrangements were changed. The proposal in the bill is for the auditor of the Court of Session and all

other auditors to become salaried members of staff of the Scottish Courts and Tribunals Service; the Gill review recommended that the auditors all become salaried officials, and that is basically what the bill will do.

The argument with regard to self-employment of the auditor of the Court of Session relates to his independence. We think that, even if in future the auditor of the Court of Session were to become a member of the SCTS staff, there is no question that he or she would be independent. First of all, following the Judiciary and Courts (Scotland) Act 2008, the SCTS is completely independent of the Scottish Government. As a result, the question of independence would arise only in relation to cases that involved the SCTS itself. We understand that it is involved in only one or two cases per annum, and of course, such cases need not necessarily have to go through the taxation of accounts process.

There is precedent for members of staff of bodies taking decisions that affect those bodies. For example, although planning reporters are employed by the Scottish Government, they take decisions all the time that affect the Government. There is also legal precedent with regard to independence.

Did you want to say something about that, Mr Walker?

Greig Walker: The other relevant precedent is that all the other officers of court—the clerks, the macers and so on—are employed by the SCTS at arm's length from the Scottish Government. As employees, they are all subject to the freedom of information, ethical standards, data protection and complaints procedures that are standard for civil servants. The fact that they are also officers in the Scottish Administration brings in another layer of governance, including the requirement for funds to be paid into the consolidated fund, which is ultimately the Parliament's money.

We begin to amplify our legal position on this matter in paragraphs 58 and 59 of the policy memorandum by making it clear that the aim

"is to increase transparency and consistency"—

indeed, Lord Gill identified some concerns in that respect that persist to this day—

"whilst preserving the fair and adversarial character and integrity of the ... process."

There is therefore no intention to depart from the rules of natural justice that we have currently. We also recognise that

"Auditors ... perform important functions in resolving disputes about expenses in which considerable amounts of money may be at stake."

From time to time, the amount of money involved in expenses is more than the sum in dispute.

We set out the key legal arguments towards the end of the policy memorandum in paragraphs 108 to 110, in which we recognise that not only common law and natural justice but article 6 of the European convention on human rights apply to auditing disputes where the principal dispute—say, about damages—engages that article. We have set out in those paragraphs the European and Scottish case law that makes us really quite confident that independence can continue to be secured—and be seen to be secured—under the bill's arrangements.

Ultimately, it is a policy matter for the minister, but we think that abandoning all the reforms and leaving these people self-employed outside the Scottish Administration in order to address the tiny number of cases in which the SCTS is a party to a taxation would be a departure from the Gill recommendation.

Liam Kerr: Paragraph 70 of the policy memorandum says that

"transitional arrangements"

will enable current auditors

"to continue as self-employed until their retirement."

Do you have any details of the transitional arrangements that you intend to put in place for current sheriff court auditors?

Hamish Goodall: Basically, they will continue in place for the time being until such time as the SCTS has sufficient numbers of trained auditors to be able to do all the work. Of course, it will be open to existing sheriff court auditors to apply for posts in the SCTS and then move over and work for it.

Liam Kerr: You say "basically". Is that set down anywhere? Is there anywhere people can look to get that clarity?

Hamish Goodall: Sorry, but what clarity?

Liam Kerr: How can people assure themselves about what you have just said? Is that written down?

Hamish Goodall: It will be provided for in transitional arrangements that are made under section 19.

Greig Walker: It will be under regulations. One of the quirks of the existing system of auditors is that it does not have much of a statutory basis. Sheriff court auditors get commissions from the sheriffs principal, and those are relevant to only one sheriffdom. I am afraid that we cannot point you to any legislation for that arrangement, which is based on custom and practice. The aim in the

bill is to produce a new, modern, future-proof and transparent regime.

In the particular case of the auditor of the Court of Session, under section 26 of the Administration of Justice (Scotland) Act 1933 he has the right to stay in office until he is 65. We propose to honour that, so the transitional arrangement for the auditor of the Court of Session is that he enjoys his current statutory rights and the new system will not come in unless or until he retires or resigns.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I want to focus on part 4, which is on group proceedings. As you know, the bill does not give any detail about how group proceedings should operate and instead gives the Court of Session the power to make the rules covering the issue, and the Scottish Civil Justice Council will consult stakeholders on how to develop those rules. It is also notable that the bill requires people to opt into any proceedings. Given that some countries allow an opt-out procedure, will you explain why the Scottish Government excluded the possibility of developing an opt-out procedure in the bill?

Hamish Goodall: In the discussions that we have had with stakeholders since the beginning of this year, all of them have favoured the opt-in procedure, because it is thought to be much more straightforward. As this will be the first time that group proceedings have been permitted in Scotland, we thought that we should go for a more straightforward model.

The opt-out procedure would be much more complicated because the court would have to decide what the group was going to be and define its boundaries. Inevitably, that would mean that some people would be included in the group who actually had not taken any decision and who might be completely ignorant of the fact that they were part of group proceedings. It seems much fairer to require people to opt in. As I said, all the stakeholders we have spoken to this year agreed with that view.

Greig Walker: The Scottish Law Commission did detailed work on the issue in the 1990s, the culmination of which was a draft set of court rules that provided for an opt-in procedure.

Ben Macpherson: So it is purely a practical issue. I can think of a group of people in my constituency who are interested in the bill and they would certainly want to opt in. It is interesting to get that clarity.

Are there any plans to revisit the issue, or are we on the course of an opt-in procedure?

Hamish Goodall: We should never say never, but the intention is that the opt-in procedure will be bedded in and allowed to operate for a few years before any consideration is given to trying the other system.

Ben Macpherson: I have a number of other practical points on part 4. How does the Scottish Government expect group proceedings to be funded?

Hamish Goodall: Group proceedings could be funded under success fee agreements, or they could be legally aided, although we think that the regulations will need to be amended.

Ben Macpherson: Do you mean the legal aid regulations?

Hamish Goodall: Yes.

Ben Macpherson: Has the Scottish Government considered issues such as how an adverse award of expenses might be enforced against a group and how disputes about the distribution of compensation between group members might be dealt with?

Hamish Goodall: Those are all issues for rules of court, although some of them might be considered in the document that sets up the scheme for the group proceedings. There would be something in that agreement between the parties about how the damages will be distributed.

Ben Macpherson: So, in effect, it will be down to private decisions between the parties who are involved.

Hamish Goodall: Yes.

Ben Macpherson: Thank you for that insight.

The Convener: That concludes our questioning. It has been a helpful and detailed session, and I hope that our witnesses found it helpful as well.

We now move into private session. Our next meeting will be on Tuesday 12 September 2017.

11:15

Meeting continued in private until 12:31.

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