JUSTICE COMMITTEE

Wednesday 25 June 2008

Session 3

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JUSTICE COMMITTEE
18th Meeting 2008, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stuart McMillan (West of Scotland) (SNP)
*Margaret Smith (Edinburgh West) (LD)
*John Wilson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
Marlyn Glen (North East Scotland) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Eleanor Emberson (Scottish Court Service
Fergus Ewing (Minister for Community Safety)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 3

Scottish Parliament

Justice Committee

Wednesday 25 June 2008

[THE CONVENER *opened the meeting at 10:32*]

Subordinate Legislation

Court of Session etc Fees Amendment Order 2008 (SSI 2008/236)

High Court of Justiciary Fees Amendment Order 2008 (SSI 2008/237)

Adults with Incapacity (Public Guardian's Fees) (Scotland) Amendment Regulations 2008 (SSI 2008/238)

Sheriff Court Fees Amendment Order 2008 (SSI 2008/239)

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I welcome everyone to the meeting and remind them that all mobile phones should be switched off.

Agenda item 1 is consideration of four negative instruments on court fees. I remind members that I have lodged motions to annul each instrument. Before the formal procedure for dealing with the motions, members have the opportunity to ask the Minister for Community Safety and his officials any questions. I welcome Fergus Ewing, who is joined by officials from from the Scottish Court Service. Eleanor Emberson, who is the chief executive; Gordon Wales, who is the director of operational support; and Nicola Bennett, who is the director of finance.

The Minister for Community Safety (Fergus Ewing): Good morning. I am here with Eleanor Emberson, who is the Scottish Court Service's chief executive and its accountable officer, along with Nicola Bennett and Gordon Wales, who will assist in answering questions, especially if they are challenging and difficult. I thank the committee for fitting in an extra meeting before the recess.

As you know, the proposals before the committee are to increase fees in the courts and in the office of the public guardian. The increases are sizeable in some cases and it is important for the committee to be given the opportunity to explore them in more detail.

Before discussing the increases, it may be helpful if I make my own position clear. I believe it right, in a just society, that Government should provide the means for dispute resolution and should safeguard the interests of vulnerable adults. Such services should be open to all and there must be access to justice for those on low incomes. However, I also believe that we must run high-quality, modern services without putting an unreasonable burden on the taxpayer.

In recent years, fees have not kept pace with the services that are provided to court users. Although there has long been a policy of full cost recovery for court fees in Scotland and throughout the United Kingdom, it is striking that over the past nine years the cost recovery rate in Scotland has fallen from 85 per cent to 53 per cent.

The proposals in the four statutory instruments represent a substantial step to full cost recovery. The step has been taken in England and Wales, where there is already full cost recovery in higher civil and probate business. Fees orders there will ensure full cost recovery in the business of magistrates courts and for most family business by the end of the spending review period south of the border.

The Scottish Court Service ran a public consultation on the proposals and around 150 consultation documents were issued. From those 150 documents, only 13 responses commenting on the proposals were received—although I accept that one response, from the judges council, represents the views of several individuals.

The concern of most respondents was, as you will understand, access to justice. I understand and share that concern. You will know that I understand only too well the viewpoint of the legal profession. As a minister, however, I have had to balance those views against the wider public interest. In particular, I have had to ensure that taxpayers are getting the best value for money.

We give access to justice through our system of legal aid. Those who qualify for legal aid are exempt from court fees and will continue to be exempt under the new proposals. At present, exemptions account for around 10 per cent of the total income from fees, and around two thirds of those exemptions support family actions in the sheriff courts.

Exemptions are one part of the story. I have been able to offer concessions to limit the increases in some areas where I believe it is right to do so. In particular, I have opted for a smaller overall increase this year, and for rises in line with inflation in 2009 and 2010, in preference to having one larger increase for the entire SR period. I am also proposing more modest increases for the public guardian fees.

Taking exemptions and fee levels into account, I do not believe that the fees proposed would

prevent access to justice, and I will give one or two examples. In the sheriff courts, the cost to a party for a full day's hearing will be just £90. In the commercial court, the equivalent cost will be £400, which should be compared with the figure of £1,800 in England.

Proper funding of services is essential. I know only too well that rural courts are under threat if money is tight. Court buildings need to be properly maintained, safe and accessible to all, including those with a disability. The fee increases proposed today will increase cost recovery in the Court of Session to 60 per cent and in the sheriff courts and the office of the public guardian to 80 per cent by 2011. Those unable to pay would be exempt from the fees, and for other people I believe that the fees represent good value for money.

I am happy to answer any questions that committee members may wish to ask about the proposals.

Bill Butler (Glasgow Anniesland) (Lab): Good morning to the minister and his colleagues. I have four initial questions. First, these matters fall within Lord Gill's review of the civil courts, so why bring forward the proposals now? Secondly, given last year's rise in fees of 13 per cent, why are further large rises proposed? Thirdly, I noted that the minister said that the Government wants to safeguard vulnerable adults and people on low incomes, but what about people of fairly modest means who are ineligible for legal aid? Many people, including me, think that that approach will disadvantage such people. Finally—for now—surely the approach represents a further dilution of the principle of the state bearing the cost of access to justice. You are heading towards achieving full cost recovery. The Lord President, who will become head of the SCS if the Judiciary and Courts (Scotland) Bill is passed, is against the so-called principle of full cost recovery. What do you think of his view?

Fergus Ewing: Your questions encompass a great deal of terrain. We have proposed increases to restore a position that is close to full cost recovery. It is important that we recollect that in 1998-99—only 10 years ago—the level of public funding as a proportion of total income was 15 per cent, which was very near to full cost recovery. Since then, the proportion that is public funding—I will not use the word "subsidy", which suggests that we are subsidising an ailing business—has increased to 47 per cent. That means that the level of public funding has increased more than threefold during the past 10 years. The principle of full cost recovery is the policy in Scotland and the UK and is embedded in the Scotland Act 1998. Therefore, we are restoring the status quo ante. It is important to state that general principle.

It is also important to say that the cost of going to our civil courts will be reduced in two ways. First, the fee for lodging a small claim for up to £50 is currently £8, but if I sued the convener for £51 the fee would be £44, because the claim would exceed the £50 threshold. We thought that that approach was unfair for people at the lowest end of the income and dispute scales, so we increased the threshold to £200 and raised the fee from £8 to £15, which represents a small but tangible reduction of the cost for people at the sharp end, who have a dispute to litigate in our courts that involves a small amount of money but is nonetheless important to them.

Secondly, although it is still early days, an analysis of the 12 sheriff courts that carry out about 80 per cent of civil work—I speak from memory; my officials will correct me if I am wrong—appears to indicate that raising the limits for summary causes and small claims has had the result of shifting the volume of business from ordinary actions to summary causes, so that there are 18 per cent—nearly a fifth—fewer ordinary actions in our sheriff courts and 10 per cent more summary causes. That is a consequence of a policy change that we made. Access to justice has improved and the process has speeded up—albeit slightly. Do not forget that I am a lawyer, so I know that when lawyers are involved things take time—

The Convener: And money.

10:45

Fergus Ewing: Indeed. The shift from ordinary actions to summary causes is good, because the summary cause process is cheaper and swifter. That might not be immediately obvious to everyone, so it is important to put it on the record in response to Bill Butler, who was right to raise the issues that he raised.

The Ministry of Justice down south carried out a quantitative survey last year for a report entitled "What's cost got to do with it? The impact of changing court fees on users". It concluded:

> "individuals feel that cost played a minor role in their initial decision-making process (ranked 8th from a list of 9 factors). The primary drivers are … 'Getting a final decision' … and 'Getting justice'."

Although it is difficult to weigh up anecdotal evidence and statistical evidence here and there, it is clear from the Ministry of Justice report that increases in court fees do not make the decision to go to court price sensitive. If anything, the contrary seems to be the case. Court fees are, as I well know, a small fraction of the total costs of litigation. We can safely assume that legal fees make by far the greater contribution—I am smiling now—to the overall cost. As Bill Butler says, that is a serious issue for anyone who faces litigation and does not get legal aid. Legal aid is the prime way

in which we secure access to justice; that will continue. Litigants who receive legal aid have their court fees paid. That includes people who are on income support, benefits and pensions credit. There are complicated rules but, by and large, all those people receive legal aid, which is correct.

Bill Butler also asks about people who are slightly above the limit for legal aid. In my time as a solicitor, I found that to be a difficult matter, particularly in family actions. However, although the fee increases for the sheriff court, where most family actions are raised, may seem to be relatively high—I think that the average increase is 31 per cent, which sounds high—when one looks at the figures involved, one sees that the increases are manageable. The fee for an initial writ to initiate a family action in the sheriff court rises from £92 to £120, which is a rise of £28; it is the same for a notice of intention to defend, which we used to call a NID. It is common experience among solicitors that a great many divorce actions do not go much beyond the level of raising an action and lodging notice of intention to defend because negotiations bring about a result in the vast majority of cases. Very few family law or personal injury cases go to full hearings. I appreciate that there may be specific questions about that later on.

The principle of full cost recovery was established by the Treasury in the Scottish public finance manual. The principle is that, for public services, full costs should be applied unless a decision is made to the contrary. That is the provenance of the policy; I want to make that clear.

I am conscious that Bill Butler asked four questions. I have tried to answer them to some extent, but I am happy to pick up on any supplementary questions that he has.

The Convener: I will let him come back on issues that are still outstanding.

Bill Butler: I will refresh the minister's memory. One question was why, in light of Lord Gill's review, the increases are being introduced now?

The minister explained the situation on full cost recovery south and north of the border, but the Lord President does not support the principle of full cost recovery. Does the minister have anything to say on that? I do not know whether he is willing to give a view on that, but I ask anyway.

I accept that there has been a reduction in small claims—that is indisputable—but the minister said that cost is a difficulty for individuals of modest means, especially in family actions. Does he agree with me and the Scottish Consumer Council that only half the population is currently financially eligible for civil legal aid, that 60 per cent of that half would be subject to a contribution and, therefore, that the fee increase is, in effect, an attack on access to justice?

Finally, the minister referred to an analysis of the reasons that people proceed with cases that was carried out down south, which indicated that costs play a minor role—they are the eighth most important factor in people's decisions. Initially costs may play a minor role, but surely they come to mean something as cases progress. I hope that that refreshes the minister's memory.

Fergus Ewing: You are right to say that I did not touch directly on Lord Gill's review—I am happy to do so now. I understand that the review will report next year. It is likely that legislation will be required to make the changes that will be consequential on the review. As the committee knows, it takes a considerable time to put such legislation in place. Any such bill will probably come to this committee, but perhaps only a couple of years after the review has reported. In the meantime, the courts must continue to run and to meet people's needs.

Failure to approve the increases would cause the SCS, in particular, severe difficulties. Work on Parliament house started in February; it cannot proceed without the £2.8 million, £2.8 million and £3.1 million that will be needed for that purpose in the next three years. The work is classed as revenue work and is needed to maintain the building and to allow capital work on Parliament house to proceed. The building poses a number of health and safety risks in relation to fire, electrics and water. If the work does not proceed, there is a distant but real prospect of a closure notice being issued by inspectors. We have a duty to ensure that those matters are attended to.

Members will be particularly interested to know that we have earmarked £5 million or £6 million to be invested in the court estate in Glasgow. If the increases to court fees are not approved, that work will be in jeopardy and will have to be forgone. The convener is more aware than anyone of the shortcomings of Glasgow district court. That is a serious issue. Similarly, there are several district courts throughout Scotland where there is insufficient access for people with a disability or where using access involves an element of discomfort and embarrassment. That is not acceptable to any of us. We want to ensure that there is both access to justice on a financial level and access to the courts on a physical level by people who have a disability. That is important.

When pegging the increases that we propose today, we have taken into account all the points that I have mentioned. Sometimes government is about hard choices. If we decided to do nothing until the Gill review had reported, some or all of the works that I have described would be in jeopardy. Improving the fabric of our courts will

provide a significantly improved public service to court users. We are not talking about a lick of paint on the wall but about major upgrades and improvements to our courts to make them more user friendly. Courts should be places where people can concentrate not on a leak in the roof, but on the content of the proof, and can get on with matters in reasonably warm, modern surroundings.

It is undoubtedly true that those who are not in receipt of legal aid are in a difficult position, especially when they are up against a party who is. I hope that I am not being unkind to lawyers when I suggest that the knowledge that one party will be able to continue an action using legal aid while the other must pay out of his pocket can be used as a lever in negotiations by one lawyer against another. The report that I quoted indicates that court fees are not a major factor. From conducting difficult family law cases, I know as an absolute fact that court fees are a small part of overall fees. I think that it is still the case that the vast majority of family actions of that type—I am referring largely to divorce actions, in which a great deal of money may be involved—do not go to proof. On the new scale, the increases to fees for sheriff court family actions are relatively modest.

I think that I have already mentioned the fee for an initial writ going from £92 to £120, which is an increase of £28. I do not think that that £28 will be the straw that breaks the camel's back. If an action settles after a NID is lodged and then the party in question assists the action for negotiation, as often happens, the court fees will form a very small part of the overall costs. I think that Bill Butler's point was more to do with larger questions about the civil legal aid system and the accessibility of and eligibility for legal aid, with which we are not directly concerned this morning.

The Convener: Are you satisfied with that answer, Bill?

Bill Butler: I am obliged, but not satisfied, convener.

Paul Martin (Glasgow Springburn) (Lab): Minister, what additional revenue do you expect to recoup as a result of the fee uprates?

Fergus Ewing: I invite Eleanor Emberson to answer that question initially.

Eleanor Emberson (Scottish Court Service): Nicola Bennett has the precise numbers, but the additional revenue will be in the order of £5 million a year. That is the full-year cost; £5 million would not be received this year.

Paul Martin: The minister talked about improving the court estate. Is it guaranteed that the uprated funds will be reinvested in the court estate throughout Scotland? Are any of the funds likely to go to other parts of the Government portfolio?

Eleanor Emberson: They will certainly not go outside the Scottish Court Service's budget. We will spend the money on whatever is necessary to see through the Scottish Court Service's projects. We have talked about the refurbishment of Parliament house, which is a big project that we need to fund. We also need to upgrade the court estate in Glasgow, which represents another major cost, and we are trying to complete court unification and to bring in the new justice of the peace courts with proper facilities. We could spend the £5 million twice or three times over on those things.

Paul Martin: Was there any indication during Mr Swinney's spending review that court fees would have to be uprated to enable those improvements to the court estate to be carried out? That question is probably for the minister. If you are successful in getting your proposals agreed to, how do you expect to carry out those improvements? I understand that, during the spending review, Mr Swinney made significant commitments to improving the court estate, so they would have happened anyway.

Fergus Ewing: The spending review was concerned with an annual budget of around £30,000 million. The total cost of administering the civil court system in Scotland is £30 million, which is 0.1 per cent of the total budget. Perhaps for that reason, some of the issues that we have been discussing today may not have featured largely in parliamentary debates on setting the overall budget. We are proceeding on the principle of full cost recovery, which, as I indicated, does apply. That means taking action to ensure that we improve the courts in the way that I have described.

Paul Martin: Are there any specific indications about where the revenue of £5 million per annum will be committed in the court estate? You must have been provided with a background briefing that gives some indication of how that money will be spent in the court estate. I take it that Ms Emberson would not have given a commitment unless you had some proposals.

Fergus Ewing: As members know, there is a rolling programme of improvements to courts, which involves court unification—that process has begun—improvements to Parliament house and improvements to the court estate. My officials have, quite properly, provided a budget for the necessary costs of such work, which I hope that we all see as necessary. That work is going ahead. I do not receive daily bulletins that specify proposed works to be carried out on the numerous courts throughout Scotland, and I would not ask

for them; rather, I want to ensure at the policy level that we have the financial resources to modernise the courts, especially those that may not be able to get fire certificates in the future, which I mentioned. My job is to make sure that the money coming in is sufficient to meet costs, and I believe that that has been achieved.

11:00

England and Wales have already moved to full cost recovery. In some civil work, it is at 108 per cent, which means that they are charging fees that are higher than the court's costs. They are also moving towards full cost recovery in family cases within the current spending review. Such decisions are tough for those down south and for us in Scotland, but it is right to make them.

I do not think that you are asking whether I receive reports about what specific work is necessary to put in disabled access, sufficient toilets, security provisions, and public gathering areas in each court. Paul Martin is not suggesting that I should receive such information at that level of detail, and I do not. However, I have been fully briefed on the big picture by Eleanor Emberson and her staff.

Paul Martin: Just to clarify the point, it is clear that additional funds are being provided to your portfolio. That is an obvious point. When you submitted your bid to the Minister for Finance and Sustainable Growth, did you indicate to him that you need to improve the court estate? Did he come back to you and say that you would have to look at uprating the court fees to allow for that improvement, or did he say that he could provide the kind of funding that would be required to carry out the improvement? That is an obvious question.

Fergus Ewing: There is no cash outwith the justice department from which money for that purpose could conceivably be drawn. Setting budgets is not a process whereby money suddenly appears from other departments. We have to operate within our budgets.

On setting the budget, the Scottish Court Service tells us how much money is required to improve and, indeed, maintain the court estate so that courts do not have to be closed at some time in the future. That has to be paid for by moving towards full cost recovery, which has been Government policy, so that is what we have done.

Eleanor, do you wish to add anything to that?

Eleanor Emberson: Only that when the issue was discussed during the spending review, the only alternative we found to the increases that we are discussing would have been to divert money away from other essential public services.

Paul Martin: I have one final question, which is about the Lord President's response. Mr Butler asked about that and I would welcome some clarity on the minister's view of the Lord President's very firm personal view, which is an unprecedented consultation response. What is your response to the Lord President's response to the consultation?

Fergus Ewing: I have the greatest respect for the Lord President and the senior judiciary in Scotland. In my professional experience as a lawyer I have seen how fortunate we are in the calibre of judge that we have in Scotland.

The Lord President was arguing his corner, as lawyers do, I have noticed. Usually they argue against change and are conservative with a small c. That is perfectly proper. However, as the minister, I have to take account of the need and duty to maintain and improve courts, not least Parliament house. If the works are not done in Parliament house, there will be serious problems ahead. We have to balance the interests that the Lord President has expressed, quite properly, against the realities of improving the court estate.

I gather that there was a flooding episode in the Court of Session at the weekend. If members are interested, my officials can provide more details about that. It happened because of difficulties in gaining access to carry out various improvement works on what is, I believe, a grade A listed building in which the mode of work is extremely difficult and the costs of that work are high.

My response is that, although I have great respect for all the judges and their views, I have to take account of the whole picture, including the interests of the taxpayer and the need to improve the courts. I hope and imagine that the Lord President fully recognises the need to improve Parliament house and some of the courts. I understand, from speaking to an advocate yesterday, that court 11 is in a particularly poor state. It is no good if people—who want proper standards of justice—turn up to what is supposed to be one of the highest courts in the land and find it a shoddy place.

Margaret Smith (Edinburgh West) (LD): I welcome the shift on small claims and the fact that you noted the particular role of the public guardian in what you said about the level of fees.

A number of questions have been asked that I was interested in hearing the answers to. On the face of it, this is a pragmatic issue: we need to have enough money to do the job that is required in the courts, and I am sure that all committee members fully support ensuring that the necessary funding is available to the courts service, whether for the on-going maintenance of the buildings or for the on-going maintenance of justice.

Two principles are at the centre of that, the first of which is full cost recovery. The Law Society of

Scotland, Shelter and the Scottish Consumer Council have raised a number of concerns about whether that principle was properly consulted on—whether people were explicitly asked for their opinions on full cost recovery. It is noticeable that people have explicitly given their opinions on it, which perhaps indicates that they have concerns about it.

You have given us an idea of the provenance of the principle of full cost recovery but, given the concerns that have been raised, will you commit to a review of it? Can you give any assurances about the direction of travel? You have told us today that, even following the relatively modest increases in funding that you have described, cost recovery will still not come anywhere close to 100 per cent. You have said that cost recovery for the Court of Session will come to 60 per cent and that cost recovery for the sheriff courts will come to 80 per cent, so there still will not be full cost recovery. Can you give people any comfort that the position will be reviewed and that through the fees system you are aiming for not 100 or 108 per cent cost recovery, but reasonable recompense for the work of the courts?

I have another question, but you might want to answer that one first.

Fergus Ewing: I thank all members for participating in the informal briefings that we arranged for them, which took place some weeks ago. In a moment, Eleanor Emberson will describe the process that the SCS followed in the consultation exercise. First, I will answer Margaret Smith's question about full cost recovery.

Margaret Smith is absolutely correct to say that, even if the increases are approved by the committee today—as I hope they will be—there will still not be full cost recovery. At the moment, the recovery rate in the Court of Session is only one third; two thirds of the costs are subsidised or funded. In the sheriff courts, the recovery rate is 61 per cent. Do we have plans to move to full cost recovery later? No, we do not. We have taken the view that we need to make the proposed increases now, for the reasons that I have described, to improve the court estate and to ensure its maintenance but, before moving further, we want to hear what Lord Gill says.

If approved by the committee today, the proposed increases will take us through to 2011. We think that, before making further changes, it would be sensible to hear what Lord Gill recommends and what all those involved in the justice system have to say about the matter. So, the answer is no—we have no plans for full cost recovery and we will not consider any further change until the Gill report has been published, fully considered and debated.

I make it clear that, to take account of views that were expressed to us by MSPs in informal briefings and by the Lord President, the judges council, the Faculty of Advocates and a few other respondents to the consultation—including East Ayrshire Council, which thought that subsidy was perhaps unjustified—we have made concessions on how the changes will be introduced. We have ameliorated the increases as a result of consultation respondents' views.

Margaret Smith mentioned the fees that are payable to the public guardian. I stress that the average increase that we propose is only 8 per cent. We want to take particular account of the needs of people who use the office of the public guardian's services, so the increase for registering a power of attorney is £5—the cost will go from £60 to £65—which is modest. I appreciate that that is still the subject of complaints, but we are living in Scotland. It will cheer up members and users of the public guardian's services if I point out the good news that the cost of registering a power of attorney in England is £150, which is more than twice the increased fee of £65 here. We have taken account of the OPG situation. As Margaret Smith—rightly—raised the issue, I wanted to bring out those facts in the evidence.

The SCS was in charge of the consultation, so I ask Eleanor Emberson to answer the remaining questions.

Eleanor Emberson: I was disappointed that Shelter felt that it did not have the opportunity to respond to the consultation. It was not on the list of bodies to which we issued the consultation document, because it has never told us that it wishes to be on that list. However, the document was on the Scottish Government's website in the normal way, as are all public consultation documents. It was also on the Scottish Court Service's website. We issued a news release, but unfortunately no media outlet picked it up, as far as I know. We made a decent effort to ensure that Shelter and others were aware of the consultation. If organisations had looked at the Scottish Government's website, which details all consultations, they would have seen our consultation there.

Margaret Smith: The second principle that underpins the pragmatic issue is access to justice. No matter how members vote on court fees today, the minister would do well to be aware of a growing general concern among not only committee members, but the public, about wider issues of access to justice. What is he doing to address those wider issues? One concern about the increased fees is that the people who will have the most difficulty in paying them will be just above the threshold for legal aid. They will be hit the

hardest. In fact, the debate is probably about legal aid thresholds and wider access to justice issues.

Members have thrown in a couple of anecdotes, so I will do so too. I am receiving feedback from constituents who receive benefits such as incapacity benefit and who have been turned down for civil legal aid, who will have to defend themselves in court on motoring charges, for example. I am also hearing concerns from the Edinburgh Bar Association about a wide range of changes that it feels will hamper access to justice—for example, for people when they are first taken into police stations.

First, will the minister commit to giving us a brief indication of what he is doing on the wider issues that underlie many of the concerns about the fees? Will he also reassure us that he will return to the issue and give us further information on it in the fullness of time? I have a number of concerns about the matter. In the past few weeks, I have written to the Cabinet Secretary for Justice about some of the concerns that people have about court fees. I agree with the minister that the increase in the fees is relatively modest, but what is relatively modest to you or me, minister, is not relatively modest to somebody who is just on the wrong side of the legal aid threshold and having to pay court fees.

11:15

Fergus Ewing: Margaret Smith makes a number of fair points, which are primarily related to general issues about legal aid, its adequacy, levels of eligibility, the contributions and the thresholds. Those are all extremely valid points.

I offer Margaret Smith some information as a starting point. Exemptions currently account for £1.3 million, or 5 per cent of the overall costs, and are provided to those who qualify for legal aid and people on income support, income-based job seeker's allowance, pension credit or working tax credits, including with the child or disability element, and with income of less than £16,000 per annum. I accept fully that people just above the threshold find the costs of litigation high. However, I argue very strongly that the court fees are a very small fraction of those costs in cases that do not go to a full proof.

In addition, it is fair for me to point out that in contested divorces, in which the issue might well be a financial claim for a capital sum, maintenance or a transfer of capital assets, often a family or second home and pensions are involved, so there is quite a lot of notional capital, but it is not realisable for obvious reasons. Therefore, at the end of the day, full recovery is made from the legal aid fund. Where recovery of assets is made in an action, the legal fees are paid from that fund. It is important to bear that general factor in mind.

Plainly, the amount of money from total Scottish Government funds that is devoted to providing legal aid is a political judgment, and it is one that the committee could certainly consider in future if it wished to do so. Given the serious expressions of concern that I am hearing from members today, that is one option. As members know, I am also always willing to meet any of you about an issue of serious concern, and I would be happy to take forward the matters raised today in that way as well.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I have concerns about the way in which discussions have gone this morning—taking the serious issue of access to justice and linking it to issues that should be decided at budget time. I have a feeling that the issues about maintaining the court estate are perhaps a means of deflecting attention from the real facts and serious concerns raised by those who represent people in our courts on a daily basis. I refer to organisations such as the Law Society, as well as the Lord President and all who have been mentioned today.

I would like more information about what discussions there were during the budget-setting process on the suggested serious impact on the planned programme of work. How much did the Scottish Court Service ask for for its planned capital works programme? How much did it get in the budget settlement? You suggested this morning that assumptions were made in the budget. Was it right for the Government to assume that the Scottish Parliament would endorse its proposals for court fees? Was it right to assume that the consultation that was just getting under way as the budgets were being discussed would support the position that has been taken?

Fergus Ewing: I said what I can say about the policy decisions in response to Paul Martin's questions. I have been candid. I assure Cathie Craigie that we treat these matters with the utmost gravity. Maintenance and improvement of the court estate is an absolutely essential function. I am certainly not going to preside over my areas of responsibility in the SCS and see that funding is not available. I assure Cathie Craigie that a sum of £5 million to £6 million has been earmarked to invest in the court estate in Glasgow. That will be put in jeopardy if we do not agree to the increases today. I have talked at length about Parliament house—I will not repeat my comments on that.

If the court fee increases do not go ahead, we might have to consider closing rural courts in Scotland, which would raise serious issues about access to justice. The reality is that many courts have not had the maintenance or improvements that they have required in years past. Therefore,

we need to take these issues extremely seriously. I will ask Eleanor Emberson to comment, given that the consultation process and the financial arrangements of these matters are the responsibility of SCS, which, as you know, is a Government agency and so is financially distinct from the Government, as it were.

Eleanor Emberson: On the spending review process, I certainly do not need to tell the committee how tight the budget was throughout Scotland and for justice in particular. It was not possible for ministers to allocate to the Scottish Court Service the amount of money that we would have ideally wanted to cover all the things that need to be done to improve the court estate and keep services running satisfactorily. Ministers allowed us to consult on the orders before they introduced them. We have set our budget on the expectation of getting the money, but we are well aware that Parliament might choose not to grant us the money. If it does not grant us the money, we will have to revisit the budget and look at further ways of saving money in addition to the more than 2 per cent a year efficiency savings to which we have already committed ourselves publicly.

Cathie Craigie: How much did the SCS ask for and how much did it receive in respect of investment for its capital programme? Is it right to assume, six to nine months before Parliament is asked to consider an issue, that Parliament will agree to the proposal, given that you are dealing with justice matters, which are so important to the work of the Government and to the people who need access to the system? I would really like answers to those questions.

I think that the explanatory notes that accompany the instruments show that the increase is for the administration of the Scottish Court Service. Nowhere does it highlight that it is for the capital works programme, of which a responsible Government should take account at the time. It should have a rolling programme of works.

Fergus Ewing: I remind members that the principle of full cost recovery is set out in the public finance manual, and has been accepted by Governments in Scotland and the United Kingdom since 1992. We are implementing a policy of full cost recovery that perhaps should have, but was not, applied previously. Whereas the amount of public funding as a proportion of the total was 15 per cent in 1998, that proportion had increased to 47 per cent by 2006-07. In taking this action, we are implementing a policy that was agreed by our predecessors. Therefore, taking that into account, I would have imagined that members would support our policy.

Eleanor Emberson has just been passed a spreadsheet—I admit that I do not spend my days reading spreadsheets if I can possibly avoid it—so I ask her whether she, as accountable officer with, along with her officials, responsibility for routine matters of accounting, has anything to add to the answers that we have already provided.

Eleanor Emberson: Sorry, I cannot add a great deal. The spending review is not a simple process in which the Scottish Court Service asks for an amount and is then sent away with an amount. Everything was discussed at the time, including the possibility of continuing to implement the policy on cost recovery by pushing up fees. We really are not pre-empting Parliament and we understand that fees orders are subject to parliamentary approval. If we need to revisit our budget to remove all this investment, naturally we will do so; but the outcome will not be terribly satisfactory.

Cathie Craigie: I hear what the minister has said, but I do not believe that we have been given a satisfactory answer this morning on the big plea that has been made about the importance of the fee increase to the future of the capital programme. Of course Government is all about priorities, but perhaps the fee levels did not previously increase in the way that the current Government would have liked because the previous Administration did not make a priority of reducing the number of people who have access to the justice system.

Fergus Ewing: I respectfully disagree with that last sentiment. We do not have a policy to that effect and I do not believe that the proposed increases will impede access to justice. The fees are a small fraction of the total cost of litigation. If we did not impose fee increases, we would need to find the money elsewhere for attending to the necessary building works. There ain't any money to find elsewhere, so we need to take these decisions so that we can do the job that we are here to do. Although I hear what members say and appreciate the seriousness of their concerns and fully respect their views, I respectfully disagree with some members on that issue.

Stuart McMillan (West of Scotland) (SNP): Good morning. On access to justice, paragraph 3 of the letter of 5 June that the minister sent to the convener states:

> "the Scottish Court Service have agreed to more vigorously promote the scheme to ensure entitlement for all those who qualify."

What exactly will the Scottish Court Service do to promote the scheme more vigorously?

Fergus Ewing: Sorry, I did not hear which paragraph you quoted from.

Stuart McMillan: I refer to paragraph 3 of the letter dated 5 June that you sent to the convener. The paragraph states:

"In addressing the access to justice concerns … the Scottish Court Service have agreed to more vigorously promote the scheme to ensure entitlement for all those who qualify."

Fergus Ewing: I am with you now.

I speak from memory, as I recently read all the responses, but the consultation response from, I think, the Scottish Consumer Council highlighted, quite properly, an issue with access to benefits, which is that not all those who are entitled to benefits claim benefits.

Citizens advice bureaux also do sterling work in promoting to the wider public the importance of claiming benefits and informing people about benefits of which they were hitherto unaware. I recently visited the Dumfries citizens advice bureau and saw the excellent work that it does. We recognise the merit of the general tenor of the representations that have been made that it is essential that everything is done to promote the exemption scheme vigorously. The gateways to those exemptions are income support, working tax credits and the other exemption categories that I mentioned before. I am sure that all members endorse and support the work of the CABx in relation to that, which we regard as very important.

11:30

Stuart McMillan: What will the SCS do to promote the scheme vigorously?

Eleanor Emberson: There are various things that we can do. We already have leaflets about fees, but we can revamp those and ensure that people are made aware. It is mostly about ensuring that people are aware that they may be entitled to a fee exemption. We can put posters up in court buildings and put things on our website. We have not decided on the precise details, but we will do whatever we can to ensure that people are aware that there are exemptions that they can claim if they are entitled to do so.

Stuart McMillan: At the other end of the scale, do any large companies benefit from the current system?

Fergus Ewing: The answer to that is yes. A very large number of the largest companies in Scotland—and indeed, Britain—benefit, perhaps reasonably handsomely, from the level of public funding that is applied, especially in the Court of Session. As I am interested in that area, I took the step of obtaining a printout of the commercial roll of actions—it might interest members to know that it is a roll call of some of the plcs and large companies that are in receipt of an element of public funding. In this case, I would perhaps call it a subsidy, because I would be surprised if any of the companies that I am about to mention would expect the taxpayer to fork out for any part of the costs of their litigation.

If I were to go to Princes Street, Sauchiehall Street or Academy Street in Inverness and explain to the public that the Government has been funding some of these companies, I would receive very surprised, if not astonished, reactions. The roll call includes the Network Rail v Stagecoach Holdings court action that was carried out in the Court of Session; Scottish Power; Littlewoods; Scottish Provident; Sun Alliance; Edinburgh Airport v Ryanair; Scottish Equitable; Scottish Legal Life; the Royal Bank of Scotland; Halifax; Scottish & Newcastle; Clydesdale Bank; the governor and company of the Bank of Scotland; and Scottish Water v Transco.

I have hundreds more of those names. It seems quite wrong in principle that an element of public funding—public subsidy—is going to the most successful companies. They would certainly not expect it. They want quality justice and swift justice, not handouts from the Scottish Government. If we were to reject the increases today, we—and anyone who rejected them—would be saying that the handouts to the top plcs should continue. I feel very strongly that that is not a right or correct use of public money in this country.

Margaret Smith: That is quite a powerful argument, but the counter-argument might be that there might be some way in which you could ensure that there was an upper threshold—a different level of fees for plcs or companies with a particular turnover. There would be some bureaucracy involved, but it might nevertheless be a way in which you could recover a great deal more of the money that is required to carry out the work of the courts—with public support, I might add.

Fergus Ewing: That is a reasonable point, which, as you would expect, I considered with my officials when the full extent of the hidden subsidy became known to me. The subsidies to plcs apply principally in the Court of Session—that is what we are talking about—and family actions in the Court of Session have a lower tariff of fees anyway. In the relatively small number of family actions—in a recent year there were 220 or 230, of which 205 were divorces—slightly lower levels of fees are paid. However, Margaret Smith asks a reasonable question about whether we should single out some types of litigant to pay a higher tariff. That is an interesting point that we can pursue, but it would involve a fairly radical transformation of the way in which we levy fees. It would be useful if Lord Gill's review considered that.

On a wider note, it has been put to me that the invisible earnings from commercial court work in England and Wales are about £2,000 million a year. A case can be made for raising our sights a little from the issues that we have rightly considered today to consider whether we can encourage more companies to use our courts and our excellent judiciary in Scotland, so that we get some of the money that presently goes to London and expand on the successful and good work of the commercial courts, which are a fairly recent innovation.

One view is that charging more for plcs or wealthy individuals would involve an element of means testing, which would involve bureaucracy and may cost more to administer. In the context of the Gill review, we can reconsider whether we need to transform the criteria that lie behind the charging of court fees. What we are doing today will take us through to 2011, by which time we can have the debate about Lord Gill's review and the long-term future of the Scottish courts.

John Wilson (Central Scotland) (SNP): The minister has dealt with many of the questions and thoughts that were running through my head, but I have a couple of points that I want to put on the record, particularly in relation to the Court of Session. We were told that the cost recovery from fees is 30 per cent in the Court of Session and 61 per cent in the sheriff courts. I ask the minister to clarify that the majority of the companies that he mentioned would be involved in cases in the Court of Session, rather than a sheriff court, and that therefore the proposals will have a benefit. The minister said that he may take on board Margaret Smith's suggestion that we should consider a different fees mechanism for such companies. However, that would mean that accountants would make more money out of the process, by trying to prove that companies were not in profit to alleviate the costs.

Why do we find ourselves in the present position? The minister said that, in 1998-99, the cost recovery from fees was at 85 per cent, but now the overall figure is 47 per cent. What has happened in the intervening 10 years? The cost recovery from sheriff court fees has reduced to 61 per cent and for Court of Session fees it is at only 30 per cent.

Fergus Ewing: To answer the last point first, in the past 10 years there have been no increases to the level of court fees, so the fees have remained more or less the same. That is why we have gone from 15 per cent to 47 per cent public funding, which is more than a threefold rise. I am not here to conduct a post mortem about what may or may not have happened before I was the minister. As you know, I tend to be an optimist and to look forward, not back, therefore I do not want to get into that issue too closely. However, we are where we are and we must tackle the situation as we find it, not as we would like it to be—that is government.

I am sure that the companies involved are interested in obtaining a swift settlement from a judiciary in Scotland that is of the highest quality. The judiciary here is a terrific asset, and one that we perhaps do not talk about as much as we should. We hope to deal with that issue separately and to provide the companies that need to litigate from time to time with a means to do so in their own country without having to deal with litigations in other jurisdictions. I am sure that if the finance directors of Stagecoach, the Royal Bank of Scotland or Costain were here, and we asked them whether they needed the several hundred pounds subsidy that they may be getting, they would say, "No we don't. We didn't know we were getting it," that just like the public don't know they are getting it.

By taking these measures, we are closing the gap considerably and reducing the level of subsidy, especially in the Court of Session, where the average increase is 49 per cent. As Margaret Smith pointed out, that will not take us to full recovery. It was the considered view that we should not go for full recovery, because it would involve too much of an increase. We wanted to make the increase proportionate, taking account of the interest of members today, and to wait until we get the outcome of Lord Gill's review next year.

Cathie Craigie: If I had known that the minister would come along with lists, I would have provided a list of individuals who benefit from and require to use our courts.

If the Government is serious about consulting the public and organisations, it must take account of what people say in response to questions. It appears from the papers that have been given to the committee, particularly the analysis of the Government's consultation, that people do not agree about the inequalities. Where people recognised that there were inequalities, the majority responded by saying that if we are to have a truly open and accessible justice system that does not take into account how much money someone has in their bank account, the state should bear the cost.

Fergus Ewing: The consultation was conducted by the SCS. I have no criticism of how it was conducted. The SCS issued papers to those that it believed had an interest in receiving them. There is no point in sending papers out on a sort of fishing expedition to those whom the SCS thinks might have an interest but who have not previously expressed one.

It is not all one-way traffic. East Ayrshire Council said:

"It is submitted that the high subsidy to the Court of Session should be removed to create greater equality."

Another local authority respondent said:

"It seems inequitable, from a taxpayer's point of view, to fund the litigation costs of well resourced enterprises."

Cathie Craigie: Could you finish the quote, minister?

Fergus Ewing: The East Ayrshire Council one?

Cathie Craigie: No, the North Lanarkshire Council one.

Fergus Ewing: It says:

"On the other hand, however, it could be argued that the principle of full cost recovery fails to recognise the collective benefit to society as a whole in having access to civil justice."

I take the other point of view to that of Cathie Craigie. She mentioned individuals. I was concerned to get a picture of how ordinary individuals would be affected, particularly those who would not qualify for legal aid and those raising personal injury claims. There is a difference between most personal injury claims and consistorial actions. One does not choose to have an accident at work. If one has an accident at work it can ruin one's life. That is slightly different from actions that one may choose to take or that involve a certain element of election.

11:45

I want to share with committee members some information that I have received from my officials. In the Court of Session, there are around 2,500 personal injury actions each year, of which 99 per cent settle. Only 1 per cent go to a proof or a trial. In 2007, only 26 cases went to a proof.

I have a useful analysis that breaks down the 2,500 cases into types of action, which will give committee members a clearer picture. Cases related to accidents at work formed 41 per cent of the total; road traffic-related cases, 20 per cent; asbestos-related cases, 13 per cent; vibration white finger, 7 per cent; clinical negligence, 5 per cent; and others, 14 per cent. My officials advise me—and I would have imagined this to be the case—that the cases related to accidents at work, asbestos and VWF were employee v employer claims. In such cases, generally the employee is funded and supported by his or her trade union, and the employer by its insurer. The main players—the financial sponsors of the actions—are therefore the unions and the insurers. The individual employee is not the payer of legal fees, including the legal costs of using the courts. Road traffic accident cases are usually against a driver. Such cases are a mixture of speculative claims and insurer v insurer claims.

We all know that that is the general terrain. The fees in the Court of Session are the highest—by and large, they are higher than in the sheriff courts—but it is only fair to point out that very few people among those who are just above the legal aid threshold fund their own litigation. From my experience as a solicitor, anyone seeking to go to the Court of Session without very substantial means indeed was given clear advice about the consequences of doing so. Hardly any do.

I wanted to make that clear because I know that members take a particular interest in personal injury claims and the law in relation to them.

Cathie Craigie: You say that the main players are unions and insurers, but unions are made up of members of the public—people such as you and me—who have to pay their union dues to cover union members who are seeking justice. I perhaps do not include Bill Aitken in that.

The Convener: I have no interests to declare here.

Do you wish to comment on Cathie Craigie's point, minister?

Fergus Ewing: Not really.

Cathie Craigie: I just wanted to make the point, convener.

Nigel Don (North East Scotland) (SNP): Good morning, minister. I am grateful for your comments on personal injuries, but I would like to ask about family actions in the High Court, particularly divorce actions. I have to plead ignorance: I do not know why people end up in the High Court. Do they choose to be there? Are they—as I guess they are—people whose means are very substantial, in which case the issues that we are discussing are irrelevant?

Fergus Ewing: Those are fair questions. I recently asked my officials similar questions and was told that, last year, 223 family actions took place in the Court of Session, of which 205 were divorce actions. The sheriff court has had jurisdiction to deal with divorce actions for well over 20 years now. It is far less expensive to go to the sheriff court, so why would people choose to take their divorce action to the Court of Session?

I can think of two answers to that question, although there may be more. The first is that very large amounts of money may be involved and people wish to have the decision made by one of the top judges in Scotland. The second is that, if one raises an action in the sheriff court, there is still, I believe, a right of appeal by either party—first to the sheriff principal, then to the inner house of the Court of Session, and then to the House of

Lords. Many would say that that process might benefit lots of lawyers but is not a process that they would want to get involved in. By going to the Court of Session, they can perhaps cut the length of time it takes to resolve the litigation. If a person can afford to go to the Court of Session to raise a divorce action, instead of going to the sheriff court, I am pretty sure that that person can afford to pay the court fees.

Nigel Don: So the conclusion that we can draw from the information about who is actually involved is that, by and large, the people who will be asked to pay the substantial percentage increases in fees are well capable of doing so and are paying large sums anyway.

That brings us back to the general principle, which was enunciated a long time ago and relates to those who are just above the threshold of legal aid. Minister, you have been invited to reconsider that point. I heard you bounce it back to us as something that we might consider, and we probably would be inclined to do that. However, I still encourage the Government to reconsider the whole issue of legal aid and access to justice at some stage, although plainly that is not relevant to this debate—it is for the future.

I think that you also suggested that there is no money outside the justice budget with which to balance the books. Will you confirm that? I understand the budget-setting process. You do not put every number down and tick off the fractions; there is a debate. I think that I understand—I would like your confirmation—that you can do nothing within the current budget to get more money into the justice system and that therefore we have to balance how we spend that money.

Will you also confirm that we are talking about a difference of revenue and capital? That may have been slightly confused. I take it that the fees do not fund anything that accountants would call capital but instead fund things that would have been under revenue budgets in the days when I ran factories—repairs, for example, and other things that could not be capitalised. I would be interested in your comments on that.

Fergus Ewing: First, I believe that those who choose to raise a divorce action in the Court of Session in Edinburgh do so without being unduly worried about the court fees.

I will take the issue of legal aid under advisement, and I am happy to meet MSPs. The legal aid issue has emerged from today's proceedings as a concern, although it is always a matter of balancing the budget. Does that cover your points?

Nigel Don: I saw Ms Emberson nodding, and I would like that to be clarified for the record.

Eleanor Emberson: You are correct that we are discussing revenue budgets. You are also correct that major projects, which are often described as capital projects, often have substantial revenue elements that cannot be capitalised. That is what we are talking about.

Nigel Don: Thank you.

The Convener: We have had a fairly lengthy debate, so we will now go to item 2, which is to discuss motion S3M-2212, which is in my name, that nothing further be done under the Court of Session etc Fees Amendment Order 2008.

I have listened with great care to the arguments that have been advanced this morning. I have listened to the evidence from the minister on the higher level of recoveries that applies in England and Wales and on the level of exemptions. I note that the hearing charges in the sheriff court will increase by only 19 per cent, which is fairly minimal. The minister was slightly disingenuous in not referring to the fact that the Court of Session fees will increase by £220.

It is necessary to consider whether the proposed action is commercially justified. It is clear that there is a level of subsidy, but members have properly raised the issue and principle of access to justice. We must ask ourselves whether what we are doing today will seriously affect so many people that it becomes an impediment to justice.

Many and varied actions are raised in our courts, and they come under various headings. However, to me, issues surrounding personal injury claims and family law are of particular importance. As the minister properly pointed out, it would not matter to many litigants, particularly in the Court of Session, if there was an increase in the charges. Indeed, it would be interesting—this is perhaps a matter for another day—to work out how much of the cost of litigation relates to the fees and how much relates to the charges that are made by senior counsel, in some cases of £2,000 per day.

I have considered the matter. On personal injury, the minister was correct to point out that only 26 cases went to proof in the Court of Session last year and that the vast majority of such actions are legally aided or sponsored by trade unions. Many such cases are led and defended by insurance companies, which have sufficient assets to ensure that they will not be troubled by the increase in fees.

On family law, the minister said that around two thirds of exemptions, which account for 10 per cent of the total income from fees, support family actions in sheriff courts. The decision whereby the actions that may be raised in the sheriff court will be significantly increased will inevitably reduce costs in legal fees and court charges, and

therefore the impact on individuals will be significantly reduced. On that basis, I am satisfied that what is proposed is acceptable and I will not move the amendment in my name, which was lodged in accordance with my normal practice, which is to protect the committee's ability to act in a given situation. However, Bill Butler has indicated his support for the amendment, as is entirely his right. I invite him to speak to and move the amendment.

Bill Butler: I propose to move the amendment to annul—

The Convener: It is a motion to annul. I misled you.

Bill Butler: I am sure that you did not do so deliberately. I intend to move the motion to annul. Like colleagues, I listened carefully to the minister's presentation and responses, but I remain unconvinced and the serious concerns that I had before I heard from Mr Ewing remain.

The proposed amendments to court fees raise basic issues to do with access to justice. I do not agree with the direction of travel of the Scottish Court Service, which says in its submission:

"Full cost pricing … will continue to be the underpinning policy for our fees."

I agree instead with the respondents to the consultation who, according to the submission from the SCS,

"expressed strong views that full cost pricing was not appropriate for court or Public Guardian business."

Indeed, Progressive Partnership said in its report for the SCS:

"the majority of respondents disagreed with fee rises in principle",

and

"0 organisations supported the strategy of implementing a one-off increase".

I pray in aid two sources. First, the Law Society of Scotland said:

"A significant part of the cost of the provision of the courts should be borne by the state. It is in the interests of both the State and the wider public that there is a robust and respected system for resolving disputes … it is not inequitable that the State meets a substantial share of the cost".

I agree. Secondly, the Lord President said:

"For my own part I cannot subscribe to the principle of full-cost pricing. While I have no difficulty with the proposition that those who use the courts should pay something to the revenue costs of maintaining those courts, I am not persuaded that non-exempt litigants should pay the whole proportionate cost of such maintenance. The courts are, after all, provided in a democratic society by the State as a forum in which disputes can be resolved judicially. The whole of society, not just those who choose to sue and those who have the misfortune to be sued, has an interest in the provision of such a facility. The general taxpayer should accordingly bear some proportion of these costs—just as he bears the cost of State education and health care whether or not he has children to educate or has need of medical services. The State (and so the general taxpayer) has some interest in resort being had to the public courts rather than to alternative modes of dispute resolution; it is only by judicial determination that the law is clarified and determined. Accordingly, whatever the arrangements put in place between now and 2010/11 I would be opposed to a scheme which had as its ultimate objective the full recovery from litigants (subject to exemptions) of the revenue costs of running the courts."

The principle of the state bearing some or a large proportion of the costs of access to justice has been diluted far enough. The proposed increase in fees, even if it was phased in as suggested, would have an impact to the detriment of the ordinary citizen, who does not have the means that are available to large concerns or comfortable individuals. Under the proposals, civil court fees would soar. The average increase in the Court of Session would be 49 per cent, and in the sheriff court it would be 31 per cent. According to the Scottish Court Service, that would mean that the level of cost recovery in the Court of Session would increase from its present level of about a third to 60 per cent by 2011. Such large increases in court fees are insupportable.

12:00

I know that the minister laid a degree of stress on legal aid. However, according to the Scottish Consumer Council, although 96 per cent of the £1.3 million-worth of exemptions that were awarded in 2006-07 were legal aid cases, only half of the population is financially eligible for civil legal aid and 60 per cent of those people would be subject to a contribution. That has led to concerns that many people with moderate incomes are dissuaded from pursuing cases because of a perceived inability to meet potential expenses, which might include court fees. "Paths to Justice Scotland" found that people on middle incomes feel more disadvantaged in obtaining legal advice than do people who are better off and people on low incomes.

The Government has brought forward inadvisable and frankly intolerable proposals in other areas. There was an increase of 13 per cent in court fees only last year, and Scotland already has high fees compared with the rest of Europe. The Government should withdraw the statutory instruments and await the publication of the results of the civil courts review that Lord Gill is undertaking, because the matter forms part of the issues that are under consideration. I do not expect that to happen, but I hope that the minister will accede to my request. I do not support the instruments.

I move,

That the Justice Committee recommends that nothing further be done under the Court of Session etc. Fees Amendment Order 2008 (SSI 2008/236).

The Convener: We have had a lengthy debate on a serious matter. I invite brief contributions from those who wish to make them, beginning with Paul Martin.

Paul Martin: I support the motion in the convener's name in the strongest possible terms.

First, I reiterate the point that I made to the minister earlier: it is unprecedented for the Lord President to make a personal response in such terms. We have been conditioned by the Government, particularly during the passage of the Judiciary and Courts (Scotland) Bill, to take the Lord President's comments seriously—I recall a number of contributions from the Cabinet Secretary for Justice in which he said that. The Government should not be selective and accept the Lord President's recommendations only when it suits it to do so. The Government has not taken his powerful evidence seriously enough.

Secondly, following Bill Butler's point about the possibility of the Government withdrawing the instrument, the minister made a powerful point about plcs, which he said are being subsidised by the current arrangements. It would be much better if he was to withdraw the amendment order today and review the current arrangements so that, in respect of the issues that Margaret Smith raised, we could reconfigure the arrangements and consider through the mechanism of the Gill review why the plcs are subsidised. It is not good enough for the minister to make the case and up the ante, saying that the companies have been subsidised, but then to say, "That's a nice piece of commentary, but we won't do anything about it." We have the opportunity to consider the matter in its entirety.

In conclusion, I welcome the fact that the Government again appears to be selectively following the lead of and emulating the arrangements in England and Wales. I am not convinced by the arguments that have been made on the revenue arrangements, which Ms Emberson confirmed today. I am not satisfied. Whatever happens today, we need to hear further information from the Scottish Court Service as to how the revenue commitments in respect of the uprating of the fees will be adhered to.

I do not welcome the fact that, once again, the committee is being held to ransom by the Government, which has advised us that, if we annul the instruments, it will not be able to go ahead with its programme. That is simply not good enough. Too often, the Government approaches the committee in such a way at the 11th hour. I support in the strongest possible terms the motion that has been moved by Bill Butler.

Margaret Smith: The decision is not necessarily an easy one. Some fundamental issues have been given a good airing this morning. I will be seriously disappointed if the minister—even if he wins the vote—thinks that this will be the end of the matter and that today marks the end of the concerns that committee members have raised. Those concerns are genuinely felt across the Parliament. We all have examples, some of which I and other members have touched on.

There is a question of balance. There is a pragmatic need for the Scottish Court Service to have the necessary funds to do its job. I note that costs have continued to rise, although cost recovery has not done anything like keep pace. The minister has suggested that, nine years ago, the cost recovery level stood at 85 per cent, whereas it is now down at 53 per cent.

I note what the minister said in relation to personal injury and family cases, in particular with regard to the Court of Session. There has been great disparity between recovery of fees at the Court of Session and fees at the sheriff courts. An argument can certainly be made for the increases. Many of the cases that we have heard about concern insurance companies, and the increases that we are discussing would be viewed as modest in themselves, taken on a case-by-case basis, per fee. Over the piece, however, we have been brought closer to complete fee recovery.

I intend to support the minister this morning, and I do not think that my support for him is incompatible with Lord President's comment that he could not subscribe to the policy of full cost pricing. If the minister had told us this morning that the Government was going to take the fees up to full cost pricing right now, he would not have my support. The minister has, however, made moves in response to comments that were made in the consultation, including the phasing of the proposed changes and moves in relation to small claims and power-of-attorney fees.

The issue of full cost recovery needs to be examined. I do not believe—to refer to what the minister has suggested—that we must reach the same position as applies in England, with 100 per cent recovery, and even beyond that in certain cases; that does not seem reasonable to me. However, it does seem reasonable to try to keep pace with the extra costs of provision of the justice service by the Scottish Court Service.

I would be happy to pursue some issues with the minister further. On access to justice, legal aid thresholds and the disparities that appear to be arising, it seems that a growing number of people are having to represent themselves in court. That

means difficulties for them, for witnesses and for the victims of crime.

On the specific issue that we touched on earlier about large companies in effect being subsidised by the public purse, I agree that most finance directors will be unaware that they are being subsidised to the tune of two thirds of the cost of court fees in the Court of Session. The public and all of us would be keen to see progress being made on that issue, which should be examined in further detail. If the minister is so minded, I see no reason why Lord Gill or someone else could not examine the issue in the interim; it would not stand or fall on the basis of what we decide today.

A case might be made for full cost recovery, at 100 per cent, from companies that have above a particular turnover: that would go further than where we are today. I am not saying that that should be the case, but the idea seems to merit further consideration. On the pragmatic basis of meeting the needs of the Scottish Court Service, and based on the fact that fee recovery appears not to have kept pace with the real costs, I am not minded to support Bill Butler.

Cathie Craigie: I will support Bill Butler and agree with the comments that he made. I did not intend to say anything more because, as members know, I do not agree with repeating what has already been said.

However, Margaret Smith's remarks have prompted me to comment. I accept her point about commercial interests: it is perhaps an issue that we should examine in the future. She also said that she intends to support the minister this morning but that she would not do so if she thought that his intention was to increase court fees to full cost recovery. I point out to committee members that in the Executive notes that accompany the documents, the policy intention is that

"Fees should generally be set at levels that reflect, on average, the full cost of the processes involved, with a well-targeted system of fee exemptions to protect access to justice."

The regulatory impact assessment that accompanies the instruments makes it clear—in fact, it is in bold print and large font—that in relation to the

"Purpose and intended effect and rationale for government intervention … Government policy is for fees to be set at a level that recovers the full cost of providing these services".

It is clear in black and white in the regulatory impact assessment that accompanies every Scottish statutory instrument that is before us today that it is the Government's intention to set the fees for full cost recovery. The minister said this morning that that had been the policy of previous Administrations, but I again point out to the committee and to the minister that it was not a priority for previous Administrations, although it seems to be a priority for this Government.

I cannot support such priority being given to the provision. It would not be in the interests of the constituents whom I represent, particularly the 50 per cent who do not qualify for legal aid and the 60 per cent of the others who have to make financial contributions. The membership conscriptions of many of my constituents who are also trade union members would have to increase to cover the costs of the court fees that this Government wants to impose.

12:15

John Wilson: First, I put on record that I support the motion.

I was not going to comment, but I feel that certain comments, particularly Cathie Craigie's remark about union members having their fees increased, must be addressed. I have in front of me a document that shows that one leading legal firm has made £141 million from representing miners in compensation claims. Those firms are not losing any money out of this.

As for Bill Butler's comments about the Law Society of Scotland, I do not see that organisation rushing to advise its members to reduce their fees for representing people in financial hardship who cannot get legal aid. As the minister and others have pointed out, we are trying to get a court system that can accommodate people where it best suits them. If the proposals do not go through and court fees are not increased, some rural courts may have to close, which will surely disadvantage many people in those areas.

We have to balance all that against the failure for almost 10 years to raise fees in line with court costs. The Government finds itself in a difficult position, because it has to set fees in order to bring the court estate up to a tolerable level and to ensure that it provides access to justice for all who are being represented or are representing themselves in court, particularly people who rely on wheelchairs or are invalided in other ways.

The minister said that he is an optimist and that he likes to look forward; however, as a realist, I need to look back at how we got ourselves into this mess. Clearly we need to find out not only why court fees have not been raised in line with inflation but why it was not done simply to ensure that the current court estate was raised to a tolerable standard for all.

Nigel Don: I should say first of all that I will not support the motion. I think that my colleague John Wilson got things the wrong way round, as we

often do with these negative instruments, double negative instruments or whatever they might be.

Margaret Smith: Don't look at me when you say that.

Nigel Don: Quite—sometimes one loses the plot.

Secondly, I declare an interest as a member of the Musicians Union, because such matters seem to have become current. Thirdly, I do not think that my union subscription will rise significantly as a result of fee increases. As the minister so eloquently pointed out, a minute number of actions will be affected. Although I accept Margaret Smith's comments about access to justice and legal aid and the problem of very well-heeled customers getting subsidy—I am aware that other members made the same points, but Margaret put them very eloquently—that is not the subject of today's debate. The minister has made the point that the instruments will not affect many of the folk about whom we are concerned. Although we will continue to be concerned about them, it is absolutely fine that we ensure that the fees catch up, and that we then take the matter from there.

Stuart McMillan: I agree with John Wilson that the court estate must be brought up to a tolerable standard and that we ensure that everyone in society can access court buildings. Unfortunately, that means that the fees will have to rise by the amounts that have been specified, in particular in the first year. After all, the situation has arisen because there have been no fee increases for the past 10 years.

Secondly, I fully accept Cathie Craigie's comments—and, obviously, the points that are made in the documentation—about the Government's policy on full cost recovery. That said, given the minister's statement that there are no plans to rush the policy through and that he is happy to wait until the Gill review is published before he considers the matter further, I am very much minded to back the proposals and not Bill Butler's motion to annul.

Fergus Ewing: I acknowledge all members' genuine concerns. We have no plans to go beyond where we are at present and to move to full cost recovery because we accept that the Gill review should be published and considered before any further action is taken. Any further action will be entirely dependent on that debate, on which I look forward to engaging fully with members of all parties.

In speaking against the motion to annul that Bill Butler has moved, and in inviting the committee to approve SSI 2008/236, the key issue for me is access to justice. Had I taken the view that access would have been impeded by the fee increases, I would not be here, but I do not take that view. I have provided substantial evidence of the nature of the litigation that the Court of Session considers, which proves, as Nigel Don remarked, that we are talking about a few individuals who pay the cost themselves and for whom it is therefore a factor.

That said, legal costs include legal fees and are high. There is a general argument—with which I, as a practising solicitor of more decades than I care to recall, have some sympathy—that cost is a serious issue for most clients, but I am absolutely certain that court fees play, and will continue to play, an extremely small part of that concern. That is the key issue.

The convener pointed out that I failed to mention a statistic about the cost of using the Court of Session. That is true and I apologise for it. Another figure that I did not mention is the cost of paying for one hour of court time in the Court of Session—currently £36. That is the cost of one hour of the time of one the top judges in the land accompanied by his macer, his depute clerk and an array of backroom staff who are diligently working away in the justice system. I wonder what tradesman one could hire or employ at a cost of £36 an hour; I cannot think of any.

John Wilson mentioned that some lawyers do particularly well out of the justice system and that one firm has managed to accumulate £141 million from coal miners' cases. That is almost five times the cost of running the whole civil justice system in Scotland. That is a telling statistic, although it is an issue for another day.

I have discussed at length the thinking behind the decisions that I invite the committee to take. The money will be ploughed back into the courts and invested in them. If the decision is taken to annul the instruments, the money will not be available for the Glasgow courts but will, instead, continue to go into the pockets of plcs. Therefore, I invite even the members who have said that they plan to annul the instruments to rethink whether they share that priority.

The increase is not, as Bill Butler said, a one-off; it is in three stages. We have listened to consultation responses and have made a concession, albeit a modest one. The work that we need to do to the court estate is absolutely essential. I fully respect the Lord President's views, but I note that he said:

> "I am prepared to accept that, seen in the context of other expenses (particularly those of legal representation), court charges are likely to constitute a less significant element"—

I entirely agree with the opinion that he expressed there—that costs need to be recovered and, therefore, that the debate is a matter of degree.

I fully endorse and welcome the approach that Margaret Smith has taken today in clearly setting out her thinking as to why she is able to support the measures, just as I welcome the convener's thinking, which seemed to me to be a fair summation.

In conclusion, there is no need for me to rehearse the individual impacts that failure to agree to the increases will have—they speak for themselves. I hope that members will be able to support the measures that we are seeking to put into law today.

Bill Butler: This has been a serious debate about a subject of real concern to the people of Scotland. I thank all colleagues for taking part in it in a way that is commensurate with the seriousness of the topic under discussion.

In his response to questions and his comments on the motions to annul, the minister said that the Government has no plans to move to full cost recovery. He, I and everyone else know that that form of words sounds very fine and firm but is not a guarantee. I say to Margaret Smith in all seriousness that the effect of the orders will be to increase court fees substantially by 2011, when 80 per cent of fees will be paid by citizens using the courts.

The Scottish Court Service states that this is an interim measure to achieve

"Government policy to set fees at a level which recovers the"

full cost of providing services. The SCS also states that

"The proposal is to increase fees to make a significant step towards the achievement of full cost recovery for civil court and"

office of the public guardian business. Technically, the minister may be correct in saying that the measures do not represent the full journey towards, and arrival at, the destination of full recovery of costs, but that is the direction of travel. Margaret Smith should be under no misapprehension about that and should not take comfort from what has gone before.

I am uncomfortable with the measures, because they strike at the principle that the state should provide in large measure—if not wholly—for access to justice by the people of Scotland. There should be no further dilution of that principle. We have gone too far down that road and I have no doubt that, if we accept the proposed changes and do not support the motions to annul, we will go further down it.

I say as kindly as possible to John Wilson and other members who have made the same argument that I understand their rationale but am unconvinced by it. To paraphrase the bard of Avon, methinks the members do protest too much. I will not resile from moving the motions to annul, as that is the right thing to do. Notwithstanding what some members said in the debate, I encourage them to vote for the motions. This is a matter of justice.

The Convener: Thank you. The parliamentary processes in this instance are somewhat convoluted. As some members, including the minister, have shown a slight lack of clarity about procedure, I will underline them. The effect of agreeing to the motions, which are in my name but have been and will be moved by Bill Butler, is to halt matters and to ensure that the increases do not happen. The motions, which will be taken seriatim, would annul all the instruments that are before us today.

The question is, that motion S3M-2212 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Smith, Margaret (Edinburgh West) (LD)
Wilson, John (Central Scotland) (SNP)

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

Motion disagreed to.

12:30

The Convener: We move on to motion S3M-2213, in my name. As with the previous motion to annul, I do not intend to move it. I advise the minister that, before the meeting, the committee took the view informally that as the debate on the first motion was likely to be lengthy, the same arguments would be adopted in relation to the subsequent motions. Does Bill Butler intend to move the motion?

Bill Butler: Yes.

Motion moved,

That the Justice Committee recommends that nothing further be done under the High Court of Justiciary Fees Amendment Order 2008 (SSI 2008/237).—[*Bill Butler*.]

The Convener: I take it that you do not feel the need to respond, minister.

Fergus Ewing: No—I do not.

The Convener: The question is, that motion

S3M-2213 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Smith, Margaret (Edinburgh West) (LD)
Wilson, John (Central Scotland) (SNP)

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

Motion disagreed to.

The Convener: We turn to motion S3M-2214. Again, I will not be moving the motion to annul, so I invite Bill Butler to do so, if he is so minded.

Motion moved,

That the Justice Committee recommends that nothing further be done under the Adults with Incapacity (Public Guardian's Fees) (Scotland) Amendment Regulations 2008 (SSI 2008/238).—[*Bill Butler*.]

The Convener: The question is, that motion S3M-2214 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Smith, Margaret (Edinburgh West) (LD)
Wilson, John (Central Scotland) (SNP)

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

Motion disagreed to.

The Convener: We turn to motion S3M-2215, which I will not be moving. Does Bill Butler intend to move it?

Bill Butler: Yes.

Motion moved,

That the Justice Committee recommends that nothing further be done under the Sheriff Court Fees Amendment Order 2008 (SSI 2008/239).—[*Bill Butler*.]

The Convener: The question is, that motion S3M-2215 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Smith, Margaret (Edinburgh West) (LD)
Wilson, John (Central Scotland) (SNP)

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

Motion disagreed to.

The Convener: The issues under consideration, which are of a highly serious nature, have been debated in an entirely appropriate manner by all concerned.

John Wilson: I inform the committee that I have given notice to the Presiding Officer that I will be resigning from the committee with almost immediate effect—the relevant motion will, I hope, be agreed to by Parliament tomorrow afternoon. I thank members for their patience with me. I have enjoyed my stay on the Justice Committee and might visit it again at a future date.

The Convener: I assume that it is nothing that we have said.

John Wilson: No comment, convener.

The Convener: Thank you for your contribution to the committee, which has been significant, particularly for a new member of the Parliament.

I thank everyone for their attendance.

Meeting closed at 12:33.

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