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Official Report

JUSTICE COMMITTEE

Tuesday 15 March 2011

Session 3

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JUSTICE COMMITTEE
9th Meeting 2011, Session 3

CONVENER

*John Lamont (Roxburgh and Berwickshire) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

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

COMMITTEE SUBSTITUTES

Claire Baker (Mid Scotland and Fife) (Lab)
David McLetchie (Edinburgh Pentlands) (Con)
Mike Pringle (Edinburgh South) (LD)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Andrew Alexander (Law Society of Scotland)
Michael Clancy (Law Society of Scotland)
James How (Scottish Government Directorate for Justice)
Kenny MacAskill (Cabinet Secretary for Justice)
Michelle Macleod (Crown Office and Procurator Fiscal Service)
Chief Superintendent Paul Main (Association of Chief Police Officers in Scotland)
Donald McGillivray (Scottish Government Directorate for Justice)
Alicia McKay (Scottish Government Directorate for Legal Services)
Colin McKay (Scottish Government Directorate for Justice)
David O'Hagan (Glasgow Bar Association)
Gerry Sweeney (Glasgow Bar Association)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 15 March 2011

[The Convener *opened the meeting at 10:01*]

Decision on Taking Business in Private

The Convener (John Lamont): Good morning. I welcome you all to this meeting of the Justice Committee. I remind everyone to turn off their mobile phones and other electrical devices. I have received no apologies this morning, other than from Robert Brown, who will be 20 minutes late.

The first item on the agenda is a decision on taking business in private. Does the committee agree to consider in private at our next meeting a draft report on the instrument that we will consider under items 3 and 4?

Members *indicated agreement.*

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

10:02

The Convener: The next item of business is the second evidence session on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which resulted from the emergency bill that was passed by Parliament in the immediate aftermath of the Supreme Court decision in the case of Cadder v Her Majesty's Advocate.

At last week's meeting, the committee heard from a panel of legal and human rights representatives on the 2010 act. The committee agreed to invite a representative of the Association of Chief Police Officers in Scotland to give oral evidence at today's meeting, before we hear evidence from the Cabinet Secretary for Justice.

I welcome Chief Superintendent Paul Main from ACPOS's solicitor access implementation team. I invite questions from members.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, Mr Main. In your view, how well did the Lord Advocate's interim guidelines on access to legal advice work in practice?

Chief Superintendent Paul Main (Association of Chief Police Officers in Scotland): They worked as an interim measure, which—if you forgive the phrase—is exactly what it said on the tin. I am aware that there were a number of appeals during the period in which the interim guidelines were in effect, which was from June last year to January this year. To be frank, I find it difficult to square the idea that they worked very well because we have appeals in relation to how the police applied them, and on some of our custody arrangements and paperwork procedures, such as the solicitor access recording forms, which enter the evidence chain.

In summary, considering that we changed the system overnight, from 30 years in which solicitors were not provided with access to suspects to their having access to suspects, the guidelines worked well when that right was taken up. However, in my view there clearly needed to be something more substantial. In particular, we still had only six hours to detain a suspect. While that was fair and was how we worked for 30 years, a time delay is built in when consultation with a solicitor, either by telephone or face to face, is provided. The very nature of that time delay compromised police investigations because we still had only those six hours. The interim guidelines did not change the time that police had for investigating the suspect.

Bill Butler: Are you saying that there were no significant problems with the police adhering to the guidelines, or that there were specific and, as time went on, possibly insurmountable problems?

Chief Superintendent Main: Initially, there was a massive cultural change, but the police have to deal with that day in, day out at the moment, so we can put that to one side. To be frank, some of the problems were practical. For example, how do we secure a private consultation by telephone without compromising evidence? Some of the difficulties were real, practical issues down in the weeds, if you will forgive the phrase.

In the broader sense, there was a fear of a risk to justice and to our ability to investigate and detect crime because of the six-hour limit. Within that six hours, we were prevented from doing certain obvious things, such as interviewing, while we waited for a solicitor. We were in an ironic situation that we are still in, to a degree, although it does not play out anywhere near as much as it did because the detention period has been extended: if a suspect wanted to circumvent justice, they could arrive at a police office, refuse their right to a solicitor and then ask for one three hours into the six-hour limit. It could then take us three hours to find a solicitor, which would mean that the detention period was exhausted.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Last week, the committee heard evidence that the interim guidelines were robust enough to meet any challenges similar to those raised in the Cadder case and that Parliament was wrong not to take additional time to consult more fully on the legislation while still using the interim guidelines. Do you have an opinion on that?

Chief Superintendent Main: Yes—that was referred to in last week's committee. I find it difficult to agree with that position because I am aware of appeals that have come up since June, when the interim guidelines came out, about the police's application of the guidelines. Some of those appeals might be part of some of the cases that are referred to as sons of Cadder. Others that are being played out in sheriff courts across the country relate to custody arrangements and our use of forms—for example, whether a suspect who waives their rights but does not sign for that is making an informed waiver.

I will not comment on whether the appeals are appropriate. Appeals are appeals, but it is difficult to square the number of appeals—I am unable to quote the actual number—with the view that the interim guidelines were sufficient. I just do not think that the one equals the other, if that answers your question.

James Kelly (Glasgow Rutherglen) (Lab): ACPOS issued its own guidance in January 2011. What was the logic in ACPOS deciding to issue guidance after the Lord Advocate issued interim guidelines and emergency legislation was passed? How does ACPOS's guidance differ from the guidelines that the Lord Advocate issued in June?

Chief Superintendent Main: There are a couple of points to make. The interim guidelines were always going to be interim. As soon as we got to 30 October and had an act that replaced them—albeit that they remained in place—there had to be a move towards something more substantive. ACPOS introduced the current guidance in January at the same time as the Lord Advocate withdrew her interim guidelines.

On the differences, the interim guidelines did not refer to extended periods of detention, by which I mean periods of more than six hours; nor did they refer to the potential to extend detention beyond 12 hours. That is one significant difference.

While the interim guidelines were in force, several issues were raised in Parliament and by other observers, such as the waiving of rights, making sure that any waiver was informed and making sure that there were sufficient safeguards around children and vulnerable suspects. Those issues are all covered by the new ACPOS guidance but they were not covered in the interim guidelines to the same level of detail.

In addition, the ACPOS guidance has far more information about liaison between investigators and solicitors, which was not in the interim guidelines. That is about what stated cases exist to permit or not permit sharing of information with solicitors. None of those issues was referred to in the interim guidelines.

Nigel Don (North East Scotland) (SNP): Will you extend that and tell us how police officers ensure that suspects are aware of their rights under the guidance?

Chief Superintendent Main: I am grateful to the member for raising that. To deal with concerns about a system being in place across the country for an informed waiver of rights, in the new guidance in January we introduced a form of words relating to that. Members will be familiar with the police caution—[*Interruption*.] I see you shaking your head, Mr Don, but I am sure that you will be aware of it from watching TV programmes such as "Taggart" or from reading Rebus books. In Scotland, the police caution is delivered in a standard and consistent way, whether in Edinburgh, Glasgow, Inverness, the islands or wherever. In the new guidance, we designed a series of questions and statements so that we have a form of words to use when a suspect is told about their rights of access to a solicitor. As with

the police caution, wherever someone is in Scotland, that should be delivered consistently.

We took advice on that from the Law Society of Scotland and the Crown Office. To be honest, they significantly redrafted the suggestion that my team and I made to make it clearer and more easily understandable and certainly more suitable for the broad diversity of suspects that we come across.

Nigel Don: I am sure that other members will want to ask about that diversity. Obviously, you normally use the Scots version of the English language, but what happens if you are talking to someone whose first language is clearly not English?

Chief Superintendent Main: That issue applies not just to people who are detained and to the 2010 act, but to anyone whom we come across. In the custody arena, there could be an issue with an arrested person, never mind someone who is about to be detained. In the past 10 years, or perhaps longer, our custody arrangements have changed remarkably and vulnerability assessments are now built into them. Vulnerability includes language issues, mental illness or health issues. We are now far better than we have ever been not just at identifying possible vulnerabilities, but at responding to them through an appropriate adult service such as an interpreter or social work service or through a medical service, which can be provided by force medical examiners, police casualty surgeons or the national health service.

Stewart Maxwell (West of Scotland) (SNP): To follow on from that, you touched on how you deal with suspects, but how do you provide information for suspects who are vulnerable adults or children? That issue arose at last week's meeting. Will you outline the procedures for dealing with such people and say how they differ from those for other suspects?

Chief Superintendent Main: Children cannot waive their rights on their own—a parent or suitable adult must assist with a decision on whether to waive those rights. Similarly, our guidance indicates that, if there is any sense that an individual is vulnerable and is not fit to make an informed waiver because of mental health or medical needs, the involvement of an appropriate adult should be considered. The bottom line and core principle in all our guidance is that, whether or not a right is waived, the issue could be tested significantly in court and therefore, if we have any doubt, we should err on the side of caution.

The guidance says that there is a presumption that children, for example, will have access to a solicitor, although we must be careful not to make a right into something that is mandatory. Access to a solicitor is mandatory in some European countries, but we try to strike a balance by ensuring that there is an informed waiver that can be assessed in court if the case becomes a court issue, although children's issues rarely do unless a serious crime is involved. We should ensure that any independent analysis, whether by the court or the Procurator Fiscal Service, would agree that the waiver was informed.

Stewart Maxwell: Do those rules and the same process apply to adults who are under the influence of drink or drugs? Does your definition of vulnerable adults exclude adults who are under the influence?

10:15

Chief Superintendent Main: That is a fair aspect of vulnerability to focus on. I have probably not covered it—in speaking about vulnerability so far, I have concentrated more on medical and mental health issues.

When it comes to incapacity through alcohol or drugs, for instance, there can be two ways in which things play out. If someone is drunk, we need confidence that they are able to make an informed waiver, but they are often not able to do so. Sometimes, dealing with a person's rights will be delayed for that reason only—to ensure that the exercise of their rights is informed.

There is another way of doing it, whereby someone can simply be offered their rights. Someone who is drunk might say that they want a solicitor, in which case we can get the ball rolling. However, if they say no, the likelihood is that when they sober up and have more of their faculties about them, they will be reoffered that right. In fact, that is almost a certainty. In certain circumstances, it would be appropriate to offer people that at the first point of contact and, as I have said, if they say yes when they are drunk we can start the ball rolling.

There is then a medical assessment, with a doctor coming in. I have a number of examples of a doctor saying that a person is fit to be detained but is not fit to be interviewed for eight hours. That allows us to engage with solicitors and make arrangements for eight hours later, instead of waiting eight hours to make an offer of rights properly.

Stewart Maxwell: Whether somebody is, or is not, in somebody else's view, incapable of taking such a decision because they are under the influence of alcohol or drugs is a difficult, grey issue. In cases in which a doctor says that the person is incapable of taking the decision because of that incapacity and will not be capable of taking it for a number of hours, I presume that you continue to detain them over that period. What happens about the length of the detention period in such cases? When does the clock start to tick?

Does the time start from the original detention, or from the point at which people are deemed capable?

Chief Superintendent Main: It starts to tick from the original detention. That is one reason why we had a difficulty with the six-hour period, over and above the issues around access to solicitors.

Stewart Maxwell: Does the new, extended initial period that is now in place effectively cover all those cases, such that people are eventually able to make an informed decision, due to the alcohol leaving their system?

Chief Superintendent Main: There have been 58 cases, to my knowledge, in which the period of detention has been extended beyond 12 hours. From memory, I think that 10 of those cases have come down to the fitness of the suspect to be interviewed. Out of the 10 cases that I have reviewed, the longest period of time that a doctor has given before someone was deemed fit to be interviewed was 10 hours. I think that the shortest period among the cases that I have read was about six hours.

We do not have medical practitioners in police offices as a matter of routine. Depending on how long it takes us to get the medical assessment, and depending on the medical view, it could be eight to 12 hours before someone is fit to be interviewed—and we still have to arrange a solicitor, potentially.

Stewart Maxwell: But that six to 12 hours obviously gives you a window of opportunity that was not there before.

Chief Superintendent Main: Absolutely.

Stewart Maxwell: And the extension beyond 12 hours might kick in under those circumstances.

Chief Superintendent Main: Yes—it has done on about 10 occasions.

The Convener: Are you saying that there were concerns about the six-hour limit prior to the Cadder case? Did Cadder simply give you an opportunity to address those previous concerns?

Chief Superintendent Main: It is a bit of both. ACPOS had raised concerns over a number of years about custody arrangements. Sometimes it can take us an hour or longer to process someone in custody so as to provide safeguards and carry out vulnerability assessments, particularly for any complex issues relating to someone's medical needs, or just when someone is under the influence of drugs or alcohol. The time is extended further, given how long it takes to carry out a more informed medical assessment.

The answer to your question is that we had raised similar issues before, as well as issues around the complexity of inquiries. In sexual cases, our support to victims, including the involvement of sexual offence liaison officers, takes a number of hours to arrange, and we often need to put that support in place before we can interview suspects.

With the Cadder judgment, the opportunity came up to raise those issues, as well as the solicitor access issue.

The Convener: From a practical perspective, how confident are you that police stations across Scotland are able to deal as they should with people who are detained for longer periods? Are the police stations sufficiently well equipped to accommodate those people? When we took evidence last week, we were told that Justice is concerned that welfare checks are not happening as frequently in Scotland as south of the border and that it is concerned about the welfare of the prisoner during their period of detention, especially given the fact that the periods of detention are now longer.

Chief Superintendent Main: I was going to respond on the broader issue of custody and our estate but, given the second part of your question, I do not think that that answer would have been appropriate.

I attended the committee meeting last week and heard that comment, but I disagree with it. If a person's detention were a maximum period of 12 hours and we were considering extending it to 24 hours, that would be one thing, but the reality is that we detain suspects on a Friday and do not take them to court until the following Monday. That is a regular feature of Scots law that, to some degree, we all have our fingerprints on, either directly or indirectly. To be frank, it is worth having a debate about the suitability of police stations as places to hold someone in custody for three days, whether they are arrested or detained.

In direct answer to your first question, I am confident that, for the periods for which people are detained, we are dealing with people's vulnerability better than we ever have and that the period that we now have in which to deal with a detained person's vulnerability is better. I do not make that point lightly. As we seek to put in place more safeguards for a child or a vulnerable suspect, the inevitable consequence is that that person will be detained for longer. I say that not in a harsh way, but in a practical way. We do not have social workers in police offices as a matter of routine, nor do we have doctors, nurses, medical staff or appropriate adults; we need to tap into all those services, and there are different financial arrangements and service levels for that throughout the country. We think that it is entirely right that those safeguards are put in place. The practical reality is that, although there is an understandable desire to keep children, for

example, in custody for the shortest possible time, the normal consequence of putting any safeguard in place is that we need to keep them in custody for longer. That is the contradiction within the practical solutions that we have come to.

Cathie Craigie: The 2010 act also provides that a constable may delay a detained person's access to legal advice in "exceptional circumstances", but it does not define "exceptional circumstances". Can you explain what you understand "exceptional circumstances" to mean?

Chief Superintendent Main: You are right to say that that is not defined. I can speak only from my experience. Two instances of undue delay are dealt with in the 2010 act. The first relates to a solicitor being advised of a suspect being in custody. That is dealt with in the Criminal Justice (Scotland) Act 1980, as it relates to detention, and in the Criminal Procedure (Scotland) Act 1995; it relates to any arrested person, as well. We have been familiar with that instance of undue delay for about 30 years or more.

The second instance of undue delay involves access to the professional services of a solicitor. In my 22 years' experience, I have been aware of only a very small number of cases in which we have created any form of undue delay in that regard. We have looked at the issue as it relates to the 2010 act since the start of February. I am not aware of any cases of undue delay, so I will try to answer your question hypothetically. What would undue delay look like? The only scenario that I and my colleagues have come up with is one that involves an investigation into serious and organised crime. If a solicitor were involved in that investigation and the people who were being detained asked for that solicitor, whom the police also had in their sights, if I can use that language, it could be argued that it would not be in the interests of justice for the police to make contact with that solicitor. However, if that happened, we would make contact with another solicitor from a duty list.

To be honest, I do not see undue delay playing out in the sense that people have raised it. It has certainly not played out in any of the detentions that I have looked at since the start of February, and I am not aware of its having played out in my experience of more than 20 years. I think that undue delay in solicitor access will happen extremely rarely. That makes it more difficult to answer your question and to define what undue delay is because we do not see it very often at all. The hypothetical scenario that I gave you is probably the most obvious and likely example that we would come across, albeit that it would occur highly infrequently.

Cathie Craigie: You have just made matters even more confusing. Is "undue delay" the police term for "exceptional circumstances"?

Chief Superintendent Main: I suppose that "exceptional circumstances" would mean a scenario such as the hypothetical one that I have described, in which the solicitor that someone asked for might be involved in our investigation. In the new guidance that ACPOS issued in January of this year, we said that if there is undue delay in any case, the suspect must be informed of that fact and we must communicate it to the Crown. Then—this is not our role—the Crown would, we anticipate, disclose that to the accused's defence agent. We have not seen undue delay happening and we do not anticipate it happening often. When it does happen, we must write that down and report it to the Crown.

Cathie Craigie: At what level is the decision taken about whether to delay access to advice? Who makes that decision?

Chief Superintendent Main: Bearing in mind that, to the best of my knowledge, it has not happened, it would probably not be a rank-based decision—it would probably be made by the senior investigating officer for the inquiry. That senior investigating officer could be a constable, but I rather suspect that, in the hypothetical scenario that I have given you, such a complex inquiry would probably be led by a detective sergeant, a detective inspector or perhaps even a more senior officer.

Cathie Craigie: Thank you.

The Convener: As the committee has no more questions, I thank Chief Superintendent Main very much for his time. Is there anything that you would like to add that has not been covered in our questions?

Chief Superintendent Main: I know that you have a busy schedule, but I would like to give you confidence that, in my opinion—I bring a bias to the issue—the police implementation of the 2010 act has been positive. About 80 per cent of detentions are still for less than six hours. As I highlighted earlier, in 58 cases the detention period has been extended beyond 12 hours, but that equates to less than 0.25 per cent of all detentions that have happened in Scotland.

I know that there have been negative comments about a blanket detention period, which may be seen as a bad thing, but I think that the six-hour period was just as much of a blanket period. ACPOS has sought a detention period that gives the police flexibility and which can be applied proportionately on a case-by-case basis. I hope that statistics such as the fact that 80 per cent of detentions are still for less than six hours and the fact that a very small number—less than 0.25 per

cent—of them are for longer than 12 hours show that we are using the flexibility that the additional power has given us proportionately and that that will deliver increased public confidence.

The Convener: I appreciate you giving us your time. Your evidence has been very helpful. Thank you again.

I suspend the meeting briefly to allow for a change of witnesses.

10:28

Meeting suspended.

10:30

On resuming—

The Convener: I welcome Mr Kenny MacAskill, the Cabinet Secretary for Justice. He is accompanied by Gerry Bonnar, who is the head of the law reform and general branch in the Scottish Government; Don McGillivray, who is from the criminal justice and parole division in the Scottish Government; Alicia McKay, who is from the Scottish Government directorate for legal services; and Michelle Macleod, who is head of the policy division in the Crown Office and Procurator Fiscal Service. Good morning to you all and thank you for coming. I invite the cabinet secretary to make a short opening statement.

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you, convener. As committee members will be aware, I made a statement on Cadder in the chamber on 23 February. I set out at that time, as I did during the debate on the bill, much of the justification for the course of action that the Government has taken. Many committee members contributed to those proceedings.

I do not propose to repeat that material. Instead, I will offer a brief reminder of our responsibility to maintain an effective system for the investigation and prosecution of crime and some perspective on where the 2010 act leaves our criminal justice system.

I am aware of the evidence that the committee heard last week from various members of the legal community to the effect that we could have continued to rely on interim guidelines issued by the Lord Advocate. I fundamentally disagree with that assessment. The judgment provided the accused with a legal right and the guidelines had no legal status. Those who gave evidence last week agreed that something had to be done and could not rule out the possibility of challenge. Indeed, I am now aware that such challenges have been taken in relation to offers of legal advice under the Lord Advocate's guidelines.

As Cabinet Secretary for Justice, I felt that it was necessary and proportionate to create a statutory framework to minimise the risk of further challenge. More than that, as Cabinet Secretary for Justice, I bear a responsibility, alongside the police and the Crown Office, for maintaining an effective system for the investigation and prosecution of crime. Although the Lord Advocate's guidelines had been effective in protecting individual cases, the information that I received from the police was that the practicalities of offering solicitors access within the existing legislative framework was reducing the effectiveness of investigation, particularly in more serious and complex cases.

The analogy that I use is that the Lord Advocate's guidelines kept the system on its feet while it limped along between June and October. As Cabinet Secretary for Justice, I was not prepared for the system to limp along any longer, as every day that it did so there was a risk of less effective outcomes for victims.

That leads me on to another important element in the need for immediate action: public confidence. We had a situation in which a decision of the highest court in Scotland had been overturned in an area that is at the heart of the justice system and which affects tens of thousands of detentions every year, and we knew that several thousand live cases could be affected. Having a system limping along in that context risked a major loss of public confidence, so I felt that it was important immediately to put the system on a surer footing.

I will move on to provide a perspective on where the 2010 act leaves the justice system in Scotland. In our system there is a clear and identifiable statutory right to advice from a solicitor before being questioned by the police; indicative figures from the police tell us that more than 80 per cent of detentions are completed within six hours; the maximum period of detention is a quarter of the maximum in the neighbouring jurisdiction; admission evidence must be corroborated; and there is a right to silence and no adverse inference can be drawn from the exercise of that right. In summary, we continue to have exceptionally strong protections for suspects in the justice system in Scotland and the 2010 act should be seen as offering a limited rebalancing of the system in that context.

Finally, I remind the committee that the act is not the final word on the matter. We have set up the Carloway review to scrutinise all these issues in more depth, so that the next Administration and the Parliament will have the evidence needed to ensure that we continue to have a robust system that is capable of protecting the rights of victims

and ensuring a fair process for accused persons that is fit for a modern Scotland.

The Convener: Thank you, cabinet secretary. We move to questions from committee members.

Bill Butler: Cabinet secretary, you outlined why you and the Government felt that it was necessary to invoke the emergency bill procedure in this instance. You said that the system was limping along and that you wanted to put it on a surer footing. You also spoke about the danger to public confidence. In what ways was the system limping along? Was it simply that the mechanics of the police following the guidelines might break down eventually? Was that why you had to put things on a statutory footing?

Kenny MacAskill: That is a valid point, but there were several reasons. First, we could not continue with a criminal justice system that fell short of compliance with the convention in such an important area. The Supreme Court had made that clear. Secondly, we needed to maintain an effective system of investigation and prosecution of crime in the new environment. Thirdly, we needed certainty on appeals. I believe that the legislation provided an immediate response to the judgment. It provided for and enshrined in statute the necessary rights of suspects while also providing measures to help our police and prosecutors effectively to investigate and prosecute crime. There were several reasons: public confidence, the requirement for certainty and the necessity to enshrine things in statute.

Bill Butler: Having heard that, I understand the approach that the Government took. However, some people have made the point that it may have been better for the Government to have dealt only with the highest priority provisions in an emergency bill and to have dealt with the remaining provisions in separate legislation that could have proceeded on a non-emergency basis. Was consideration given to that way of dealing with matters?

Kenny MacAskill: Yes. That was the approach that we took by way of legislation and Carloway. We believe that the provisions in the bill were those that were necessary to deal with the immediate issues. We recognised that we could not deal with everything in the bill, which is why we put in motion the independent review to consider what had been done and look at wider change. We believe that the bill struck an appropriate balance: the rights of the accused were secured with legal aid measures to support that right and the police were given the powers they needed and were strongly supported. Time limits were also introduced for common-law appeals with a grace period to ensure that thousands of cases were not re-opened and measures were taken to avert a wave of applications to the Scottish Criminal Cases Review Commission. The Supreme Court had, of course, highlighted that point. The response was sensible and reasonable; it provided a balance between what was immediately necessary and what could be left for Lord Carloway on a longer-term basis.

Bill Butler: So you are content with the Government's approach.

Kenny MacAskill: Yes.

Bill Butler: Okay.

Robert Brown (Glasgow) (LD): I am struggling a little to follow the nature of the practicalities, cabinet secretary. What practical difficulties could have arisen had you not introduced the bill? I assume that the essence of the matter was whether, in practice, a suspect person under detention had the right of access to a solicitor during that period. Provided that the Lord Advocate's guidelines were being followed, what difficulties were being caused? What might have been subject to challenge? I seek clarity.

Kenny MacAskill: The problem with the Lord Advocate's guidelines is that they do not enshrine matters in statute. Equally, the police are not required to follow those guidelines; they have discretion on the matter. The Lord Advocate's guidelines were essential to being able to limp along between June and October, but they were not capable of providing certainty thereafter. Once the Supreme Court's decision was out, it was necessary for us to act. As I said, given that guidelines from the Lord Advocate are discretionary for the police, matters were limited. That was why action had to be taken.

Robert Brown: You will forgive me for saying so, cabinet secretary, but that does not add anything. Will you give a practical example of the sort of situation that was causing difficulty?

Kenny MacAskill: A whole variety of matters were causing difficulties and they had been flagged up, including by the police. We also knew about possible references to the SCCRC. Indeed, that came from the Supreme Court itself. In their judgment, Lord Hope and Lord Rodger referred to difficulties that they could envisage. The Association of Chief Police Officers in Scotland had already raised difficulties with detention. Previously, difficulties had been raised on a variety of matters, but they were being compounded—

Robert Brown: I am sorry to interrupt you, cabinet secretary, but I seek clarity on the practical difficulties. The 2010 act did not sort out the business of accommodation. What problem could not continue to have been dealt with under the Lord Advocate's guidelines, at least for a period?

Kenny MacAskill: The Association of Chief Police Officers in Scotland raised problems with

detention in serious cases where multiple accused each request a different solicitor, when time limits are about to expire and in cases involving foreign nationals where translation is required. It also raised cases where one or more suspects is a juvenile, in which cases the police are required to contact and secure the attendance of a responsible adult. In addition, cases where distance and rurality are involved were highlighted. In such cases, ACPOS said that the time limit may be insufficient. ACPOS raised a variety of matters with us and it specified situations that the police were finding it impossible to cover. That is why we acted.

Robert Brown: We have just heard from ACPOS that, since the 2010 act came into force, only a quarter of 1 per cent of cases have required the use of a period beyond six hours. [*Interruption*.] Is that not what we heard? I thought that I heard that when I came in.

Stewart Maxwell: Beyond 12 hours.

Cathie Craigie: There are 58 such cases.

Donald McGillivray (Scottish Government Directorate for Justice): I think that I can help with that. My understanding is that Mr Brown is referring to extensions beyond 12 hours. The tentative figures that we have from ACPOS for detentions that exceed six hours but are below 12 hours, which are based on quite a short run of data, are between 15 and 20 per cent. That is my understanding.

Robert Brown: Fair enough. Okay.

I go back to the 2010 act and the timescales. The bill was introduced within hours of the judgment, rather than days or weeks. The Scottish Human Rights Commission, which is the statutory body that was set up by the Parliament to give advice and to have a standing on human rights issues, has repeated a particular complaint. It has indicated that it was not consulted on the bill at all before it was introduced. Given that we are talking about an issue that was known about from July—or probably before that—why on earth did you not consult the Scottish Human Rights Commission?

Kenny MacAskill: We immediately dealt with the key stakeholders that are involved in the day-to-day administration of criminal justice: the Law Society of Scotland, the judiciary, ACPOS and the Crown. My understanding is that the Scottish Human Rights Commission's views were sought and an SHRC representative is on the Lord Carloway reference group. Its views have therefore been factored in, but the primary people—

Robert Brown: I am sorry to interrupt, but the senior human rights commissioner said that the Scottish Human Rights Commission was not consulted prior to the bill being introduced. Is that not the case? Are you challenging that?

Kenny MacAskill: No. I am saying that we approached the statutory bodies and other bodies that we normally deal with. My understanding is that a late intimation was received from the Scottish Human Rights Commission, but we spoke to the bodies that deal with matters on a day-to-day basis. As I said, the SHRC is represented on Lord Carloway's review committee, which shows the judiciary's position in seeking to have the SHRC's views imported.

Robert Brown: I am sorry, but we are talking about the biggest single human rights issue that has come before the Parliament or challenged the Government. The Parliament set up the Scottish Human Rights Commission to be a repository of advice on such substantive matters. Why on earth did you not take the opportunity to consult the Scottish Human Rights Commission before the bill was introduced, with a view to safeguarding its ECHR compliance among other things?

Kenny MacAskill: We had to address the issue using emergency legislation, which meant discussing it with those who deal with the matter on a day-to-day basis—that is, Scotland's courts of law, the police, the prosecution service and defence solicitors. Those are the primary responsible bodies and we approached them.

As I said, the views of the Scottish Human Rights Commission are taken on board and represented on the review committee under Lord Carloway, but the primary day-to-day participants are the bodies to which I referred and we sought to work with them.

Robert Brown: I merely observe that it is difficult to see how the views of the Scottish Human Rights Commission could have been taken on board if it was not consulted.

May I ask a further—

The Convener: I am sorry, but we are short of time. We will come back to you after other members have had the opportunity to ask questions.

James Kelly: Cabinet secretary, we heard in last week's evidence the view expressed that the bill was rushed through as emergency legislation, that it was not given due consideration, and that we could have continued with the Lord Advocate's guidelines in the interim until legislative proposals were dealt with in a more considered manner.

You countered that by saying that the Lord Advocate's guidelines were essentially not fit for purpose and that they were challenged on appeal. How many appeals have been lodged because the Lord Advocate's guidelines were not robust

enough and can you give the committee some background in that respect?

10:45

Kenny MacAskill: Michelle Macleod will respond to that on behalf of the Crown Office.

Michelle Macleod (Crown Office and Procurator Fiscal Service): Perhaps I can assist the committee. At the moment, there are 24 live appeals that relate to different points in the Cadder judgment and which are distinguishable from appeals related to cases that have become known as the sons of Cadder.

There has been a challenge in respect of the rights—or, indeed, the lack of them—under the Lord Advocate's guidelines, with the person in question appealing on the basis that they were not provided with their legal right. However, other on-going appeals that have been made on the basis that people waived their rights without being fully informed of them clearly relate to how the guidelines were interpreted or implemented at the time. As the appeals are on-going and sub judice, I would not care to say anything more specific about them, but even in the evidence that he gave last week Mr McGovern mentioned on-going challenges that he was aware of, relating to cases that had arisen when the Lord Advocate's guidelines were in place.

James Kelly: I respect your point that the appeals are sub judice. Did you say that there were 24 live appeals but that only one of them was a challenge relating to the Lord Advocate's guidelines?

Michelle Macleod: No. I am aware that one of the appeals relates specifically to the type of right that was provided under the guidelines. I understand that other appeals challenge aspects of the guidelines and their implementation. I do not have the full facts and circumstances of all the different issues but, as Mr McGovern said last week, some of the challenges relate in particular to waivers that were made under the guidelines.

Stewart Maxwell: You might not have heard it but, in his evidence, Chief Superintendent Paul Main mentioned some of the day-to-day practical difficulties that the Lord Advocate's guidelines were causing. If we had not introduced emergency legislation but had simply carried on with the guidelines, given the practical difficulties—for example, the six-hour extension to the detention period that was provided for—and the 24 appeals that have been made on a range of issues including the guidelines, would the various legal difficulties that have arisen have put the whole system in danger? Indeed, as more and more appeals were made and as the practical difficulties increased with suspects becoming aware of the ability to block their period of detention by, as we heard this morning, waiting for three hours and then changing their minds and asking for a solicitor, would the system simply have unravelled?

Kenny MacAskill: Yes. Even before the Cadder decision, ACPOS had envisaged that, under the six-hour timescale, problems would arise with people under the influence of drink and drugs; indeed, it had experienced such problems. It was clear that, when the grounds changed with regard to Cadder, the difficulties faced by the police would only be increased and exacerbated in the cases involving multiple accused, youngsters, translators and so on that I highlighted earlier. Not only would an investigating officer's life have been made more difficult, but justice would have been compromised. You are also correct to suggest that the number of challenges would have increased exponentially. A small industry out there is seeking to challenge these matters; of course, it is entitled to do so, but I am sure that its representatives would have taken the opportunity to lodge minutes and whatever else with regard to these issues. We acted immediately and appropriately to protect the rights of all our citizens and communities.

The Convener: On a more practical point, I asked ACPOS whether police stations are suitable for holding suspects for longer periods. Are they fit for purpose in that respect? Last week, the witness from the organisation Justice expressed concern that welfare checks were not sufficient compared with what happens south of the border under the Police and Criminal Evidence Act 1984.

Kenny MacAskill: Thank you. I think that that is a valid question. Detention is one aspect of being held in police custody. Police have to be prepared to hold suspects in custody for appearance in court, which can involve holding them over a weekend. They therefore have the experience and capacity to deal with such issues. I have no doubt that there are specific locations and facilities that will require some adaptation and improvement. Police in various areas are reviewing facilities and costs, which were factored into the financial memorandum. Police spend to date on facilities has been low, which suggests that there are few locations where there is an urgent and pressing need. It is a matter of the police being pragmatic and flexible while recognising the need for facilities—in the main, such facilities do exist in most jurisdictions.

The Convener: Is there any evidence to suggest that in rural areas the police are using the extended periods disproportionately because of the lack of available solicitors? Is there any foundation to that suggestion?

Kenny MacAskill: That matter might be addressed more appropriately by ACPOS. There

is no evidence from those on the front line that there is different practice in rural areas.

There are clearly issues in terms of rurality, and we are giving the Scottish Legal Aid Board responsibility for establishing a police station duty solicitor scheme, which will commence in July and will aim to offer a high-quality service throughout the country. We need to recognise that delays can occur in some areas for reasons of traffic, other commitments, weather or unforeseen circumstances. The detention regime has to recognise that and be able to adapt to circumstances without imposing a lot of additional bureaucracy. Lord Carloway's review will clearly investigate that.

There are situations in which difficulties arise. I visited Arran recently and met the four officers stationed there. I was told that there is no lawyer on the island and, unless a lawyer got the ferry over before 7 o'clock in the evening, they would have to wait until 7 in the morning for the next one. There are such jurisdictions in Scotland, which is why we have to have some flexibility—occasionally incidents arise in places such as Arran. That is why there is the possibility of a telephone call, if that is what the person who is detained wants. Equally, we have to have a period of extension to allow for circumstances, such as those in Arran, or inclement weather.

Robert Brown: I have one other question on the 2010 act and the Lord Advocate's guidelines. Michelle Macleod said that there had been one challenge to the Lord Advocate's guidelines in relation to whether there was a legal right, but a number of other cases involved the waiving of rights. We have put in place the 2010 act, which has things in it about the waiving of rights that have been the subject of some comment. Does it change the law in any respect from what existed before? Can you really say that the act, with regard to the waiving of rights, will be immune—not from challenge; people can always challenge things—but from successful challenge?

Kenny MacAskill: I think that the Lord Advocate did all that she could by introducing guidelines as a short-term measure. I thought that that was the appropriate thing to do, but we could not rest on the guidelines. The guidelines did not provide a legal right. The Lord Advocate made her position plain: the rights should be enshrined and her guidelines withdrawn as quickly and expeditiously as possible. That is what we did.

The Lord Advocate asked the Supreme Court whether we could defer the implementation of its decision for four months, to allow any steps to be put in place that were necessary following its decision. The Supreme Court declined but, in an unprecedented step, stated that it would delay its decision for four months, which was a clear signal that the Crown and Government required to plan for legislation. There was a need to prepare for contingencies, but the guidelines were simply not enough. It was for that reason that we had to have scenario planning. We did not have information that a scenario would definitely arise, but we prepared for it. We could not undermine existing legislation, given the decision in HMA v McLean and the attitude that the Lord Advocate correctly took in debating matters before the Supreme Court, but it was quite clear that if a change was to come—as came around—guidelines would not be enough and statutory powers would be necessary.

Robert Brown: That is not what I asked. I asked whether you thought that we were now immune from successful challenge on the particular issue of the waiving of rights—which I think was provided for in the Lord Advocate's guidelines to a degree and in the legislation—given the significance of that particular aspect.

Kenny MacAskill: You cannot waive a right that you do not have. What we have are ACPOS guidelines on how we deal with vulnerable people and children, and the statute before us. I am not sure what further points you wish to pursue on that.

Robert Brown: I am really asking whether you think that the 2010 act—which we passed with such haste, despite four months of possible preparation time—deals satisfactorily and fully with the question of waiving rights, or whether the challenges that are coming forward already will pose a problem for the Government.

Kenny MacAskill: We think that the 2010 act and the ACPOS guidelines, which still exist, provide sufficient cover in the interim to balance the rights of the accused with the requirements of those who investigate and prosecute crime to protect our communities. We accept that it was emergency legislation and as such was brought in more quickly and with less scrutiny than other legislation, which is why we have instigated Lord Carloway's review. I doubt very much that it is the ultimate solution; that is why Lord Carloway is carrying out his review.

Was it necessary to take those steps to protect our communities and the victims of crime? Sadly, we have not been able to protect them all, as has been raised in the chamber with regard to cases that have fallen with manifest injustice. However, the legislation was the appropriate step to take, it has provided the appropriate balance and it will be reviewed by Lord Carloway to examine how we can add to it, whether that is by adding to the rights of the Crown, the police or the accused.

Cathie Craigie: Good morning, cabinet secretary. We heard last week that guidance was sufficient in the interim period, and therefore we

did not need to have a statutory footing. You admitted in your answer to the previous question that the emergency legislation that was passed is sufficient cover in the interim, so it is clear that it is not long-term legislation.

Given that the law lords gave us a three or four-month period of notice before they gave their judgment, why did you not cast your net wider and consult more people while the interim guidance was in place? That is the criticism that has been levelled at the Government, and at the Parliament and all those who voted for the legislation.

I tried to raise an issue with you in Parliament that a constituent had raised with me. I have not had an answer to that, and you have not answered the questions this morning. Why did you not feel it necessary to use the period over the summer to consult on such a serious case?

Kenny MacAskill: Well, we did—public consultation took place—but you have to remember the circumstances that we were in. The judges had upheld the status quo, the United Kingdom Supreme Court had not reached a decision—there were numerous authorities for it to consider and numerous potential outcomes—and the Lord Advocate had presented a robust defence. We established a working group and worked through the issues with the Crown, ACPOS, the Scottish Legal Aid Board and the Law Society of Scotland.

We had to plan for several different scenarios. We could not make assumptions about what the Supreme Court's position was going to be—it could have come to a variety of decisions—so we briefed justice spokespersons in all parties, and we met representatives in Parliament, asked for their views and kept them apprised of matters. We consulted the necessary and appropriate bodies, and people took the opportunity to fire in their own views on a variety of issues. I think that that was an appropriate balance.

We could not—if Cathie Craigie is suggesting that this would have been appropriate—have gone out and said that we knew what the Supreme Court was going to decide, because we did not: the Government does not have the benefit of second sight. In May 2010, we could not have made assumptions about what the decision of the court down in London was going to be. The Supreme Court's decision ultimately went against the standing decision of a large bench of judges in Scotland, and was contrary to the arguments that the Lord Advocate presented in court.

We could not undermine the High Court in Scotland or the Lord Advocate's position, but we had to prepare for their position being undermined by the Supreme Court, which is what we did. We consulted appropriately the relevant bodies: not only the legal stakeholders, but the Opposition parties. At every stage, we sought to ensure that we proceeded on a non-partisan basis, taking on board the views of Bill Aitken, Richard Baker and, indeed, Mr Brown, who was present. We viewed the matter as one of national interest and we acted in the national interest.

11:00

Cathie Craigie: I am not saying that the Government or you, cabinet secretary, should have prejudged what the court might determine. However, it has been put to the committee in written evidence, to a degree it was put to the committee in oral evidence that we received last week, and it has been put to me as a constituency MSP that the Government had an idea of the outcome, so it could have consulted on options depending on the judgment of the court. That is where the failure was: we did not consult. By its very nature, emergency legislation does not come along very often, but we in Parliament must learn from our mistakes when we have been forced to introduce legislation. The Parliament made a mistake with this legislation by not consulting properly.

Kenny MacAskill: There are two issues. First, it would have been very difficult to conduct the public consultation that you seem to wish for on a matter that was being decided by the courts and was going to turn decades of Scots law on its head. There would have been a grave danger of undermining the support for and faith in the existing system, never mind undermining and challenging the authority of the Lord Justice General, the Lord Justice Clerk and the Lord Advocate, all of whom took a position contrary to that of the Supreme Court. There is an obligation on each of us who is elected to office as an MSP, and on the justice secretary, to support those institutions when they represent the law of Scotland. They were doing that, and it would have been counterproductive to have a public inquiry or consultation that sought to undermine those institutions when they were taking the appropriate and correct position at the time. I cannot see how a consultation would have added anything.

Secondly, I am still gobsmacked that many of those who are saying that we should have had a consultation prior to May—and indeed many years before May—seem to be saying in the same breath that the action that was taken was precipitous and beyond what was necessary. They seem to be saying that we should have acted but we should not have acted so quickly. That seems to be perverse.

Nigel Don: My understanding is that the 2010 act provides for a private consultation with a solicitor. How is that consistent with the Supreme

Court's decision, which as some people read it is more about a solicitor being present during questioning?

Kenny MacAskill: The 2010 act allows for advice to be provided by telephone, but I make it clear that, as was the case with the Lord Advocate's interim guidelines and ACPOS's guidance, a face-to-face consultation should take place if a suspect requests that a solicitor attend in person. The ACPOS guidance helpfully explains that a solicitor may raise issues with the police, who may have to consider how to respond in individual cases. The guidance also encloses for information the practical pointers from Justice, which were written by Jodie Blackstock and John Scott. When the accused is undecided about taking advice in person, advice by telephone may lead to advice being given in person, so the 2010 act is permissive. I noted that Professor Miller suggested to the committee that electronic means of consultation might be appropriate in rural areas. I will be happy to see what Lord Carloway recommends on that.

Nigel Don: So you are quite clear that the Cadder judgment does not mean that it is necessary for a solicitor to be present while a suspect is being questioned by the police.

Kenny MacAskill: That right can be waived. If the detainee is happy to deal with a solicitor by phone or does not wish to have a lawyer present, a lawyer does not have to be there.

Stewart Maxwell: We heard this morning from Chief Superintendent Main about the ACPOS guidance on solicitor access when children or vulnerable adults are detained as suspects. Why does the 2010 act not make specific provision for those groups?

Kenny MacAskill: Specific guidance has been issued to police on the provision of access to a solicitor for accused aged between 16 and 18, given their potential vulnerability. The Lord Advocate has instructed that a presumption should be inserted into the ACPOS guidelines that children and those aged 16 and 17 should have access to a solicitor and that every effort should be made to obtain solicitor services.

In January, the deputy Crown Agent wrote to chief constables on that point, with a view to improving safeguards for children and vulnerable suspects, especially in regard to having an informed waiver of the right to a solicitor. ACPOS has built that into its guidelines for solicitor access.

Additionally, police forces in Scotland have had a focus on minimising the frequency with which they keep children in custody for court since the thematic inspection by Her Majesty's inspectorate of constabulary for Scotland in June 2008. In specific regard to children, police forces throughout Scotland work with local authority social work departments to ensure that children are kept in police offices only when no alternative is available. The 2010 act has not changed that safeguard.

In its discussions with officials, ACPOS has indicated a wish to keep children and vulnerable people, in common with all other detained and arrested persons, in police custody for as short a period as possible.

Stewart Maxwell: That is helpful and welcome information, but why does the 2010 act address, if you like, normal detained suspects—adults who are not vulnerable and suspects who are not children? Why does it not specifically mention those two other groups?

Kenny MacAskill: We took the view that the ACPOS guidance on that sufficed. We have the working arrangements with social work departments. On that basis, we will be happy to see what advice and recommendations we get from Lord Carloway. However, the issue is complex. Not all individuals who are 17, or whatever, are in the same position. We sought to ensure that we preserved the rights, which are covered in the ACPOS guidance. Lord Carloway will investigate the matter. However, as I say, the current protections and safeguards are sufficient. Given its complexity, the issue is better considered by Lord Carloway over a period of time rather than legislated on immediately.

Alicia McKay (Scottish Government Directorate for Legal Services): There is very little in the Criminal Procedure (Scotland) Act 1995 on dealing with detention of vulnerable people, so the Cadder act has not necessarily changed anything—it has just very much continued the status quo. The only provision that is relevant to detention is that when a child is detained, they have a right for their parent, usually, to be with them, unless there are exceptional circumstances. Cadder has just reflected that—that continues to be the case. However, there is little in the 1995 act about additional safeguards for children and vulnerable people.

Stewart Maxwell: So the 2010 act basically reflects the situation as was.

Alicia McKay: Yes.

James Kelly: When the emergency legislation was passed, the position in the financial memorandum was that up to 500 police officers would be required to support it. You said earlier that police resource was low or limited. There is some dispute about the implications of the Cadder judgment—we see the sons of Cadder cases—and about the issue of when a suspect's right to a solicitor kicks in, which indicates that there might be a greater role for the police. Will you give us

more detail about the impact of the emergency legislation on the involvement of police officers and the implementation of the procedures at police stations?

Kenny MacAskill: I am happy to do my best, although that question might better be put to Chief Superintendent Main.

I have a further breakdown of ACPOS costs. The estimated costs are: £4,500 for training, which means local training and production of training materials; £124,081 for custody, which is the conversion of existing facilities, new-build facilities and telephony; £98,441 for data gathering, which entails collation of statistical data, information technology costs and staff costs; and £77,342 for the solicitor access implementation team, which is staff costs. That brings ACPOS costs to a grand total of £323,342. I would much rather have spent the money on front-line police services, but it is not the meltdown figure that was being bandied around at one stage.

James Kelly: That is all very well, cabinet secretary, but the financial memorandum said that 500 police officers might have to be taken off the streets to operate the procedures in police stations. You said that police resource on the new arrangements is low. Can you square the two comments and give more information?

Kenny MacAskill: I said at the time that extraordinarily cautious positions were being put forward. I have provided the factual information that was given to me. If you want to drill down further, I can say only that my understanding is that the number of officers that was referred to has not been necessary. It might have been better to ask the ACPOS representative who gave evidence earlier about the matter.

I can only repeat what I have been advised by ACPOS; I have given you the figures. I am not aware of 500 officers being taken off front-line community policing to deal with the outcome of the Supreme Court decision—which we very much regretted—but I am sure that ACPOS will be happy to provide the further information that you have wanted to ask about since Mr Main left.

James Kelly: As Cabinet Secretary for Justice, you were responsible for the emergency bill that went through the Parliament, including the financial memorandum, which said that 500 officers would be involved. You have repeatedly said that that is not the case. You said that resource is low. I am pressing you to indicate the figures, but you do not seem to have the detail to hand.

Kenny MacAskill: I gave you the figure of £323,000—or whatever it was—as the cost. It might not be the apocalypse that you have been looking for, Mr Kelly. Why you always seem to want the worst-case scenario to befall us, I do not know. I have narrated the information that we have. It might disappoint you, but I cannot comment beyond that. If you want me to obtain more information from ACPOS, I will happily do so. Why you did not ask Mr Main for the information, I do not know, but I am more than happy to ask him for you.

James Kelly: I merely seek accuracy, cabinet secretary. You said that police resource on the new arrangements is low and I am asking you to back that up. You had said that the new arrangements might require 500 police officers. To be fair, you now say that that is not the case. I am asking you to demonstrate why 500 officers are not needed and to say how many officers have been taken off the streets and into police stations to implement the new procedures.

Kenny MacAskill: I demonstrated the information that ACPOS provided. I am the justice secretary, not a chief constable or representative of ACPOS. I have provided you with the information that was made available to us. You had an opportunity to ask questions of ACPOS. For whatever reason, you did not ask ACPOS about the matter, but I am more than happy to do so on your behalf.

All that I can do is assure you that, despite your desire, 500 officers have not been taken off the front line. As you correctly said, that is the figure that was put in the financial memorandum, as the doomsday scenario. We are thankful that the doomsday scenario has not occurred. That might disappoint some people, but why that should be the case when it is clear that the doomsday scenario would damage communities, I do not know. I will happily ask ACPOS for more information.

Cathie Craigie: On the doomsday scenario in the financial memorandum, I presume that when a financial memorandum accompanies a bill that will go through the Parliament, whether it is an emergency bill or a normal bill, you are confident that the information that you provide to members is as accurate as it can be. It is clear from evidence that we heard last week and from other people that the information that we were given was not accurate. It is also clear, from your evasive approach to answering questions, that you do not have accurate information. That is not how a Parliament should operate.

Kenny MacAskill: I presume that there was a question in that statement. I will try to respond. It is obvious that a financial memorandum contains a wide range of figures, from low to high, to cover a range of possible scenarios. We were dealing with emergency legislation to address a situation that was neither anticipated nor welcomed, and a worst-case scenario that would have involved

significant police time and changes to police stations and custody suites. Thankfully, that has not occurred.

As I have said, that is the information that is before me. Most of the practical matters relating to police stations and police officers fall within the domain and jurisdiction of ACPOS. I do not know why you did not ask ACPOS but, as I have said, I have provided the committee with the most accurate briefing and information from ACPOS that we possess. The Government is delighted that the worst excesses that might have arisen because of the Supreme Court decision have not arisen. I would have thought that that would be welcomed by all, especially people in our communities.

11:15

Dave Thompson (Highlands and Islands) (SNP): Professor Alan Miller of the Scottish Human Rights Commission stated that there is a "real worry" that section 7 of the 2010 act could affect the Scottish Criminal Cases Review Commission's ability to review and refer cases in which an alleged miscarriage of justice might have occurred. Do you have any comments to make on that?

Kenny MacAskill: The Supreme Court judgment said that closed cases should not be affected, although it raised the issue of applications to the SCCRC. As I said, the matter was raised by both of the Scottish judges in the Supreme Court, Lord Hope and Lord Rodger. Those senior Scottish judges raised the issue, and the Supreme Court noted that the SCCRC would have to determine whether it would be in the public interest for cases that had already been finally determined to be referred to the High Court, which in turn would have to decide how to deal with such cases if a reference was made.

In section 7, we legislated to prevent the SCCRC from being seen as a means to undermine the need for finality and certainty in existing convictions, as referred to by the Supreme Court. The SCCRC plays an important role and it was in no one's interest for it to receive a large number of speculative actions on the back of Cadder. Building on the principles to which the Supreme Court referred, the 2010 act makes clear that there is a high bar for concluded cases to be reopened and reinforces the importance of finality and certainty in cases in which there has been a change in law.

In England, broadly similar provisions have been in place for a number of years in relation to the Criminal Cases Review Commission. The SCCRC recognises that certainty and finality are appropriate parts of the test of the interests of justice. The 2010 act specifies the power of the court to consider the interests of justice, and certainty and finality are aspects of that. I felt that both elements were required as a deterrent and to ensure fairness. I believe that the provisions in the emergency legislation have been effective in reinforcing finality and certainty. They will be subject to review by Lord Carloway.

Those significant possibilities were flagged up to us by Lord Hope, Lord Rodger and the Supreme Court and, as I say, we progress with the support and consent of the SCCRC.

Subordinate Legislation

Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 (SSI 2011/163)

11:18

The Convener: We have a bit of time left with the cabinet secretary so, if he does not mind, we will move on to the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011, which we will consider later this morning and which obviously are connected with Cadder. As the cabinet secretary probably knows, the Glasgow Bar Association has provided a written submission on the regulations. When we consider the regulations later, there will not be an opportunity for the Scottish Government to respond, so I want to give committee members the opportunity to ask the cabinet secretary any questions and to give the cabinet secretary the opportunity to respond to the Glasgow Bar Association's concerns.

James Kelly: I want to allow the cabinet secretary to get his responses on the record. The regulations appear to move us away from appointed solicitors and towards appointed firms. The Glasgow Bar Association's contention is that that would limit choice. I do not necessarily endorse that, although I am interested in the cabinet secretary's response. The association also has concerns about the potential extension of the role of the Public Defence Solicitors Office. What are your comments on that?

Kenny MacAskill: I appreciate that the matter is on the agenda. The regulations put the duty to make solicitors available in Cadder cases on to the Scottish Legal Aid board. The Law Society of Scotland has been fully consulted on the regulations, as have ACPOS and the Crown through the Cadder senior working group.

Negotiations are on-going between the Law Society and the Scottish Legal Aid Board as to how any police station duty schemes will operate. Such schemes will need to be cost effective and ensure access to advice in those situations, but it is hoped that the fundamental right of the individual to use a solicitor of their choice—which has been raised by the Glasgow Bar Association—can be a full part of any such scheme. That is something that the Scottish Legal Aid Board and the Law Society are working towards. I know, from matters that have been raised with me by the criminal legal aid committee of the Law Society, that they are looking for some flexibility in the solicitor of choice to avoid causing inconvenience in the early hours of the morning or whatever else while, equally, preserving the right of an individual to contact the solicitor whom he or she wishes to use.

Robert Brown: My question is not so much on the regulations per se as on the operation of the system. Cabinet secretary, you are probably aware that one of the Glasgow Bar Association's agitations has been about the way in which the duty scheme has operated with regard to weekends. For the past month or so, the public defender has been the person who has been called out as, in effect, the duty solicitor over the Thursday-to-Monday period—when, of course, most of the cases arise from weekend activities of various kinds, with which we are all familiar. That seems to be a not-too-subtle move towards increasing the use of the public defender and reducing the use of private solicitors without that being the subject of detailed consultation. What policy underlies that?

Kenny MacAskill: The PDSO was established prior to the current Administration coming into office. Since then, I have said that I will expand the PDSO only where there are clear gaps or public contingencies, and preferably with the consent of the profession. I understand that about 80 per cent of cases will be dealt with by the solicitor of choice, which will not be the PDSO. As I say, discussions are on-going with the Scottish Legal Aid Board and the criminal legal aid committee of the Law Society. The duty plan is not due out until July, so at the moment we are talking about subordinate legislation laying out the framework for duty plans. The matter is on-going and I appreciate the concern that has been raised.

Some currently enshrined aspects of the solicitor of choice require to be changed. Olly Adair and others have advised me that, at the moment, if an accused says that their agent is to be Robert Brown, for example, the police are duty bound by that and cannot pass the accused on to somebody in another firm. We must introduce some flexibility to enable somebody else to see that individual, although, equally, they will remain the client of their solicitor of choice. It is about providing flexibility. It involves the PDSO, but it also involves changing fundamentally how the Law Society views the matter. With the Cadder judgment resulting in more call-outs to police stations, there is a desire among a lot of lawyers not to have to deal with every one of those call-outs. When they have a social and family life, they want to ensure that they are not called out every night.

Robert Brown: I am grateful, cabinet secretary, for your emphasis on flexibility, which is important, but I am trying to get to the principle that underlies the changes. Can you elaborate on that? In Glasgow, where there is no lack of competition among solicitors, are there plans to expand or

spend more money on the public defender system as a consequence of the changes?

Kenny MacAskill: That is fundamentally a matter for the Scottish Legal Aid Board. There may be consequent increases in costs, but, if you are asking whether there is a grand plan suddenly to deposit huge numbers of public defence solicitors in Glasgow, the short answer is no.

The Convener: As there are no other questions for the cabinet secretary, I thank him and his colleagues for their time this morning. It has been very helpful.

I suspend the meeting for a comfort break and to allow the witnesses to change over.

11:24

Meeting suspended.

11:29

On resuming—

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162)

The Convener: Item 3 on the agenda is evidence on the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011, which is a negative instrument and is therefore subject to annulment. A motion recommending annulment has been lodged by James Kelly. The committee will now take evidence in order to inform the next agenda item, under which the motion to annul will be considered. Members have copies of the cover note and of written submissions that we have received in relation to the regulations, and those can be found in papers 2 to 6.

We have two panels of witness before us. On the first panel, representing the Law Society of Scotland, are Michael Clancy, who is director of law reform, and Andrew Alexander, who is the secretary of the legal aid negotiating team. Representing the Glasgow Bar Association are David O'Hagan, who is a past president, and Gerry Sweeney, who is a committee member. Good morning—I welcome you all.

I invite questions from committee members.

James Kelly: I will start with a couple of questions for the representatives of the Glasgow Bar Association. On stipendiary fees, it has been put to the committee in submissions that the bulk of cases that are heard by the stipendiary magistrate court would logically be placed in justice of the peace courts. What is your response to that suggestion?

David O'Hagan (Glasgow Bar Association): First, on behalf of the GBA I thank the committee for the opportunity for me and Mr Sweeney to speak to you this morning, and I extend my thanks to Mr Kelly for lodging his motion.

I direct you to the GBA's written submission, and to appendix H in particular, which is the letter from Lesley Thomson, who is the procurator fiscal for Glasgow. Discussions on the matter began in November last year between the Law Society, the Government and the Scottish Legal Aid Board. No one saw fit to consult Lesley Thomson until yesterday, as I understand it. The Law Society of Scotland and the Scottish Government contacted her for her view on the cases that go to the stipendiary magistrate court.

The first people who contacted Lesley Thomson were the GBA, on 9 March, and her response to the association is contained in appendix H. She makes it abundantly clear that when she or her deputes mark cases for the stipendiary magistrate court, those cases would otherwise be heard in the sheriff court. A justice of the peace court case would be marked to go into the justice of the peace court. I do not know whether the committee has received the briefing that Lesley Thomson provided thereafter to the Scottish Government and the Law Society yesterday.

The Convener: Yes. Members should have received that, as paper 30. It was handed round a short time ago.

Nigel Don: Forgive me, convener, but I wish to record—so that we have some sense of the discussion—that I have taken possession of the document quite literally two or three minutes ago.

The Convener: We all have.

Nigel Don: I am struggling to find time to read it while we are asking questions. It is fair to say that we will not be proceeding on the basis that we have understood the document.

David O'Hagan: That highlights my point. The GBA takes the view that there has been a real lack of consultation, particularly of the procurator fiscal, who is perhaps the most significant person to give her view as regards what cases go to the stipendiary magistrate court. It is quite clear, in the procurator fiscal's view—judging from the letter—that she puts only sheriff court cases into the stipendiary magistrate court.

There are exceptions when it comes to the custody court, which deals with all matters—whether they be justice of the peace court or stipendiary magistrate court cases. Also, from time to time, certain trial matters will be put from the justice of the peace court into the stipendiary magistrate court.

However, it is important that the committee bears it in mind that that issue has no impact whatever on legal aid fees, which the Law Society seemed to completely misunderstand in its submission. Legal aid regulations say that in a stipendiary magistrate court case, payment should be at the stipendiary magistrate court rate. If a case has been marked by the procurator fiscal for the justice of the peace court, even if at any point during proceedings the custody court is involved or the trial is moved to the stipendiary magistrate court, the legal aid payment remains the same as for the justice of the peace court, so there is no interaction between the legal aid payments. The fiscal was quite clear about the fact that cases that the stipendiary magistrate court deals with are cases that in any other jurisdiction would ordinarily go to the sheriff court, and that does not affect the legal aid payments. It leads to misleading statistics, but it does not affect the legal aid payments to Glasgow solicitors.

The Convener: Before I invite members to ask other questions, I wonder whether the Law Society would like to respond to the points that have been made about its submission.

Andrew Alexander (Law Society of Scotland): I thank members for the invitation to address the committee on this topic. It is clear from our submission and from the letter from Lesley Thomson at the Crown Office that if there were no stip court, the cases that it deals with would go to the sheriff court, but she notes that

"more sensitive or complex cases"

would, in general, go to the sheriff court rather than the stip court, when that choice is available. She says that there are presumptions as part of Crown Office and Procurator Fiscal Service policy

"that certain offences (eg offences of racially aggravated behaviour, hate crime ... domestic abuse and knife crime) should be prosecuted in the Sheriff Court."

The sheriff court fixed fee is paid to solicitors for proceedings in the sheriff court. It is a rough average that is based on the complexity and seriousness of the cases that go before that court. I think that part of the Law Society's case is that the cases that go before the stipendiary court are, in general, less serious and less complex and so would legitimately attract a slightly lower fee on average.

James Kelly: I have a couple of questions about the proposed reduction in the fee for stipendiary magistrate court cases from £515 to £390. I ask the Glasgow Bar Association representatives what impact that reduction will have on Glasgow law firms and on the ability of accused persons to access appropriate representation.

Gerry Sweeney (Glasgow Bar Association): It is a well-established principle of law that similar cases should be treated alike, whether they are within the Glasgow jurisdiction or in the Glasgow jurisdiction and elsewhere. If the regulations are agreed to, there will be differential treatment as regards how similar cases are handled in the stipendiary magistrate court and in the Glasgow sheriff court. There will also be differential treatment as regards how similar cases are handled in the stipendiary magistrate court and in a sheriff court outwith the Glasgow jurisdiction.

That immediately flows against the generality of the principle. The effect that it would have on individual cases and individual providers of legal assistance would, in my view, be highly significant. It would be significant as regards the competitiveness of the independent—by which I mean independent from Government and from the PDSO—providers of legal services. They will come under strain. The strain in the system of fixed fees is supposed to operate on a swings-and-roundabouts basis—in other words, when fixed fees came into being in 1999, it was adjudged that some cases would be overvalued and that some would be undervalued, but that the aggregate would provide a reasonable remuneration for all cases across the base.

If, however, Glasgow firms are arbitrarily targeted and if the funding for a large proportion of the cases that they deal with is substantially reduced—these are, after all, not minor reductions—it will necessarily affect not only the particular case before the stipendiary magistrate but other cases not in the stipendiary magistrate system, including sheriff court cases and solemn court cases, because the firms themselves will come under strain. That point either is not mentioned or is easily lost in the counter-representations that the committee has received.

James Kelly: Of course, the issue has arisen from the need to make savings in the budget, with which no one will disagree, so the instrument seeks to set out a way of achieving that aim. Its proposed cuts in stipendiary magistrate court fees will save £398,000 in 2011-12 and £652,000 the following year. I acknowledge that we will, if the proposal does not go ahead, need to find some other way of making those savings. In its submission, the Glasgow Bar Association states that a

"£5 cut to the core fee ... would achieve the same saving."

Can you expand on that comment?

Gerry Sweeney: What we are dealing with are the principles of proportionality and equity. Like others, the GBA accepts that in these straitened times funding has to be readjusted, but we believe that there must be equity in the system with regard

to the necessary reductions, and that such equity can be achieved by a further £5 reduction across the base for sheriff court and stipendiary magistrate cases, which would equate to somewhat less than 1 per cent of the overall core fee. We feel that such a move would be more equitable across the Scottish jurisdiction, rather than simply targeting the Glasgow jurisdiction and, perhaps, throwing up convention discords within particular cases and certainly within the Glasgow jurisdiction.

James Kelly: Does the Law Society wish to comment not on whether it agrees with that approach but on whether a £5 cut to the core fee would achieve the same savings as the reductions to the stipendiary magistrate court fees?

Andrew Alexander: If we take the 2009-10 figures, a £398,000 saving in 2011-12 equates to a 2.1 per cent cut in the fees paid to Glasgow solicitors. The Government and the Scottish Legal Aid Board have suggested to us that, if this cut to the stipendiary fee does not go ahead, it is likely that the core fee will have to be reduced to £459 instead of the £485 that has been mentioned.

Of course, if the regulations are agreed to today as they stand, it will be very difficult to bring forward regulations in time to avoid deeper cuts. After all, the financial year starts on 1 April, so if cuts cannot be made now they will become proportionately deeper the further into the year we get.

Michael Clancy (Law Society of Scotland): It is also important to acknowledge Mr Sweeney's comment about swings and roundabouts. The case law quite clearly shows that that was the anticipation in 1999 and, even with the changes to the fixed payment regime that are proposed in the regulations, the swings-and-roundabouts argument still holds good.

In the leading case on this, in which the solicitors who represented Norman McLean and Peter McLean were referred to as being extremely experienced and well respected—one of them is sitting at the table with me today—it was noticeable that a solicitor acting under the fixed payment regime was expected to take the rough with the smooth. That is part of the theory behind the fixed payment regime. This is not new and it will continue, even within the constraints of the fixed payment regime as amended.

11:45

The Convener: Members, we are very tight for time so it would be helpful if you could keep your questions as brief as possible.

Robert Brown: I want to be clear about the position here, and I have two issues to bring up. The first relates to the change from the current position. I want to ask the Law Society if I have it right that the current block fee for the stipendiary magistrate court appearance is £515. That will go down to £485 for sheriff court appearances and £390 for the stip. Indeed, it would have gone down to £340.

Michael Clancy: That is correct, except that it would have gone down to £350 under the original proposals and it was in discussions between the cabinet secretary and the Law Society that the figure was increased to £390.

Robert Brown: Regardless of anything else, stip court and sheriff court appearances are dealt with on the same basis, so that for those who appear in the stip court there will be an immediate loss of £125 in the block. That means that there will be a disproportionate loss to mainly Glasgow solicitors who appear before the stip court. Before we look at whether it is justified, do you accept that as being the reality of the position?

Andrew Alexander: It is a substantial cut to the current position in which there is equity between the sheriff court and the stipendiary magistrate court. However, on the evidence that is in the submission, you can see that a number of cases do not go before the stipendiary court because of their complexity and seriousness. We believe that averaging out the payments on the basis of seriousness and complexity of the cases will mean appropriate remuneration.

Robert Brown: I want to examine that a bit further. The key issue is the clarity of what the courts actually do. As I understand it, cases are brought as either custody cases or cited cases. In either event, in Glasgow at the lowest level, they will be marked as JP cases, if appropriate, and they will go to the JP court. Is that correct? Is the nuance that if the accused is in custody, they will appear before the stipendiary magistrate to avoid having a separate custody court?

Michael Clancy: That is our understanding of the situation.

David O'Hagan: Yes.

Gerry Sweeney: Yes.

Robert Brown: Everyone is agreed on that. Thereafter, we would go higher up the scale. If Glasgow's procurator fiscal's statement is correct, those cases that are marked for the stipendiary magistrate court in Glasgow would go before the sheriff court in other jurisdictions. That means that other cases, other than for custody appearances, would otherwise go to the sheriff court. Is that correct?

Gerry Sweeney: Absolutely.

David O'Hagan: Yes.

Andrew Alexander: On the distinctions between JP, stip and sheriff courts, although there is no precise science for the marking of such cases, what you have said is correct.

Robert Brown: So, the only distinction that the Law Society is relying on is that certain of the more serious cases do not get marked for going to the stipendiary magistrate court because of Crown Office policy, but they nevertheless go to the sheriff court in Glasgow. All the stip cases are sheriff court cases, but the sheriff courts do not get them all because some of them are occasionally more serious.

Gerry Sweeney: Yes. It must also be borne in mind that Glasgow has a much higher proportion of serious cases than any other jurisdiction. Until very recently, the Glasgow jurisdiction had the busiest criminal court in Europe, so there is a weighted bunch of very serious cases.

Robert Brown: On the type of case we are talking about, one of the solicitors involved has sent me an example of a case that went before the sheriff court in Ayr. Obviously that was not a Glasgow case. It involved the stealing of a pot of yoghurt and a jar of honey. It appears that in some jurisdictions at least, the type of cases that go to the sheriff court would not qualify entirely as hugely serious cases. They sound like JP cases, if I dare suggest that to the Law Society.

Michael Clancy: Of course, there will be variations throughout the country, and what is considered to be serious in one place may be considered to be not so serious in another. There may be a breach—

Robert Brown: I suggest that stealing a pot of yoghurt and a jar of honey would not in any jurisdiction of Scotland be regarded as the most serious of the criminal cases that come before the court.

Michael Clancy: Indeed not, but as recently as yesterday I saw cases in the stipendiary magistrate court and in the JP court in Glasgow that would not have counted as extremely serious. There was also a case involving a young man who had head-butted a police officer: that is by all accounts a serious case, but it was in the JP court in Glasgow. Another case involved a man who had to lose his driving licence for a traffic violation and would therefore lose his job, and it was being dealt with in the JP court at the same time—or rather, an hour and a half beforehand. In the stipendiary magistrate court in Glasgow, there was a case in which a woman had broken a police officer's finger when she was being handcuffed.

Serious cases can be viewed through different prisms. I do not know what the ratio of honey theft in Scotland is, but it is clear that in certain parts of the country, public disturbance and breaches of the peace are a nightly occurrence—down in the Cowgate, for example—while in other parts of the country such occurrences may be very rare. I do not think that we can judge that periodic specific cases being drawn to our attention is indicative of a widespread trend.

Dave Thompson: Just to follow up on that, the crucial point is the status of the courts, which is important in deciding where we go in terms of the fees.

The Executive note to the SSI shows that the categories of cases in which the stipendiary magistrate court is closer in share to the JP court make up 64 per cent, those which are closer in share to the sheriff court make up 11 per cent, and those in which there is no clear pattern make up 24 per cent.

The note also states:

"the percentage of business dealt with in the JP courts outside Glasgow under the case categories of assault, theft and breach of the peace are very similar to the percentages of work done under these case categories in the Stipendiary Magistrate's Court".

There is also evidence from the Law Society about similar cases. I am keen to tease out what that status is, and how the stipendiary court relates. There is quite a lot of information on evidence in the Executive note that appears to show that it is somewhere between the JP court and the sheriff court.

David O'Hagan: I refer you to appendix B of the GBA's submission. Even a cursory look at it may give you an indication that the premise that those cases are less complex is not the case. There is a sexual aggravation in one case and a football aggravation in another, and there are three benefit-fraud cases, which may deal with matters involving tens of thousands of pounds and are evidently complex. A cursory look at one day's business in the stipendiary magistrate court gives you an indication that there are many complex matters that we have to deal with.

Mr Clancy is contradicting his own argument. To say that there are serious matters in the JP court in Glasgow gives you an indication—if the fiscals think that those matters are worthy of the JP court—of the seriousness of the cases that go to the stipendiary magistrate court.

Dave Thompson: It is the number and the percentage of those serious cases in the stipendiary court that is important. The figures seem to show that the cases that would, on balance, relate to the sheriff court are relatively small in number: it is never 100 per cent, for instance.

David O'Hagan: The statistics were produced retrospectively, after the proposals were made. As

I said, there was no consultation of the fiscal about any of it—until yesterday, as I understand it. The statistics are in the Executive note, and in the paragraph that precedes the one that you quoted it is accepted that no indication is given of the seriousness of cases. The statistics have no scientific basis and are an attempt to produce a cohesive argument, which—with respect—has been totally contradicted by what the procurator fiscal said.

Dave Thompson: Does Mr Clancy want to comment on that?

The Convener: I want to bring in Mr Maxwell.

Dave Thompson: May we first hear from Mr Clancy on that point?

The Convener: Briefly, please.

Michael Clancy: I have to trust the statistics. Statistics have to be developed retrospectively; they cannot be developed prospectively. It is important that we acknowledge that the Government was acting in good faith in producing the information that is in the Executive note.

If there is criticism of the Government's statistics gathering, that is another matter. The Government's not speaking to the procurator fiscal in Glasgow before it produced the statistics is not a good ground for saying that the statistics are wrong.

Stewart Maxwell: The Law Society of Scotland said in its submission to the committee:

"The Stipendiary Magistrate Court is ... not the direct equivalent of the Sheriff Court although the current fixed payment structure under the Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 1999 is the same for both courts."

It also listed different types of offence and areas of law that would not appear in the stip court.

The Glasgow Bar Association has put much emphasis on the evidence from area procurator fiscal Lesley Thomson and has rested its case heavily on her comments. However, in the final paragraph of her letter, she said:

"We generally prosecute the more sensitive or complex cases that are appropriate for summary proceedings in Glasgow Sheriff Court".

She went on to talk about cases that would go only to the sheriff court and would not go to the stip court.

Given that in the Law Society's evidence and in the letter that you mentioned a number of times it says that more sensitive and complex cases go to the sheriff court and not to the stip court, do you accept that there is a difference—in general terms, there is overlap—between the cases that go to the sheriff court and the cases that go to the stip court?

David O'Hagan: Let me deal first with the Law Society's submission. The Law Society's list of cases that it said do not appear in the stip court highlights the society's complete misunderstanding of the stip court's role. The Law Society referred to breaches of community service, which do not fall under the fixed-fee arrangements that the regulations deal with, and to probation orders, which also do not come under the remit of the regulations. It mentioned fraud, but as I have pointed out, appendix B of our submission, which shows one day's business, shows that the stip court considered three benefit frauds on that day. There was also a sexual aggravation case on that day. A number of complex matters are dealt with in the stip court.

On what the fiscal said about sensitive and complex cases, let us consider the domestic abuse court. There is invariably a low number of witnesses in domestic abuse cases. It is normal to have the complainer and a couple of police officers—and perhaps a second witness. Even if one regards such cases as more sensitive, the amount of work that is required to deal with them is the same as is required to deal with a case in the stipendiary magistrate court. Similarly, we are required to do the same amount of work on a breach of the peace as is required on a racially aggravated or sectarian breach of the peace. Even if we accept the point about sensitive cases—I accept it to some extent—it does not really take account of the level of work that a solicitor puts in. It is the same amount of work in each case.

Stewart Maxwell: I accept your point about sensitivity. You did not mention complexity, though.

David O'Hagan: I mentioned that three benefit frauds were among the 25 cases that were considered in the stipendiary magistrate court on one day—it was 3 March. Those are complex cases, and I understand that the fiscal has recently moved such cases into the stip court because of pressure of business.

We should bear in mind that the fiscal can take a batch of cases of a certain type and move it into the stip court. She has the power to do that at any time, if there is pressure of business at the sheriff court, because the Criminal Procedure (Scotland) Act 1995 basically gives the two courts the same status. The statistics do not take account of the fact that the fiscal can at any time move a certain type of case from the sheriff court to the stip court.

12:00

Stewart Maxwell: So should I understand that you do not accept that, in general—I know that there is an overlap and that we can all point to individual cases that can break the rule—more

complex cases are prosecuted in the sheriff court rather than in the stip court?

Gerry Sweeney: I take you back to what we said a moment ago. It must be appreciated in talking about complex cases in the Glasgow jurisdiction that it is the biggest, busiest and most complex jurisdiction not only in Scotland but in the whole of the United Kingdom. If one has to decide whether to put the most complex case into the sheriff court or the stipendiary magistrate court, I think that, on the whole, one would put it into the sheriff court, but that does not mean that the cases that are placed before the stipendiary magistrate court in Glasgow would not be regarded as complex in any other sheriff jurisdiction. The Glasgow jurisdiction is different. That is why it has at least four stipendiary magistrate courts, at least three or four justice of the peace courts and the full plethora of sheriff court cases running every day.

Stewart Maxwell: I understand what you are saying, but I do not accept that saying that a jurisdiction is big or busy means that it is complex; it simply means that it is big or busy and that there are more cases in it. It does not necessarily mean that it is complex.

I would like to move on, as I know that we are running out of time.

The Convener: We are short of time. You should be brief.

Stewart Maxwell: I would appreciate an answer on that from the Law Society, given the comments on the matter.

Secondly, you raised the issue of consultation. To summarise your position, I think that you said that there has been a lack of consultation. In its submission, the Law Society states:

> "The Society's position as communicated to the Cabinet Secretary for Justice was agreed by representatives of the local Faculties on 6 January. That meeting included representatives from 19 faculties across Scotland (including Glasgow)."

A counter-proposal is made in your written submission. How much consultation on that was there across Scotland?

David O'Hagan: On the £5 proposal?

Stewart Maxwell: Yes.

David O'Hagan: A number of individuals put that proposal to the Law Society and its negotiating team on a number of occasions. I put it forward at the Law Society council meeting.

Stewart Maxwell: I presume that it was rejected at that meeting.

David O'Hagan: It was, and I will tell you why. All the other faculties were given the option of sacrificing Glasgow, which would take a larger hit in the cut in its stipendiary magistrate fee or, if they did not agree to that, they would be worse off because there would be a further cut in their core fee. It is significant that the vote was 18 to one—obviously, Glasgow was the one. If the others had voted against that, they would have suffered financially. The GBA's objection to the Law Society throughout the process has been that it has necessitated self-interest. Those who voted to make Glasgow take a bigger hit were self-interested. I resigned from the Law Society council because that had been done.

Stewart Maxwell: We need to get an answer from the Law Society on that particular issue, but you seem to be suggesting that your colleagues throughout Scotland are extremely mercenary for the sake of £5. I will pass on that. We will move on to the Law Society.

Michael Clancy: It is important to realise that the Law Society represents all solicitors in Scotland, including solicitors in Glasgow, and that it operates on issues of principle. The principles involved were to maintain access to justice, to ensure that solicitors got a fair remuneration for work that had been done, and to get generally fair treatment with a swingeing Government cut of 8 per cent in the legal aid budget. It is important that we appreciate the context.

The Government mooted the original proposal to increase the Public Defence Solicitors Office network by 41 solicitors and four additional offices in the latter part of last year, and that proposal would have had an impact throughout the country, including in Glasgow. The society was put in a difficult position in negotiating a difficult set of arrangements, and that resulted in the regulations that are before members.

Andrew Alexander has specific comments to make on the paragraph relating to the various offences.

Andrew Alexander: Yes, indeed. However, first of all, I would like to make a comment about that faculties meeting. The stipendiary court is, of course, an issue that is unique to Glasgow but I must point out that other faculties across Scotland that were represented at that meeting will also be affected by the various measures in the regulations. For instance, the PDSO expansion will for the first time ever take a 35 per cent share of the duty scheme from people in West Lothian, while colleagues in the Scottish Borders who would have benefited from a full-scale expansion of the PDSO because the office would not have opened in their area will now have their core fee cut. Moreover, the cuts to travel fees will affect colleagues in rural areas. The situation is exceptionally difficult. An 8.2 per cent cut will affect criminal legal aid lawyers throughout

Scotland and the issue was reflected on in a mature way at the faculties meeting that has been mentioned.

As for the seriousness of offences, the figures that we have received relate to cases that SLAB has paid for. Obviously, there is a small margin of error in that respect, because not every case is publicly funded, but with regard to fraud, which David O'Hagan mentioned, 25 such cases come before the stipendiary magistrate court and about 130 before the sheriff court every year. Of course, we need to bear in mind that, according to Crown Office figures, there is roughly a 2:1 split in the number of summary matters that go before the sheriff court and the stipendiary magistrate court.

The Convener: We have time for only two more questions.

Bill Butler: As long as it can be a two-part question, convener.

The Convener: If you are quick.

Bill Butler: Thank you very much.

Quoting Lesley Thomson is becoming a habit. I note that the sentence following the one that was quoted by Stewart Maxwell says:

"While the cases that are prosecuted in Glasgow Stipendiary Magistrates Court will not include any of the foregoing I can confirm that the other types of cases in the Stip courts are all of a Sheriff Court level."

Do you agree with that, Mr O'Hagan?

David O'Hagan: Absolutely.

Bill Butler: Does Mr Alexander or Mr Clancy disagree with that statement or question its veracity? Yes or no will do.

Andrew Alexander: No, although—

Bill Butler: Thank you. That is okay.

Stewart Maxwell: I would like to hear Mr Alexander's answer.

Bill Butler: With the greatest of respect, Mr Maxwell, those were my questions.

Stewart Maxwell: But surely it is a matter for the witness to provide a full answer.

Bill Butler: It is actually a matter for the convener.

The Convener: Do you have anything to add in response to Mr Butler's question, Mr Alexander?

Andrew Alexander: Yes—and thank you very much for the opportunity to do so. I will be very brief.

The number of summary matters going before the Scottish courts has reduced quite substantially from 77,963 in 2005-06 to 49,298 in 2009-10. Over a shorter period, the number of cases going before the district court—or what is now the justice of the peace court—has increased from 5,000-odd in 2007 to 8,000-odd. The clear message is that at a time when direct measures have been removing some of the least serious cases from the criminal justice system, the amount of cases going to the justice of the peace courts has been increasing substantially while business at the stip court has stayed at roughly the same level. Taking a more gradual view, I think that there is possibly an indication that more serious cases are being dealt with in the lower courts.

Bill Butler: That is really a matter of opinion. I much prefer the matter of fact with which you answered my initial question. Thank you for that.

I also thank you, convener. I do not need advice from other colleagues about the questions that I ask and I thank you for your protection.

The Convener: Thank you very much.

James Kelly: I have to say that I was not satisfied with the Law Society's response to my earlier question about the GBA's alternative proposal that reducing the core fee for all legal aid grants by £5 would derive the same amount of savings as the proposed reduction in stipendiary magistrate court fees. Are those figures accurate? If the Law Society does not accept them, what sort of reduction does it suggest would be needed to derive those savings?

Michael Clancy: The fact of the matter is that we proposed a package of savings to get the equivalent of the Government's original anticipated saving of £4.25 million. Therefore, the figures have to be taken in the round. It may be the case that the £5 cut would be an equivalent of the £380,000 in this year and the £600,000 next year, but one has to understand the approach that the society has been taking: we promoted these changes on the basis of the package.

The Convener: Thank you very much for your time. I think that all the points have been exhausted, but is there anything further that you would like to add briefly?

Gerry Sweeney: Myself and Mr O'Hagan are somewhat different from the chaps from the Law Society of Scotland. There has been an overfocus on statistics. I do not deal with an industrial process; I deal with human beings, with all their complexities and vulnerabilities. Whether those human beings are complainers or accused persons, they have to be dealt with as individuals. Simply looking at what a charge is in a case does not reveal the complexity of the case or the complexities and vulnerabilities of the individuals involved and the protections that are required in order properly to provide a defence to those individuals. It is very easy to get lost in statistics

and to lose sight of the individuals whom the statistics are meant to serve.

David O'Hagan: I just want to add to Mr Sweeney's comments. We do not want this simply to be about what solicitors are being paid. There is a public element. What has concerned the GBA from the outset is that the Law Society has failed properly to take into account the public interest. I say that for two reasons: first, the negotiating team did not at any time consult the access to justice committee of the Law Society; secondly, when at a council meeting the negotiating team was challenged about the potential article 6 contraventions in what it was proposing, the vice-convener said that if the solicitors were successful it would be a hollow victory, because they would simply have cuts made elsewhere. In our view, the public interest—particularly of the citizens of Glasgow—is not being properly taken into account.

The Convener: Thank you. Does the Law Society wish to add anything?

Michael Clancy: The society has a statutory obligation to promote the interest of the solicitors profession and the interests of the public in relation to that profession. Of course we have the public interest at heart when thinking about access to justice issues. The internal management of our committees is another matter. However, as you will have seen from our submission, the three principles to which we adhere in these regulations are access to justice, proper remuneration for the work done and overall fairness within the savings package. It is unfortunate to suggest that the society does not have access to justice concerns at its heart.

I remember from the very earliest days of being involved with legal aid issues—in 1992-93—traversing arguments about article 6 in order to protect and preserve advice and assistance in Scotland. There is a long heritage for us to reflect on. I cannot accept that we have not borne that in mind in dealing with the regulations.

We can always do better on consultation, but within the timeframes concerned—from the publication of the Scottish Government budget to the present day—we have made as much effort as we possibly could to consult relevant interests.

Mr Sweeney said that he deals with people. We deal with people, too. We deal with people who are solicitors and people who are solicitors' clients. We accept that they are complex and human individuals, just as much as we are. We are not just statistical policy wonks.

The Convener: Thank you all for your time. I suspend the meeting briefly to allow a change of witnesses.

12:14

Meeting suspended.

12:15

On resuming—

The Convener: I welcome back the Cabinet Secretary for Justice. I apologise for the delay, cabinet secretary. I also welcome your officials, Mr Colin McKay, the deputy director of the legal system division; James How, head of the access to justice team; and Fraser Gough, from the Scottish Government directorate for legal services. I invite you to make a short opening statement.

Kenny MacAskill: My letter to the committee, which was sent in advance of today's meeting, makes clear the financial context in which we are operating and the savings in legal aid that need to be made in 2011-12. As the committee has heard this morning, making those savings has meant taking some difficult decisions, which have not been taken lightly. I have made it clear that I must take action now to ensure the long-term sustainability of the legal aid system and preserve access to justice.

Savings have been proposed in several areas, including the Scottish Legal Aid Board's administration budget, the fees that are paid to solicitors for travel time and the fees that are paid to counsel. However, given the fact that almost two thirds of the spend goes on the criminal side, it was always clear that savings would have to be made in summary criminal legal assistance. Decisions have been taken in close consultation with the Law Society of Scotland and I have personally had a series of meetings with the Law Society's criminal legal aid negotiating team. The Law Society originally asked me to protect core fees, which is why, in November, I proposed a large expansion of the PDSO. Then, at the start of December, the Law Society requested further time to consult the profession. It came back to me on 7 January with revised proposals for a lesser expansion of the PDSO and the reductions in summary fees that we are looking at today.

The Law Society wrote to me again on 4 February in relation to one aspect of the package of reductions—the reduction in the fee that is paid for work in the stipendiary magistrate court. I had a further meeting with the Law Society to discuss that proposal and agreed to increase the proposed fee from £350 to £390, which is £95 less than the new summary core fee. I accept that stipendiary magistrates currently operate only in Glasgow, due to the volume of business. I also accept that the stipendiary magistrate court and the sheriff court have equivalent powers in relation to sentencing. Nevertheless, the Crown has made it clear that it prosecutes the more sensitive or

complex cases that are appropriate for summary proceedings in Glasgow sheriff court. There is also a presumption by the Crown that certain, more serious, cases involving, for example, knife crime, offences with racially aggravated behaviour or hate crime aggravations and domestic abuse should be prosecuted in the sheriff court rather than elsewhere. In addition, figures from the Scottish Legal Aid Board indicate that there is a substantial difference between the early pleading rates in the stipendiary magistrate court and the sheriff court in Glasgow. In the stipendiary magistrate court, the figure is 43 per cent, whereas, in the sheriff court, the figure is 25 per cent. That also suggests that a different level of fixed fee would be appropriate.

The regulations form part of a complex package of legal aid savings on which the profession has been consulted extensively. Many of them interact and it would not be possible, at this late stage, to unpick a specific part of the package. The savings that I propose will safeguard the current scope of and eligibility levels for legal aid—something that is not happening in England and Wales. If action is not taken now, deeper and wider savings in some other form would have to be made at a later date, and it is likely that any such savings would be even less palatable to the profession and the wider public throughout Scotland.

The Convener: Thank you. I invite committee members to ask questions.

James Kelly: It was brought out in the previous evidence session that the Scottish Government consulted Lesley Thomson, the area procurator fiscal, on the issue only yesterday. Why did the Government not speak to Ms Thomson about the issue until so late in the day?

Kenny MacAskill: We have regular on-going discussions with the Crown. Ms Thomson has a particular interest, given where she is located, but such matters are not considered in isolation. We have regular on-going discussions.

James Kelly: I am not really satisfied with that answer, but I will move on to my next question.

As you said at the outset, the stipendiary magistrate court is peculiar to Glasgow. The proposal for the stipendiary magistrate court fee is a reduction of £125, from £515 to £390. The proposal for the sheriff court fee is a reduction of £30, from £515 to £485, so there is an inequity there. I put it to you that not only is that unequal but that Glasgow firms are being unfairly penalised by the proposal.

Kenny MacAskill: The proposal does not affect only Glasgow firms. Any firm in Scotland that has a client who appears before a stipendiary magistrate will be affected. In my 20 years' experience as an agent, I appeared in stipendiary magistrate courts on behalf of accused from Edinburgh. The fee reduction relates to the court, not the geographical location of the lawyer.

It is accepted that stipendiary courts exist only in Glasgow, due to the volume of crime, so it is a fact that the proposal affects Glasgow. However, our proposal for the stipendiary court fee is that it should be at the mid-point between a justice of the peace court fee and a sheriff court fee. A stipendiary court is not a sheriff court, but we accept that it is a greater court than a justice of the peace court. As a compromise, we have therefore set the fee at the mid-point to reflect the fact that the stipendiary court is above one but is not necessarily reflective of the other.

Stewart Maxwell: I come back to a comment that you made in your opening statement. Am I right in assuming that, if the regulations are lost, it is not only this particular part of the package of regulations that is lost but all the regulations in the package? The whole package of regulations will be lost, with the likely impact that the total savings that are required in the coming financial year will still be required in the coming financial year, but by the time that we get to new regulations later in the year, at some point in the new session of Parliament, there will be much less time. Is the impact of losing the regulations today that the same amount of savings will have to be made, but in, if you like, half the time?

Kenny MacAskill: Yes, that is the case. The situation is that we have to make savings and we entered into discussion with the Law Society of Scotland. SLAB advised us that we should adopt a particular position on the expansion of the PDSO but the profession did not want that. We were happy to agree with the Law Society of Scotland that, although the savings had to be made, how the cake should be cut was a matter for discussion and sharing. If the regulations fall, further regulations would have to be introduced in due course but, as you correctly point out, the same amount of savings would have to be made and there would be a shorter time in which to make them, so the cost to the profession would be deeper and wider.

Stewart Maxwell: If the regulations were to be rejected and new regulations introduced—I know that this is a hypothetical question—where would the cuts have to be made? I am struggling to think where they would be made. Do you have any idea where they would be made if they have to come later in the year?

Kenny MacAskill: There is limited room for manoeuvre. You could expand the PDSO—

Stewart Maxwell: —which has already been rejected.

Kenny MacAskill: Yes, or the cuts would have to be deeper and wider. The fees that we propose to pay in sheriff courts and justice of the peace courts would therefore have to come down, so there would be a significant loss across the board.

James How (Scottish Government Directorate for Justice): If we were to make the savings later in the year, we really would have to make them on the summary side because, on the civil and solemn side, savings take much longer to come in. Therefore, if we were to make savings on the summary side later in the year, they would have to be a lot deeper to get them into 2011-12.

Robert Brown: I struggle to get a view of what sort of cases go to the stipendiary court. We had good evidence earlier on from the Law Society and the GBA, but I am troubled by the statement under the fourth policy objective in the Executive note that is attached to the regulations, which says:

> "in Glasgow, cases can often be programmed into either the Stipendiary Magistrate's Court or the JP Court for convenience ... not due to the seriousness of the case."

That is directly contrary to the unified evidence that we had from the earlier witnesses, who indicated that, as Lesley Thomson says in her letter, the cases that are marked for the stip court are those that, in other jurisdictions, would be heard in the sheriff court. Do you accept that they are sheriff court cases and that the statement in the Executive note is not quite accurate?

Colin McKay (Scottish Government Directorate for Justice): We certainly accept Lesley Thomson's statement. There is a complexity about how cases end up in a particular court. There is a distinction between what the case is marked for and where the case is heard. I think that you have already discussed custody cases. It is also the case that, on occasion, trials will be marked for—

Robert Brown: With respect, we were also told that that did not affect the categorisation of the case for legal aid, so it is irrelevant for the regulations.

Colin McKay: It should not affect the categorisation of the case for legal aid, so I accept the point that it does not make a huge difference for the regulations. It sometimes has an impact because it is not always easy for the board to tell what is happening in a case and how it has ended up in the stipendiary court. There are problems with that, which is one of the reasons why the matter has been more confusing than might have been hoped.

Robert Brown: Sorry, what is the problem? I do not quite follow that. It seems that cases are clearly marked up by the procurator fiscal's department. What is the problem with that being translated?

Colin McKay: Our understanding is that the board often has difficulty in determining the nature of a case when it receives solicitors' accounts. It is not always the case that it is made clear to the board that a case has been marked for a JP court. The board is in discussions with the Crown about ways to resolve that in the future, but that is the current position.

Robert Brown: I will make a helpful suggestion on other savings. One of the issues that the Government has taken into account is the ratio of early guilty pleas in the stipendiary court. I am told that part of the reason for that ratio is difficulty in relation to access to the fiscals in the sheriff court. Would that not benefit from close examination? Resolving that successfully could achieve savings.

Kenny MacAskill: Early guilty pleas are always to be appreciated, not simply because of the cost saving but because of the inconvenience to victims and witnesses that is otherwise caused. In many instances, those matters rest within the Crown's control. To be fair, I know from speaking to the law officers that they are well aware of the issue. Fiscals seek to try to encourage early guilty pleas, and our Administration is more than happy to do what it can to continue to encourage that approach. That is why intermediate diets were introduced many years ago. It is also why fiscals make themselves available.

Any attempt to address the matter is about not only financial savings but best practice for the court and, indeed, the victims and witnesses. We are happy to continue to encourage that.

Dave Thompson: Am I right in thinking that the original idea—increasing the size of the PDSO to a far greater extent than is now planned—would have affected all solicitors in Scotland? We had some evidence from the Law Society that there could have been particular problems in the Borders and various other rural areas. Am I also right in thinking that the savings package that is now before us, which was negotiated after that initial position statement, has taken all those things into consideration?

A number of savings are being applied throughout the country. Am I right that picking on the savings in the stipendiary court and making a judgment on them would be detrimental to solicitors everywhere because it would not take into account the package in the round, which is important?

12:30

Kenny MacAskill: Yes, that is a very fair point. I have never suggested that these are anything

other than cuts—indeed, we have been quite clear about that—and, as such, I am extremely grateful to the Law Society for its forbearance. Basically, we have asked it to tighten its belt considerably. A proposal was put forward, and the society asked whether it was negotiable or whether our course and direction were set. We said that our course was not set, that all we had to do was to make the appropriate savings and that if it could find a way of making those savings we would be happy to work with it. The society then came back with these proposals. We are grateful to it for its sufferance but the fact is that these savings have to be made. Solicitors in rural practices have been complaining about the loss of travel fees and we accept that there is an issue that is specific to Glasgow—excepting, of course, the odd occasion when solicitors outside the city take on clients in the city. The regulations apply across the country and have the consent of the Law Society, which represents the overwhelming majority of criminal law practitioners. As I have said, if we do not make these cuts, what will be introduced will be deeper and worse.

Cathie Craigie: The regulations were laid on 28 February, or 28 days before the Parliament sits for the last time this session. A lot of issues have been raised with members in recent weeks. Could the regulations have been laid earlier? Could the consultation process, for example, have started earlier?

Kenny MacAskill: Actually, the Law Society asked us to delay the regulations, which were ready before Christmas. It said that it wished to consider another method instead of the PDSO route, so it consulted its respective faculties the length and breadth of the country and came back with a different direction. Thereafter, the proposal had to be worked through. We have sought to strike the right balance between making the appropriate cuts and taking on board the profession's wishes. As I said, it was the society that asked us to ensure that we proceeded at an appropriate pace.

Colin McKay: I should also point out that, as a result of that further discussion, specific account was taken of issues around the stip fees, which were then increased from £350 to £390. Had we laid the regulations earlier, the figure would have been lower.

The Convener: As committee members have no further questions, I move to the next item, which is the formal debate on motion S3M-8085, recommending annulment of the regulations on which the committee has just taken evidence.

I invite James Kelly to speak to and move his motion.

James Kelly: The issues have been well rehearsed in the evidence session. At the outset, I should say that I accept all the SSI's proposals for achieving the required savings, except those in regulations 7 and 9, which relate to the stipendiary magistrate court. That proposal is badly thought out. It will result in unequal treatment and will, in particular, penalise Glasgow law firms which, in the main, service the clients in those courts. There is also an access to justice issue, because the service that is provided in those courts will be undermined.

As I have said, the proposal to reduce the core fee by £125 in the stipendiary magistrate court and by only £30 in the sheriff court is clearly unequal. There has been some discussion about the cases that are dealt with in the stipendiary magistrate court. Some members have suggested that a fair number of justice of the peace court cases end up there; indeed, the Executive note contains a table on that. However, I have to say that the evidence that we have heard this morning does not back up such an assertion. Appendix B of the Glasgow Bar Association's submission, which sets out the list of cases that the court dealt with on 3 March, shows the serious cases that come before the court.

Much has been made of Lesley Thomson's letter, but she also made a submission to the committee in which she makes her position even clearer by stating:

"For the ... avoidance of doubt therefore, if there was no Stipendiary Magistrates Court to deal with custody cases then those marked for the Stipendiary Magistrates Court would be in the Sheriff Court and those marked for the Justice of the Peace Court would be in one of my Justice of the Peace Courts which would then require to sit on a custody basis".

The GBA's submission was very helpful, in that it proposed as an alternative a reduction of £5 in the core fee for all legal aid grants. That is a reasonable way forward, because it would spread the load evenly across the country and would not unfairly penalise Glasgow firms.

I will continue with my motion to annul. The regulations should be brought back, with the exception of regulations 7 to 9.

I move,

That the Justice Committee recommends that nothing further be done under the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162).

Robert Brown: I support James Kelly's motion. The issue gave me considerable difficulty, and I wanted to be clear that I was acting not purely from a Glasgow perspective but with a wider view in mind. I pay tribute to the efforts of the Scottish Government and the Law Society to resolve a difficult situation.

Nevertheless, we have ended up, after hearing today's evidence, with considerably more clarity about the nature of the stip court. It is clear that it deals entirely with sheriff court cases, and does not—as, I must confess, I had originally thought—deal with JP cases as well.

It is also clear that the nature of criminal jurisdiction in Glasgow is such that there is an escalation: we are dealing across the board with a higher category of cases, and more serious cases, than might be found in the rest of Scotland. The illustration that I gave of the case in Ayr may be anecdotal in the sense that it is one example, but stealing a pot of yoghurt and a jar of honey does not strike me as being a typical sheriff court case, which illustrates the difficulties.

We now have clarity about the merits of the position. The result—because we begin from a position in which the sheriff court and the stip court were dealt with in the same way—is undoubtedly a hit on Glasgow and lawyers who practice in Glasgow, as well as on one or two people who come from other places. The question is whether that is justified or not. I am reasonably clear in my mind that it is not.

With regard to alternatives, much play was made of the question of greater numbers of guilty pleas in the stipendiary magistrate court. The evidence that has been given to me—which has not been reflected too much today, as we did not have time to pursue it—shows that there is a significant issue around access to fiscals in some sheriff courts throughout Scotland. That issue might, as a cost-saving exercise, be examined with some degree of care by the Crown Office and the Government.

I accept that there is a difficulty, but I suspect—although the cabinet secretary has not been entirely clear about this—that the regulations, with the exception of those that relate to the stip court, could be brought back within a few days, before Parliament dissolves. For the avoidance of doubt and for some help on that, I follow James Kelly's point and say that I accept the regulations other than those that relate to the stipendiary magistrate court. With that qualification, I will support the motion to annul.

Finally, my understanding is that the PDSO was brought in as a pilot and for filling gaps. Whatever else it is doing, it is not filling gaps in Glasgow. There is a very competitive criminal bar, and against that background it seems that if the PDSO system is to be expanded—we have heard some of the stuff about the custody court—there should be a much wider and fuller consultation on the exact costs and implications. I am certainly not satisfied, on the information that I have at present, that that would be either a cost-effective or satisfactory method of proceeding as a cost-saving alternative—if, indeed, it is so.

Stewart Maxwell: I am sure that one thing on which we all agree is that we wish that we were not here. I accept the position of Opposition members in arguing their case in what is a very difficult situation, but we are in that difficult situation because of the cuts that the UK Government has forced upon us.

I oppose the motion to annul the regulations for a number of reasons. First, the evidence that we heard this morning was not as was stated by James Kelly. I accept the statistics that the Crown Office has provided, and do not reject them out of hand, as he seems to be doing.

The idea that there will be cuts only in Glasgow—that the regulations are Glasgow focused—is completely wrong. The regulations would impact on a number of areas throughout the country. We have also had submissions on various other aspects of the regulations. It is not about Glasgow; it is about trying to deal with the budget problems that we face. There are cuts throughout the country and not just in Glasgow, and it is unreasonable to state otherwise.

I do not accept Robert Brown's proposal that we could bring the regulations back within a few days with the Glasgow situation omitted. I doubt that we could do that in a few days, but even if we could, Robert Brown has not said how we would fill the hole that would be created by the omission. I do not accept that we could just fill it using the Glasgow Bar Association's proposal, because that proposal has not been consulted on in the discussions between the Government and the Law Society and between the Law Society and its members. In the discussions that have taken place, the proposal was rejected by the 19 faculties. The profession has already told us its views on the Glasgow Bar Association's proposal on how to fill the hole.

Finally, it is not helpful when we cite individual cases. I know that Robert Brown said that the case that he mentioned was anecdotal and could be seen in that way, but cases that were mentioned in other evidence this morning could be shown in the opposite light. Citing individual cases adds nothing to either side of the argument. I accept that this is a difficult position—all of the proposals for reductions in the sheriff court fees, the travel fees and all the stuff to do with the stip court are difficult. However, given the circumstances that we face, we have to take a decision. To put off such a decision, or to reject the regulations, as we have heard we should do this morning in evidence, will have a serious impact throughout the country. It would be unhelpful and unwise to accept the motion in the name of James Kelly.

Dave Thompson: I support what Stewart Maxwell has said. He has covered a lot of the points that I wanted to make. I reiterate the issue of the effect that such a change would have throughout Scotland, particularly in rural areas. The package that was negotiated appeared to cover the whole country and tried to apply the savings as evenly as possible. It would be unhelpful to come along and arbitrarily take out one part of a package and agree to the rest. There would be a hole in the budget, the Government would have to come back to the issue later in the year and it would adversely impact on all other parts of the country.

The crux of the matter is the status of the courts. It appears to me, from the evidence that I have heard, that setting the stipendiary magistrate court at a mid point between JP court and sheriff court is probably the right thing to do. I will oppose James Kelly's motion.

The Convener: No other members have indicated that they wish to speak. I sense that it will be a relatively close vote so I will set out my thoughts—

Robert Brown: Before we take a vote, on a point of order, I ask for clarity from the clerks about the possibility of bringing back an instrument without provisions on stipendiary magistrate fees. As I understand it, that could be done—the only difference being that it could not be annulled by the Parliament. There is an indication that no one here would wish to annul the regulations, were those provisions removed. Is that the case?

The Convener: I suspect that the cabinet secretary could respond to that when he makes his closing remarks.

As Dave Thompson and Stewart Maxwell said, we are making tough decisions in a difficult economic climate. No one wants to be in that position, but the reality is that we are, and that we are having to find savings.

As I see it, there are three key issues. First, there is the status of the stipendiary magistrate court. Is it a mid point between the JP court and the sheriff court or is it closer to the sheriff court, as the Glasgow Bar Association has set out today? We will all have to come to our own conclusions on the evidence that we have heard at today's meeting and the representations that we heard prior to it.

12:45

The second issue is the consequences of not approving the regulations, given the overall package. We have heard evidence from the cabinet secretary on what the implications of that might be, and we will have our opinions on that. I am struck by the fact that the Government has significantly improved its original offer. I think that the first package suggested that the fee would be £350; the fee is now up to £390. Therefore, I acknowledge that the Government has made some progress.

The third issue is the profession's view. We have heard disputing views from the Glasgow Bar Association and the Law Society on how it consulted the profession's wider membership. Again, we must all make a judgment call on what has been said, but in the light of where we are and the need to make savings, I think that it would be difficult for us not to approve the regulations.

I invite the cabinet secretary to respond to the points that were raised in the debate.

Kenny MacAskill: We recognise that this is a matter of great difficulty and that cuts have to be made. It has been suggested that it would be possible to re-lay the subordinate legislation with the provisions relating to the stipendiary magistrate court deleted. That is the case in theory, but we have all along sought to achieve as much consensus as possible in discussions with the profession. We varied the PDSO expansion when it needed to be varied, we varied the cut in the core fee and we made an upwards variation in the stipendiary magistrate court fee when we thought that legitimate points had been made. Therefore, we have sought to strike the right balance that reflects Scotland's varied jurisdictions and geography.

The only way to go down Mr Brown's theoretical route would simply be to delete the provisions in question and lay the SSI without them, but that would not make the cuts that are required. The cuts would need to be deeper and more severe later in the year. Alternatively, I would need to renege on my attempt to achieve consensus and perhaps simply reduce the core fee by £10. Other faculties elsewhere in Scotland have not welcomed that approach. If I made the arbitrary decision to reduce the core fee by £10, that would not be an appropriate manner in which to operate, and the cuts later in the year would be detrimental not only in Glasgow, but to other places.

The package will be unravelled unless we proceed as I have suggested. On that basis, I urge members to approve the regulations. They are difficult, but the overwhelming majority of the profession in rural Scotland and urban Scotland supports them.

The Convener: Thank you very much, cabinet secretary. I invite James Kelly to wind up and indicate whether he will press his motion.

James Kelly: I want to make a couple of brief points.

The fundamental issue is how to make the savings; trying to put together a fair package is linked to that. Dave Thompson tried to argue that we have a fair package, but fees relating to one court will be reduced by £125 whereas the figure for another court will be £30. His reasoning simply does not stand up.

I accept what Robert Brown said. The issue is not only a Glasgow issue, and it is incumbent on us to consider a proposal that spreads the load across Scotland. From that point of view, it would be better if regulations 7 and 9 were withdrawn and the core fee were amended by an additional £5. The load could be spread across Scotland in that way.

The cabinet secretary has indicated that it would be possible to annul the SSI, amend it and bring it back. It is correct for the Justice Committee to take a view on the SSI, and it is reasonable to express the opinion that it should be annulled and to move forward with a fairer package that deletes regulations 7 and 9. Therefore, I press my motion to annul.

The Convener: The question is, that motion S3M-8085 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Don, Nigel (North East Scotland) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

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

As the convener, I am obliged to use my casting vote, which I use to vote against the motion.

Motion disagreed to.

The Convener: Under agenda item 5, we have 14 negative instruments to consider. The relevant papers are 7 to 22 and 29.

Officers of Court's Professional Association (Scotland) Regulations 2011 (SSI 2011/90)

The Convener: The Subordinate Legislation Committee reported that the regulations failed to follow proper drafting practice in relation to how to access an external document, but it accepted that that was unlikely to have any practical effect on the operation of the regulations. Do members have any comments? If not, are we content to note the regulations?

Members *indicated agreement.*

Licensing (Food Hygiene Requirements) (Scotland) Order 2011 (SSI 2011/128)

The Convener: The Subordinate Legislation Committee drew the order to the committee's attention on the basis that it doubted whether the order was intra vires, but it reported that the Scottish Government intends to revoke and remake the order. The Justice Committee will consider the new order at its final meeting tomorrow. Do members have any comments? If not, are we content to note the order?

Members *indicated agreement.*

Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133)

The Convener: The Subordinate Legislation Committee reported that the rules contain a minor drafting error, but it accepted that that was unlikely to have any practical effect on the operation of the rules. Do members have any comments? If not, are we content to note the order?

Members *indicated agreement.*

Advice and Assistance and Civil Legal Aid (Special Urgency and Property Recovered or Preserved) (Scotland) Regulations 2011 (SSI 2011/134)

The Convener: We considered the regulations at last week's meeting, when we agreed to write to the Scottish Government to seek further information on clawback in matrimonial home cases. The Scottish Government's response can be found in the annex to paper 10. Are members satisfied with the response to the point that Robert Brown raised?

Robert Brown: Yes. I have no further comments on the issue.

The Convener: Do other members have comments? If not, are we content to note the regulations?

Members *indicated agreement.*

Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137)

Extreme Pornography (Electronic Commerce Directive) (Scotland) Amendment Regulations 2011 (SSI 2011/170)

The Convener: The Subordinate Legislation Committee reported that the meaning and effect of regulation 4(2) in SSI 2011/137 could be clearer. The Scottish Government subsequently laid SSI 2011/170 to address those concerns, and the Subordinate Legislation Committee was satisfied that the amendment regulations made the legislative intention clear. Do members have any comments? If not, are we content to note the regulations?

Members *indicated agreement.*

Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140)

The Convener: The Subordinate Legislation Committee drew the regulations to the committee's attention on the basis that the Scottish ministers had elected to use negative procedure when the Subordinate Legislation Committee considered the use of affirmative procedure to be more appropriate, because the regulations effect a substantive change to the law and modify primary legislation in doing so. Do members have any comments? If not, are we content to note the regulations?

Members *indicated agreement.*

Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)

The Convener: The Subordinate Legislation Committee reported that the regulations contain a minor drafting error but that it is unlikely to affect their operation and that the Scottish Government will correct the error at the first legislative opportunity. The committee also reported that the form or meaning of regulation 39(2) could be clearer.

The regulations have generated several representations from stakeholders, which can be found in paper 15. Do members have comments?

Dave Thompson: I have read all the information and the various representations, which include submissions from Citizens Advice Scotland and Money Advice Scotland. In a past incarnation, I was a director of trading standards, when I had much to do with money advice and debt counselling. Having looked at everything that has been put to us, I think that what is proposed in the regulations is the right way to go.

James Kelly: I know that the regulations have generated a number of submissions. The Carrington Dean Group, in particular, has expressed concerns about potential tax-raising and conflict of interest issues. However, after considering the submissions in full, I am persuaded by the comments of Citizens Advice Scotland and Money Advice Scotland.

Stewart Maxwell: Like other members, I read with some concern the submissions that we received. Mr Kelly mentioned some of the points that have been made. I point to the letter that we have received from the Minister for Community Safety, which goes through all the points that have been made and addresses the tax-raising and conflict of interest issues, in particular. I accept the arguments that are made in the letter. The minister has dealt with the points perfectly reasonably.

The Convener: Are members content to note the regulations?

Members *indicated agreement.*

Police Grant (Carry-forward Percentages) (Scotland) Order 2011 (SSI 2011/148)

Licensing (Minor Variations) (Scotland) Regulations 2011 (SSI 2011/151)

Removing from Heritable Property (Form of Charge) (Scotland) Regulations 2011 (SSI 2011/158)

Advice and Assistance and Legal Aid (Online Applications etc) (Scotland) Regulations 2011 (SSI 2011/161)

The Convener: The Subordinate Legislation Committee has not drawn any of the instruments to the attention of the Parliament or the committee.

Nigel Don: The Advice and Assistance and Legal Aid (Online Applications etc) (Scotland) Regulations 2011 are undoubtedly sensible, but I put on the record that it occurred to me to wonder what will happen when computers crash. In order really to foul something up, you need to have it on a computer. I wonder whether we will finish up in a position in which the only way in which someone can lawfully do something is by computer. If that is the case, it worries me ever so slightly.

The Convener: Do you want to seek clarification from the minister ahead of tomorrow's meeting?

Nigel Don: It may be worth our observing that there must be a risk that the Government's

computer system will go down. We should ask the Government whether that has been thought of.

Stewart Maxwell: I accept what Nigel Don says, but I understand that the instrument merely makes online applications an option. It says that an application

"may include an online form",

not that it must do so.

Nigel Don: I accept that, but I understand further that, effectively, it allows the rules to say that that is the way in which applications shall be made.

The Convener: We will carry forward the instrument to tomorrow's meeting and get clarification on the matter. Are members content to note the other instruments?

Members *indicated agreement.*

Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 (SSI 2011/163)

The Convener: The Subordinate Legislation Committee has not drawn the regulations to the attention of the Parliament or the committee. The committee has received a written submission on the regulations from the Glasgow Bar Association, which can be found in paper J/S3/11/9/21.

James Kelly: The matter was touched on in the earlier evidence session with the Cabinet Secretary for Justice. The Glasgow Bar Association has expressed concerns about choice being limited and the potential expansion of the PDSO. However, having listened to the cabinet secretary, who indicated that he is prepared to work with the Law Society and other bodies to ensure that the regulations are implemented appropriately, I am content to support them.

The Convener: Are members content to note the regulations?

Members *indicated agreement.*

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2011 (SSI 2011/166)

The Convener: The Subordinate Legislation Committee has not drawn the instrument to the attention of the Parliament or the committee.

Robert Brown: I note that the instrument provides for an increase of 3.6 per cent in fees to shorthand writers. Given that there have been reductions across the board in legal fees and so on, it is not entirely clear to me why fees in this area are going up. I do not propose to make an issue of it, but I make that observation in passing.

The Convener: Are members content to note the instrument?

Members *indicated agreement.*

Annual Report

12:59

The Convener: I invite members to consider and agree the committee's annual report, which is in paper J/S3/11/9/23. If the report is agreed to, it will be published online on Thursday. Are members content to agree the report?

Members *indicated agreement.*

13:00

Meeting continued in private until 13:15.

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