The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 11 September 2012

Session 4

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JUSTICE COMMITTEE
25th Meeting 2012, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Jenny Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (SNP)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
*David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
Humza Yousaf (Glasgow) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Oliver Adair (Law Society of Scotland)
Mark Harrower (Edinburgh Bar Association)
Dr Colin Lancaster (Scottish Legal Aid Board)
Gordon MacDonald (Edinburgh Pentlands) (SNP) (Committee Substitute)
Professor Alan Miller (Scottish Human Rights Commission)
Ian Moir (Law Society of Scotland)
Elspeth Molony (Capability Scotland)
Kingsley Thomas (Scottish Legal Aid Board)
James Wolffe QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 11 September 2012

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 25th meeting in 2012 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices completely as they interfere with the broadcasting system even when switched to silent.

With Humza Yousaf taking up ministerial office, I welcome Gordon MacDonald, who is appearing as his substitute. I am sure that we want to congratulate Humza. I will miss his charm or perhaps it is his youthful cheek—I think that the jury is out on that—but I wish him well, as I am sure the committee does, in his latest escapade.

Item 1 is a decision on taking business in private. Do members agree to consider in private item 3, which is the committee's work programme?

Members *indicated agreement.*

The Convener: We are agreed? Crumbs.

Scottish Civil Justice Council and Criminal Legal Assistance Bill: Stage 1

10:01

The Convener: Item 2 is an evidence session on the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

I welcome Elspeth Molony, senior policy and consultancy manager, Capability Scotland; James Wolffe QC, Faculty of Advocates; Mark Harrower, vice president, Edinburgh Bar Association; and Oliver Adair, legal aid convener, and Ian Moir, legal aid vice-convener, Law Society of Scotland. I thank all the witnesses for their written submissions. We are looking primarily at part 2 of the bill, but anyone who wants to say something about part 1 later on should not feel constrained.

Alison McInnes (North East Scotland) (LD): Good morning. Does the panel agree with me that access to justice, fairness and proportionality should underpin the new arrangements? We have received a number of representations that the proposed arrangements do not live up to those criteria. For example, those acquitted will have to carry the costs. The appeals arrangements are also rather strange. Will the panel explore those issues?

The Convener: I ask panel members to self-nominate. I will call you and your microphone will come on automatically. Who would like to start?

Ian Moir (Law Society of Scotland): Good morning, and thank you for the opportunity to attend today to explain some of our concerns, which are along the lines of those already expressed by the committee.

The consultation document stressed at page 6 that there was a commitment

"to maintaining and improving access to justice ... In addition, lawyers should be paid fairly for the delivery of a good quality service."

However, there are a number of concerns about all aspects of what the bill seeks to do that lead us to conclude that, in its current form, it will not achieve its aims. The main reasons for that are the levels at which contributions will start, how high they will go and the fact that solicitors will be asked to collect summary contributions—all of which we see as creating substantial problems for access to justice.

Elspeth Molony (Capability Scotland): We absolutely agree that access to justice should underpin the bill. In 2009, we carried out an extensive programme of research on behalf of the justice disability steering group, which is a group

of justice organisations that includes the Law Society of Scotland, the Scottish Legal Aid Board and the Scottish Government justice directorate. We found that 40 per cent of disabled people said that they did not have equal access to justice in comparison with non-disabled people. We are operating with a starting point at which disabled people already feel disadvantaged, and we urge that the bill must ensure that that situation is not made worse.

The Convener: Is it going to make the situation worse?

Elspeth Molony: We believe so.

The Convener: Can you expand on that?

Elspeth Molony: Absolutely. The Scottish Government's latest poverty statistics show that disabled people are disproportionately likely to be living in poverty. Twenty five per cent of disabled Scots subsist on less than £10,000 a year and households that include a disabled person are 20 per cent more likely to be living on a net annual household income of zero to £6,000 per year. As a result, many disabled people who previously qualified for criminal legal aid are likely to be asked to make a financial contribution to the cost.

Moreover, poverty among disabled people is likely to worsen as a result of welfare reform. Over the next five years, there will be a 20 per cent cut in disability benefits as disability living allowance is replaced by personal independence payments, and eligibility for that benefit will be reassessed for all disabled people. The cuts are likely to mean that 360,000 disabled people will not receive any financial contribution towards the additional costs of living with disability.

Alison McInnes: Is it not the case that disability living allowance will not be discounted and will actually be taken into account in income calculations? Do you think that that is fair?

Elspeth Molony: No. We think that disability living allowance—or the PIP that will replace it—should be disregarded completely in income calculations.

However, you should also note that the disregarding of disability benefits is not actually the end of the story for disabled people; the fact is that, as the Department for Work and Pensions itself admits, such benefits do not cover the total costs of living with disability. Indeed, research carried out by the DWP in 2005 found that the extra costs incurred by disabled people range from £7.24 to £1,513 per week. There is general consensus that disability benefits do not cover a person's entire costs. As a result, disregarding disability living allowance is only a first step; the second step is to calculate a person's disability-related expenditure and subtract that from the disposable income calculation to ensure that disabled people are not put at a disadvantage.

The Convener: Solicitors always moan about having to do things; indeed, everyone has the perception that that is all they do. Why should they not collect the instalment payments?

Mark Harrower (Edinburgh Bar Association): May I answer that, convener?

The Convener: Yes, indeed.

Mark Harrower: First of all, I thank the committee for giving me the chance to give evidence. Today I am speaking not only for the Edinburgh Bar Association, which is Scotland's second largest faculty of solicitors, but on behalf of the largest: the GBA. Both faculties have come together in their opposition to the bill's present proposals.

The Convener: And the GBA is the Glasgow Bar Association.

Mark Harrower: Yes, it is.

At the moment, the relationship between solicitors and accused persons is close and important; indeed, it has been very important in the implementation of the improvements to early case resolution that were brought in by the summary justice reforms of 2008. Those improvements have led to a steep increase in the number of cases that have been resolved early, which has resulted in a lot of savings.

We have a close relationship with our clients because they have to accept the advice that we give them at an early stage. As a result of SJR changes, the Crown now provides a summary of evidence at the start of a case; we go over that summary with accused persons and give them advice. Very often, they accept that advice and the cases can be resolved early. If we are asked to collect contributions far in excess of any that are in place at the moment, that will place a layer of conflict between us and the people whom we represent in court. If the changes come in, there will be many stages at which we will be giving advice to accused persons while asking them for quite large contributions, and we foresee such a move causing delays and leading to clients falling out with solicitors, because contributions will not be paid.

As solicitors, we have no mechanism for collecting such contributions. At the moment, the level of contributions that we are expected to collect—which, way back in 2004, SLAB accepted most solicitors do not collect—is pretty small; I think that it amounts to less than 1 per cent of most firms' annual turnover.

At the moment, contributions from clients relate only to advice and assistance cases and

assistance by way of representation—ABWOR—cases, which are cases that result in an early plea of guilty or certain cases that involve breaches of court orders by people who have already been convicted. The disposable income arrangements start at £105 per week: if somebody has a disposable income of more than £105 but not more than £112, the maximum contribution is £7. Under the bill's proposals, in a sheriff court summary case—which is the most common type of case—an ABWOR contribution for someone who pled guilty would be £134. However, if they pled not guilty, their contribution would be more than that: it would be £145.60.

I point out as a side issue that there is an anomaly in the proposal. It seems that, if somebody were to plead guilty in the sheriff court, they would pay less of a contribution than if they pled not guilty. There seems to be a financial disincentive to people to exercise their right to plead not guilty.

At present, contributions go from £7 up to a maximum of £135 for advice and assistance and ABWOR cases. There are no contributions in cases in which people plead not guilty. Under the proposals, if somebody has a disposable income of around £160, their contribution will be more than the current fixed fee, which is £485.

We will have no mechanism for collecting that contribution other than asking people to pay us. Last week, *The Herald* reported that £6.5 million-worth of fines are still owed to the courts. The Scottish Court Service has powers to take enforcement action, such as making benefit deductions, freezing bank accounts, stopping wages and seizing cars. We cannot do any of that.

In its response to the consultation on the draft bill, the Scottish Legal Aid Board told the Government that it did not need any additional powers to recover contributions because it had been successful in doing so in relation to civil cases—SLAB collects contributions in all civil legal aid cases. It says that it will collect contributions in all solemn criminal cases, but refuses to do so in summary criminal cases and says that we should do that. SLAB knows that we will not be able to do that in many cases. It will simply be a cut for us.

Why should we not collect such contributions? We do a difficult job and try our best to make the system in Scotland work, but asking us to collect contributions will create another conflict between us and clients, which will lead to further delays and cuts for us and simply will not work.

The Convener: It struck me that you are saying that the introduction of the system would interfere with justice.

Mark Harrower: It would. Let us consider a couple of specific examples, starting with an intermediate diet—four weeks before trial—involving a person who is accused of a sexual offence and pleads not guilty. It could be quite a serious sexual offence, notwithstanding the fact that it is a summary case. Somewhere, the consultation documents say that the cases affected would not be serious cases. However, summary criminal cases in the sheriff courts are more serious now than they have ever been.

When I started in this job 20 years ago, an accused person could get up to three months' imprisonment for breach of the peace on summary complaint in the sheriff court. If they were on bail at the time, they could get up to an additional three months' imprisonment. That is a total of six months. Now, if someone is accused of breach of the peace—exactly the same charge—they can get up to 12 months' imprisonment on summary complaint and, if they are on bail, they can get an additional six months. That is a maximum of 18 months' imprisonment. However, it is not only bail that aggravates such cases. There are racial aggravations, homophobic aggravations and antisocial behaviour orders. Such cases are far more complicated and far more serious than they used to be.

I am doing a case at the moment on summary complaint that, 10 years ago, would have been an assault with intent to rape and would never have been seen on summary complaint. If you ask solicitors up and down Scotland—and sheriffs, who frequently comment on the matter—they will tell you that summary cases have never been as serious as they are now.

People come to the sheriff court for serious cases, including sexual offences cases. If we got to the intermediate diet in such a case and the accused person had to pay a contribution of, say, £200 but had not paid a penny piece four weeks before a trial in which there would be vulnerable or child witnesses, the solicitor would tell the sheriff that the contribution had not yet been paid and he was not yet ready to go ahead.

What would happen in such a case? The policy documents are silent on that. In fact, they say that they do not know what would happen. I will quote from the Scottish Parliament information centre briefing on the bill.

10:15

The Convener: Can you give the page number, please?

Mark Harrower: It is page 24. Under the heading "Practical implications", the last paragraph on that page says:

"It is unclear what options a solicitor might have when dealing with a client who does not make payments as

required ... it may be possible for solicitors to withdraw their services in less serious cases".

I do not know what is meant by "less serious cases", and neither does SPICe, because the briefing goes on to say:

"It is not clear where the dividing line between less and more serious cases might lie."

From experience, we now frequently deal with summary complaints that involve embezzlements of £20,000-plus, Department of Social Security frauds of £40,000-plus, assaults to severe injury, serious sexual offences, as I have already mentioned, and cases that involve forensic, scientific and closed-circuit television evidence. Those cases are complicated and serious. If an intermediate diet is reached and someone has not paid half the fixed fee as their contribution, the solicitor will have no option but to say, "We're not ready here. This hasn't been paid."

What will happen to the legal aid certificate? Currently, in civil cases SLAB will suspend a certificate for 30 days, and if the arrears are not brought up to date, the certificate will be terminated and the case will effectively come to an end. However, civil procedure is completely different from criminal procedure. In the criminal courts, the case must go on. The accused is not a willing participant in it. He is not a pursuer who has stepped into court to sue to get some remedy; rather, he has been brought into it by the state. If an accused is on remand, the time limit is 40 days. Not all people who are in custody will be exempt from contributions, as they may have savings of more than £750, which will be the limit if the changes come in. If the case is a domestic abuse case, there must be eight weeks between the first plea and the trial, whereas there are timelines of 26 weeks for the recovery of contributions in the policy documents. Only a fraction of the contribution will be paid by eight weeks. What is a solicitor to do at the intermediate diet in a domestic abuse case if hardly any of the contribution is paid after, say, six weeks? Will we have to say that we are not ready, as we will not be sure whether we will be paid?

The Convener: Can you also touch on what will happen when there is a co-accused? I have raised that issue previously. Surely that would complicate things.

Mark Harrower: It would. When there are co-accused persons, every accused person must be ready for their trial. Summary cases commonly involve four or five accused, and there will be a delay if not every accused person is ready. The court will have to grant an adjournment. If an accused person repeatedly refuses to pay their contribution, their solicitor will have to withdraw from acting. The process will make it very difficult for solicitors to balance their professional responsibilities to the court to make cases work and keep them going and to represent the client if they are not paid for their work.

The Convener: I will move on. I know that others who have been in practice want to speak.

Alison McInnes: I would like to hear about the general principles of the bill from the Faculty of Advocates before we go into its details.

The Convener: I am sorry, Mr Wolffe. I did not know that you were indicating that you wished to speak about the general principles of the bill. I apologise.

James Wolffe QC (Faculty of Advocates): Not at all, convener. Thank you very much for inviting me to give evidence.

On the general principles of the bill, I entirely endorse the view that the three principles of access to justice, fairness and proportionality must be tests by which any proposal of this sort are measured, but I add to them the question of the impact on the administration of justice. I endorse the remarks that Mr Harrower has just made about the potential impact on the smooth running of the courts and add to them the point, which is made equally well in the Edinburgh Bar Association's written submission, that one might expect the proposals, if they are brought in, to result in an increase in accused persons representing themselves. For the reasons that are set out in the Edinburgh Bar Association's written submission, that is likely to have a significant impact on the smooth administration of justice, and it may result in unfairness for particular individuals.

As you know, the faculty's big point, as it were, on this is a fundamental one about fairness. It seems unfair to us that someone who is brought into court on a criminal charge but is not ultimately convicted for whatever reason may, nevertheless, be left to bear the cost or part of the cost of his or her defence. That is not only unfair, but is liable to lead to what may be called perverse incentives of the sort that we describe in our written submission.

The other point is that any system of contributions that starts from the premise that the people who are able to meet part of the cost of their defence should do so should be designed in such a way that it bears only upon people who really can afford to meet the cost of their representation. In that respect, I respectfully align myself with the observations made by the Law Society of Scotland and the Edinburgh Bar Association in their written submissions.

The Convener: Thank you very much.

Roderick Campbell (North East Fife) (SNP): Good morning. I refer to my registered interest as a member of the Faculty of Advocates.

I wonder whether Mr Harrower or anybody else on the panel is able to help with my question. I want to touch briefly on ABWOR and contributions. I understand that the maximum contribution is £135 and that there have been approximately 43,000 grants of ABWOR in the past year, with £20 million spent on that. I presume that that £20 million excludes contributions. Do we have any more information on how much was raised in contributions? What precisely are the levels of non-contribution? Mark Harrower talked about some contributions being only £5 or £6. It would be helpful to flesh out the issue.

Mark Harrower: At the moment, my firm does not collect contributions because we do not have the time or the mechanisms in place to do so. Also, it is not worth creating conflict between ourselves and the client given the current level of contributions.

I am not sure how much should be raised through contributions—SLAB would be best placed to tell you that. SLAB knows—and has known since 2004, when it commented on Sheriff Principal McInnes's proposals for the review of the whole summary criminal justice system—that most solicitors do not collect contributions. In fact, in 2004 SLAB proposed that contributions should be removed completely. I think that SLAB realised that contributions and their collection could raise another area of difficulty between solicitors and the accused, whose relationship is important and is central to the early resolution of cases.

The proposals suggest that the level of contributions should be increased to just about the whole fixed fee. The most common fixed fee charged by solicitors is £485, which is for cases in the sheriff court in which there is a guilty plea from the outset on a summary complaint; for cases in which a not guilty plea has been tendered at the outset but which do not go to trial and in which there is a guilty plea later in the procedure; and cases that go to trial but do not go over 30 minutes at trial. As soon as someone has a disposable income of around £160, they will pay the whole fixed fee—in other words, solicitors will have to collect the whole fixed fee before the conclusion of the case to be sure of getting paid.

As for how much contributions inject into firms at the moment, I really cannot say. They do not inject anything into ours.

Roderick Campbell: According to the Government's figures, taking income and capital together, the average contribution for ABWOR will come to only £330 from the 18 to 20 per cent of people who will contribute. Do you take issue with the Government's figures in the financial memorandum?

Oliver Adair (Law Society of Scotland): Perhaps I can assist with that. We assume that the figure of 18 to 20 per cent has been given to the Government by the Scottish Legal Aid Board. Part of the difficulty is that we have never seen any data to support those percentage figures, so I do not think that you can take them at face value as totally accurate.

David McLetchie (Lothian) (Con): Could we put some numbers on the cases that we are considering? How many cases fall into the criminal legal aid category, in which responsibility for contribution collection is in effect going back to the solicitors along with ABWOR?

Oliver Adair: According to the SLAB annual report of 2010-11, 153,962 cases.

David McLetchie: How does that compare with the totality of cases?

Oliver Adair: That is the total figure for criminal legal assistance; 27 per cent of those cases, or 42,000 cases, were ABWOR.

David McLetchie: What about the ones that are assessed and collected by SLAB?

Mark Harrower: SLAB does not collect any criminal legal assistance contributions at the moment. It collects civil contributions and it proposes to collect solemn criminal contributions. We think that that is because the last thing that SLAB wants is for a High Court judge to order it to turn up at the High Court when a case grinds to a halt because of an unpaid contribution of £200. SLAB is quite happy for collection to fall to us in the summary criminal field.

Mr Campbell made a point about default rates. On page 7 of our written submission, we repeat what was said in the SPICe briefing. It is accepted that there will be non-payment of contributions and a loss. SLAB says that a contribution will have to be paid in 18 per cent of cases, and the Law Society estimates that in up to 30 per cent of that 18 per cent of cases the contribution will not be paid. SLAB thinks that the figure will be rather less than that, and the Edinburgh Bar Association thinks that it will be more than that. Last week's article in *The Herald* said that

"Fiscal direct penalties are £2m in arrears for 2011/12",

which means that 42.1 per cent of the total value of fiscal direct penalties is outstanding.

We think that a figure of 30 per cent for non-payment in the 18 per cent of cases in which there will be a contribution is low, but SLAB says that it is too high. In any event, in a significant proportion of cases, people are just not going to pay and we will be expected to take that hit.

David McLetchie: The Government's consultation says that requiring solicitors to collect

contributions for ABWOR while SLAB collects contributions for criminal legal aid could create a "perverse incentive" for solicitors to encourage clients to plead not guilty so that they can be relieved of the burden that is associated with collection. Is there any evidence to support that?

Mark Harrower: The evidence is contrary to that. The proposed contributions for summary criminal sheriff court cases will be higher if someone pleads not guilty. I have some figures with me.

At the moment, if someone who has a disposable income of £182 a week pleads guilty in a sheriff court summary case, their contribution is £77 out of the £485 fee. If the proposed measures come in in their present form, that contribution will be £440 of the £485. If the person pleads not guilty initially and later resolves their case by way of a guilty plea—that does not mean that they plead guilty to the whole thing; people resolve their cases later on for many reasons—their contribution will be £681.20.

If a person's disposable income is about £161 per week, their contribution will be £440 if they plead guilty but £473 if they plead not guilty. The incentive is to plead guilty, and we think that that is wrong.

David McLetchie: So we can dismiss that point, on the basis of your evidence anyway.

The SLAB evidence on incentives says:

"If the onus of collection were to shift to the Board for summary criminal legal aid but remain with the solicitor for ABWOR, the latter could become a less attractive form of criminal legal assistance from the solicitor's point of view. Given the shift towards guilty pleas seen when ABWOR payments were increased in 2008, there is a risk that any difference in collection responsibilities could lead to a reversal of those advances."

The implication is that the collection mechanism has an impact on whether people plead guilty or not guilty.

10:30

Mark Harrower: It will have an impact, but it will be to reverse the improvements made by the SJR in 2008. If we also have to worry about getting contributions in before the case is dealt with and the accused is off into the sunset, waving goodbye to us, we will be more likely to have to seek a continuation without plea before putting in an early guilty plea in order to ensure that the contribution has at least begun to be paid.

Paragraph 79 on page 19 of the policy memorandum states:

"Consideration has been given as to whether or not the Board would require new powers of recovery in order to maximise the potential savings. However, given that the Board already collects contributions in civil cases using its existing powers with considerable success ... The Government has concluded that special powers of recovery are not justified."

We do not have any powers of recovery. Even the courts, which have powers of recovery, cannot do it, so how can we possibly do it if we do not have powers of recovery?

Ian Moir: According to its website in the past week, SLAB has brought online a new, enhanced system to improve collection procedures. We simply cannot afford to introduce such procedures. It is illogical and does not make sense to say that because, under the previous ABWOR scheme, we have done a little bit of work to collect very small amounts for SLAB—one of whose core functions is to assess and collect contributions—in most cases writing the amounts off, we should collect all the contributions.

There is a more fundamental difficulty with the bill in that, if the proposed figures are brought in, the maximum contribution under ABWOR for people on the minimum wage, for example, will be in excess of £800, or almost £850 for a summary legal aid case. I do not think that anyone would view that as an example of people who can afford to pay making a contribution to legal aid.

That is a problem because it is likely to lead to people pleading guilty without having a lawyer because they cannot afford to pay the contribution that they are being asked for. Without realising that it would be a consequence of that decision, they might find themselves in prison or disqualified from driving and ordered to resit the driving test. They might not understand that all sorts of things could happen as a consequence of their decision to deal with their case themselves because they cannot afford to pay the contribution.

Capability Scotland will be well aware that DLA and war pensions are currently not taken into account when assessing the figures but they will be included under the new scheme. It is all very well to say that there will be scope to take into account somebody's outgoings over the past seven days, but disabled people or anyone else who finds themselves housebound or subject to a 28-day mental health order will not incur their normal outgoings. That might mean that a snapshot of their outgoings will result in their having to pay a large contribution. Somebody who is temporarily in that category and who has an income of £135 a week, for example, but could not vouch for their outgoings to the satisfaction of SLAB because they have not been taking taxis to the physiotherapist or whatever could find that their contribution will increase from nil under the current scheme to £252.50.

The proposed levels will not bring in a system in which people who can afford to pay make a contribution to legal aid. That principle is not

contentious for us, but the system that will be brought in under the bill will not meet the principle—that is the real concern.

Elspeth Molony: Even a disabled person who is in the best possible situation and not in a cell awaiting their solicitor finds it difficult to calculate disability-related expenditure. It is almost impossible to calculate it. We could consider, for example, a family that has to have the heating on more often, and which has high heating bills as a result, because a family member's physical impairment requires their body temperature to be maintained, or a person who is unable to find work because of discrimination in the employment market, who is therefore at home more often and has high heating bills. We could consider a family that has far higher laundry bills because it contains a disabled child who is doubly incontinent. Last week, I spoke to a man with cerebral palsy who said that he has to buy more shoes than the average person as his shoes wear out more quickly because of how he walks.

It is incredibly difficult for such people to compare their expenditure on those items with the expenditure of an average household or non-disabled person. The gentleman whom I spoke to about the shoes said, "Look, it would just be impossible." Even in the best possible situations, which are by no means the ones that we are talking about today, it would be difficult for a solicitor to establish a person's outgoings in order to establish their disposable income and therefore their contribution. In a stressful, crisis situation, it would be nigh on impossible for a person to give an accurate description of their outgoings.

The Convener: I do not know whether this is the case in general, but certainly in civil legal aid, which I used to deal with, outgoings that are submitted to the Scottish Legal Aid Board are challengeable by the board. That would also be an issue, would it not—whether the board would grant payment? A lot of administrative stuff would have to go on there, would it not?

Mark Harrower: It is getting worse. Recently, the board introduced new guidelines under which it wants to see evidence that we have seen vouching for all the financial documentation that pertains to an accused person. We have to confirm that we have seen bank statements, wage slips and evidence of certain benefits, or to have a very good reason for not having seen that documentation, before the board will even consider paying us for the work that we have already done.

It has to be remembered that many cases in the criminal courts are dealt with in a short timeframe, because that is the aim of summary justice or summary criminal business. As defence lawyers, we understand that. Often, people appear from custody and are dealt with on the same day, then they can be off to jail or they can be fined. In such cases, we start to make the legal aid application only after the case is over and we have gone back to the office. If we cannot get hold of financial documentation after the fact—you should remember that the client has no real incentive to provide it—we will not get paid.

The Convener: So you would also need electricity bills and shoe bills or receipts.

Ian Moir: Yes, that is exactly the position. Every single outgoing that we want to be taken into account would have to be vouched for in writing. That will cause delays and churn in courts with continual intermediate diets and adjourned trials. There will not be an overall saving in the criminal justice budget if churn continues in the way that is anticipated. The thrust of summary justice reform has been to try to speed up the resolution of cases through the courts but, in our view, the proposal will have the opposite effect.

Another legitimate concern is raised by the Church of Scotland on page 2 of its written submission. It states that problems with access to justice might result from solicitors taking the view that it is impossible for them to continue doing legal aid work, particularly in rural areas, where solicitors often undertake such work in order to provide a service to the community and not because it is the most remunerative work that they do. That would cause substantial additional difficulties for the operation of rural courts and so on.

As a basic principle, a scheme that might incentivise people to plead guilty because the level of contributions has been wrongly set will not provide justice and might not meet the requirements of the European convention on human rights.

It should be borne in mind that the cases that we are discussing are now much more serious because, as Mr Harrower rightly identified, summary justice reform took many of the more minor cases away from courts altogether and they are now dealt with, in theory, by the person paying a fiscal fine. We can see the difficulties with that and the huge level of non-payment. I do not think that the bill in its current form would do anything other than add to those difficulties and undermine the good work that has been done so far on summary justice reform.

The Convener: We may come back to the words "in its current form" later, unless Graeme Pearson is going to pick up on that.

Graeme Pearson (South Scotland) (Lab): I suppose that contributions to legal aid are a bit like income tax, in that no one volunteers to pay their way. Mr Harrower's description of contributions of

£7 almost takes us back to Dickens's day in terms of the value that it would offer to the system. I understand many of the issues that have been rehearsed this morning relating to how that might impact on the system.

I want to round off some of my ideas. Let us say that a client fails to pay their contribution in a case. Does there need to be some form of directory to indicate that that person is a bad debtor so that, if they return to the system, they are treated as not having paid in a previous case and are therefore not even considered for legal aid in the subsequent case? Alternatively, would a client be treated as a new client on every occasion?

Oliver Adair: One of the problems with the system that is proposed, in which solicitors collect for summary cases, is that there will be no record of whether a client has paid. If a client does not pay their solicitor and goes to a new solicitor, that new solicitor will never know that that person had been abusing the system by not paying a contribution.

Graeme Pearson: Would you want to create such a system? It sounds bordering on an apoc—aca—a difficult time—[*Laughter*.] I am not going to have a third go at that one. Do you envisage forming that kind of administrative support or would you just give up on it and treat it as—

Oliver Adair: It would be more logical for the board to collect contributions because it has the systems in place to do that. It has a 95 per cent success rate. Surely it should collect contributions and have them on record.

The Convener: That is an interesting point. Is your question on contributions and impacts, John?

John Finnie (Highlands and Islands) (SNP): It is on the impact on the system.

The Convener: How about yours, Jenny? You have been waiting for a long time.

Jenny Marra (North East Scotland) (Lab): It is not about contributions.

The Convener: I will take questions about contributions and impacts. Jenny has been waiting a long time.

Roderick Campbell: Mine is on contributions.

The Convener: Definitely?

Roderick Campbell: Yes.

The Convener: Okay. I just wanted to be sure that you were not slipping something in—not that you would do that.

Roderick Campbell: The policy memorandum says that if contributions are made, they can be treated by solicitors as payment of fees straight away, which would improve cash flow. What do you think of that as a possible sweetener? What other steps could the Government take to make life easier for practitioners in respect of contributions?

Oliver Adair: It is fair to say that it would be of assistance to a solicitor if they could put the money to fees, but of course that only works if the contribution is collected; otherwise, it is of no value.

Roderick Campbell: Is there anything else that the Government could do?

Oliver Adair: It could ask SLAB to collect.

Mark Harrower: That is the issue.

Ian Moir: I do not know whether the universal response from all persons who replied to the consultation was that those problems do not have to exist because SLAB should be asked to collect the contributions, but we have not heard a compelling argument why that should not be the case. All the potential difficulties of churn and delay in court cases, which will ultimately increase the overall justice budget, would be taken away by the relatively small amount of money that SLAB would need to add to its budget in order to collect in all areas of legal aid and not just in civil legal aid.

10:45

James Wolffe: Although the issue of who collects contributions is important, I invite the committee not to focus on it exclusively. The fundamental issue here—again, there is no issue with the basic principle that those who can afford to pay may properly be asked to make a contribution—is that there remains a question about the level of income at which contributions kick in and whether we are really dealing with people who can afford to make a contribution.

Another question is whether it is fair to have a system in which someone who is not convicted still has to bear what can be very considerable costs. In that regard, we have talked a lot about the potential impact on the administration of justice in the summary justice system, and that is the area in which the most significant problems might arise. The system of contributions will also apply in solemn cases—in other words, the most serious case that an accused person can face—and the individuals involved might have to face very significant bills for their proper defence. Moreover, the fact that people might face significant bills that they will have to pay even if they are not convicted also raises issues of perverse incentives and fairness.

Roderick Campbell: I want to come back to James Wolffe's comments, although my question is not directly about contributions.

I presume that you will not be able to answer this question, but I will ask it all the same. Does the faculty have any estimate of the cost of reimbursing the legal expenses of privately funded clients who are acquitted?

James Wolffe: I am afraid that I cannot offer any such estimate. However, I should point out that, in response to our position on this matter, the policy memorandum says that, at the moment, someone who does not qualify for legal aid at all has to bear the legal costs. Our position is that the fundamental unfairness argument applies equally to those persons; in fact, the Government has identified an anomaly in the current arrangements in that someone who has to bear these costs might not be convicted and still be left out of pocket.

The Convener: Are you suggesting that in such cases expenses should be awarded at the discretion of the judge, which is what prevails in the civil courts?

James Wolffe: There should be a system in which someone who requires to contribute to their defence against a criminal charge and is ultimately not convicted can recover at least an appropriate proportion of the costs. That seems to be fundamentally fair. After all, the state has hauled someone into court on a criminal charge but has not made that good. Why should a person who, apart from anything else, has had to undergo a great deal of stress and anxiety be left significantly out of pocket?

The Convener: Are you therefore suggesting that we should not agree to means-tested contributions for criminal legal aid and appearances without looking at the introduction of awards of expenses in criminal proceedings?

James Wolffe: We are looking in particular at the recovery of contributions in the event of an acquittal or no conviction. All I am saying is that the one objection highlighted in the policy memorandum, which is that people who do not qualify for legal aid at all have no system of recovering their contributions, does not seem to me to be a good answer. Whether it is necessary to deal with what we would see as an anomaly in that respect while dealing with the issue under discussion is another question.

Mark Harrower: We should remember that in a significant proportion of summary criminal cases there is no conviction. In 2009-10, for example, 7 per cent of summary criminal cases either were not called or were deserted—in other words, either they were dropped or a not guilty plea was accepted. Moreover, that figure does not include the cases that went to trial that year; I do not have figures for the number of people who were acquitted after trial. That is a significant number of people whom the courts have found not guilty of what they have done. If the aim is to move from the current system of modest contributions in some cases to a system in which many of the people who currently qualify for legal aid have to fully fund or pay a significant proportion of rather than merely contribute to their defence costs, it might seem somewhat unjust and we should look at whether they should get a refund if they are acquitted, as is the case in England.

The Convener: In England, they get a refund?

Mark Harrower: If they are acquitted, they get a refund.

The Convener: That is interesting.

Jenny Marra is next—she has waited a long time.

Jenny Marra: If you do not mind, convener, I want to pick up on exactly that issue.

In effect, the proposal is such that someone will have to pay even if they are found to be innocent. As the process of being brought to court is non-voluntary, the situation cannot be compared to what happens in civil proceedings. People enter civil legal proceedings voluntarily, but that is not the case with a criminal prosecution.

I want to ask about other jurisdictions. In England, people who are acquitted get a refund. Do you know what happens in other jurisdictions?

Mark Harrower: I am afraid that I do not. The policy memorandum points to other jurisdictions for other reasons. I do not know what happens in other jurisdictions, apart from the one over the border.

Jenny Marra: Rightly, the debate has focused, and will continue to focus, on what in my opinion are the medieval income thresholds that the Scottish Government has proposed for the contributions. However, I would like to take the witnesses back to the first principles. As legal experts, what impact do you think that the criminal contributions proposal will have on our legal system? Do you think that it is correct?

Mark Harrower: I do not think that it is correct. We are talking about savings of £3.9 million per year. I believe—and the GBA and the EBA believe—that, if we are to collect contributions at the level that is proposed, the changes will cause huge problems for the running of summary criminal business. In coming here today, I walked past a massive hole in the ground that is costing hundreds of millions of pounds. Scotland's legal system is one of the finest in the world and we are talking about making changes for savings of £3.9 million per year. We need to get our priorities right.

At the moment, people who can afford to pay for their defence do so. The EBA and the GBA accept

that a level of contribution is in place. It has been in place for years and has not changed much for years, and we do not really take issue with the present levels. The proposed levels represent a massive increase on what is in place at the moment, and I think that they will cause real problems for our system.

Ian Moir: There is no directly comparable legal system that involves exactly the same system for contribution and collection as is proposed in the bill.

Every system has its own features. For example, in Finland there is no contribution system unless the case is viewed as being so minor that a sentence of imprisonment of less than four months is expected. There are no contributions in any case involving a substantial period of custody. The same applies in Ontario and in England and Wales—if there is a question of custody, there will be no contribution—whereas modest contributions are collected at the moment in Scotland.

Under the bill, the contributions that are collected from people who are in Barlinnie or Low Moss prison will be much more substantial. It is simply unrealistic to think for one minute that, if we write to someone who has just been sentenced to 12 months' imprisonment to ask them to empty their Post Office account to pay a contribution of £400 towards what they will view as us getting them the jail, they will do it. They will not do it.

James Wolffe: It is important to focus on the practical impact on the smooth operation of the system of an increase in self-representation and of solicitors having to withdraw from acting in the course of a case. I come back to the fundamental point that it is simply not fair for someone who is not convicted to have to bear the cost of their defence. I entirely accept the point that following that logic would involve introducing some system of recovery for persons who currently have to bear the cost of their defence. It would be an improvement to our system if such an arrangement were introduced.

Elspeth Molony: The convener mentioned earlier that disabled people would have to present bills such as heating bills and shoe bills. That is relevant when considering the impact on the system, because it is not even as straightforward as just presenting the bills. For example, the heating bill would have to be compared with the standard, average heating bill for a home of the same size, with the same number of occupants, in the same area.

The criminal justice system would somehow have to develop benchmark measurements so that solicitors could try to assess what the additional cost of living with disability was in that respect. The complications that are involved in that should not be underestimated.

John Finnie: The witnesses mentioned churn a couple of times. We heard about the possible implications for the accused and for the solicitor. In relation to the process, Mr Harrower mentioned a particular example—domestic abuse—in which there was a timeline of eight weeks. Mr Harrower, can you explain the wider implications of that timeline for the criminal justice process, not least as regards the alleged victim?

Mark Harrower: The domestic abuse court is a pilot project in Edinburgh. These are anxious cases, so the pilot court tries to fix a trial diet in cases that are disputed—when a not guilty plea goes in—within eight weeks of the initial appearance. It will be less if the person is held in custody.

A solicitor has to do a number of things once a not guilty plea goes in. He has to take his client's full instructions in order to see what avenues of defence are to be explored; he has to obtain a full copy of the disclosure case—full statements—from the Crown; he has to get any technical evidence from the Crown; and he has to try to be ready for that trial diet in eight weeks.

In most other cases, it is about 26 weeks from the initial plea of not guilty to the trial diet, which is longer than the Government wanted. However, as I mentioned earlier, the Scottish Court Service has told Audit Scotland that that length of time is needed because cases are more and more complex. In that timeframe, whether it is eight weeks, 26 weeks, or 40 days, solicitors try to get the case ready. One aspect of that is applying for legal aid—it will be either an ABWOR application or a legal aid application.

At the moment, solicitors have to obtain financial documentation from the client to get a legal aid application backed up, vouched and verified. There is a pre-trial hearing in cases where not guilty pleas have been tendered, which is called an intermediate diet. Those hearings were introduced a number of years ago to try to make the system more efficient, which they did. One of the things that sheriffs want to know at the intermediate diet is whether we are ready for trial. If a major aspect of being ready for trial is whether we have managed to collect the contribution, or whether there is a system in place for getting that contribution that we can be sure will produce the full contribution by the end of the case—or even after the end of the case—we will have to say to the court that we are not ready for trial unless we are sure that we will get that contribution.

The proposals have not even come in yet, but SLAB has recently increased the number of checks that it wants solicitors to carry out. As I

said, we have to say that we have seen all the relevant financial documentation—SLAB introduced new guidelines on that at the start of August. There have already been cases in the sheriff courts that have been continued without plea at the first calling—which means that the guilty or not guilty plea is not being put in—so that the solicitor can be sure that he will get sight of the documentation before the guilty plea goes in, so that he can be sure that the ABWOR application will be granted, so that he can be sure that he will be paid. I am aware of that happening.

It is not just about getting paid. Sometimes the legal aid certificate will cover other work that we have to do, such as getting an expert report. Sometimes we have to get a doctor's report or a psychiatric report about a client. Those are outlays—we do not profit from them—but we have to pay for them in advance, because the national health service will often not give us reports if it does not know that it is going to get paid. If the legal aid certificate or the ABWOR certificate is not granted at the end of the process, we will not get back that outlay.

There are many reasons why we need to ensure that legal aid is in place before a guilty plea goes in. If we also have to get a contribution in place, that will be yet another reason why things are not ready in time, whether there is a guilty plea or a not guilty plea at the start of the process. When the accused is represented by a lawyer, there will be more scope for a defence not being ready in time. As I said, that is already happening.

Mr Wolffe rightly said that there will be an increase in party accused. Solicitors think that that is inevitable. We think that, if the rates of contribution are increased, people will either be unable to afford to pay the contribution or come to the view—before they have even been to a lawyer—that there is no point in going to a lawyer because they will not be able to afford it. There will therefore be an increase in the number of party accused in courts.

At the moment, hardly any people represent themselves in the criminal courts. A few people represent themselves in the justice of the peace courts, which used to be the district courts, for relatively minor cases, such as not wearing a seat belt, minor assault or shoplifting. It is also common in speeding cases. Often, those people plead guilty at a late stage in the case because they do not fancy cross-examining police officers, as they do not know how to do it.

11:00

We think that, if the proposals go ahead, the following will happen. We will write to the client ahead of the intermediate diet, telling them to be there and to remember their £200 contribution. If there is a trial diet in, say, four weeks' time, we will have to tell the sheriff that we are not ready for it. The sheriff will say that it is not the first time that the case has been adjourned and something will happen—I am not sure what, but either there will be a suspension of legal certificate or we will have to withdraw from acting and the accused person will be standing in the dock on his own, representing himself.

The problems that that will cause in the sheriff court cases will be more marked than those in the JP court cases, as the sheriff court cases are more complex and difficult. The Crown will be unwilling to disclose evidence to a party accused in the form in which we get it. It will not want to give them full statements, potentially with people's personal details in them, and it will not want to give them CCTV footage on disk or expert drug reports or forensic science reports, which they would struggle to understand anyway.

Significantly, a party accused cannot enter into a joint minute of agreement with the Crown. At the moment, a lot of evidence in summary and solemn cases is agreed not to be contentious by the defence and the prosecution. A document can then be drawn up by either side—it is often the defence—which is a complicated thing to draft and which is signed by both parties. That removes the need for expert witnesses to come into court or for formal evidence. For example, people may have had their cars broken into and not have seen anything—we can agree all that. However, a party accused cannot enter into a joint minute of agreement, so we will have people coming into court needlessly because the accused person cannot do a lot of the things that we can do. In addition, the accused person will not have access to a lot of the information that we get.

John Finnie: Sticking with the domestic abuse courts, is there a concern that a manipulative accused—I appreciate that they are still an accused at that point—would find non-payment a way of further aggravating the situation?

Mark Harrower: I think so. If an accused person sees the writing on the wall and that he may well get a jail sentence, it may be in his interests to delay that for as long as he can—nobody wants the evil day to come. Yet another way of delaying the case would be for him to fail to make a contribution to his current solicitor, the next one and the one after that. We do not know whether such an accused person would be barred from going to another solicitor.

Ian Moir: There may also be an impact on somebody who is awaiting a trial, in the normal run of things, and who is behind a party accused who has not paid his contribution. Inevitably, the party accused's trial will take far longer and will delay

the running of everyone's trials for that day. People will find their trial adjourned because a sheriff is having to ensure that an unrepresented accused receives his convention rights and has the whole procedure explained to him before the trial starts. Objections to evidence will take far longer and the sheriff will have to ensure that he has given the accused person, who has no knowledge of the legal point that has arisen, time to research it or have it explained to them, whereas a solicitor may be able to deal with the matter quickly. That is another way in which the justice system will be slowed down if a system is introduced whereby people who cannot afford to pay a contribution are asked to do so.

The Convener: Is there not also the prospect, in a summary trial that has had to stop because legal aid has been withdrawn, of having to ensure that the same sheriff, who has heard part of the evidence, can be brought back? Is it not another unintended consequence that that sheriff has to come back to hear the continuing trial?

Mark Harrower: I think that we will know before we get to the trial diet whether or not the person is going to be represented. Sheriffs will try hard to avoid conducting a trial with the party accused standing before them because they know just what a difficult situation that is.

The Convener: I am not talking about party accused; I am talking about a trial that is continued over a period of days. Maybe this is an extreme case, but let us imagine that the legal aid certificate is withdrawn and the trial has to be adjourned to await the solicitor finding out what the position is. It would have to be ensured that the same sheriff came back the next time, and that sheriff would have diary commitments to other trials further down the road. I am looking at the ripples that could be caused by something like that.

Mark Harrower: There will be many ripples like that, I am sure. The fact is that very few cases that go to trial in Scotland last for more than a day. Some of the figures that SLAB has put forward for case costs reflect scenarios that are rare. I do not think that I have ever done a summary trial that has gone to a third day, although I might be doing one soon. It is a pretty serious case—

The Convener: You will eat your words yet.

Mark Harrower: Yes.

Most cases are dealt with on the same day, so the fees are relatively low and they will be fully covered by the contributions that people will have to make. It will not be a contribution; it will be funding.

Ian Moir: Convener, part of the difficulty in answering your question is that there has been no pilot of the scheme, so we are in uncharted waters. The plan is to introduce the scheme without a pilot. We can anticipate a number of problems, but nobody will know for sure how many problems there will be until the scheme is in place. By then, it will be too late.

Alison McInnes: Listening to the discussion, it occurs to me that a particular problem is thrown up in relation to domestic abuse cases. I would welcome the panel's views on that. If the assessment of the ability to pay is based on the household income, it will surely add a particular insult to injury if the victim of domestic abuse has to pick up the tab for the defence of the accused. Would that be the case? If so, is that a particular problem?

Oliver Adair: In that situation, if the party has an interest that is contrary to that of the accused, their income will not be taken into account.

Alison McInnes: That is helpful.

Jenny Marra: Most of your evidence is in agreement that £68 is an unrealistic threshold. What would be a more realistic figure?

Ian Moir: We do not have the ability to do research on the exact figure for an appropriate level. However, the Joseph Rowntree Foundation report on minimum income standards, which was published in July, states that a single person needs to spend £192.59 a week to reach a minimum standard of living, and that is when they are anticipating what might be coming. Nobody anticipates that, next week, they might be charged with a criminal offence, so people do not put money aside to pay for a contribution to legal aid. To say that £68 a week is a reasonable level is so far off that mark that a substantial increase in the figure is required.

To state an exact figure is not something that the society could do, but I have indicated how far off the mark we believe the current figure to be.

The Convener: As no one has asked about the Public Defence Solicitors Office, I will ask two questions about that, and then I will ask the panel whether there are any other aspects that we have not covered.

First, it seems to me that there might be a role for the Public Defence Solicitors Office to step in if contributions are unpaid. If it stepped into the shoes of the accused's solicitor, that would remove the problem in summary cases. Do you see that as a possibility?

Secondly, proposed new section 25AC(4)(a)(iii) of the Legal Aid (Scotland) Act 1986, as inserted by section 20, seems to suggest that where solicitors are employed by SLAB—as they are in the case of the PDSO—SLAB will take on the function of collecting contributions. If it is to do that

in the case of the PDSO, why should it not do that for all solicitors? Is the proposal in the bill unfair?

Oliver Adair: On the first question, we have raised the matter with the board and it has assured us that the PDSO will be expected to collect contributions, as well as private practitioners. That will provide a safety net in that situation.

The Convener: Okay—that question has been dealt with. What about the second question? Mr Harrower, do you see a role for SLAB to step in, or are you unable to comment on that?

Mark Harrower: I am sure that certain people at SLAB would love that to happen, but I do not think that there are enough of them at present. If the system was expanded, there would be a cost. Also, the idea does not take into account the fact that, under the European convention, an accused person has a right to representation of his choosing. If everybody who is left standing in the dock is represented by the PDSO, what will happen if someone falls out with the PDSO? There would be nobody left for them to go to.

The Convener: Do people fall out with the PDSO?

Mark Harrower: I am sure that they do.

The Convener: Right. You would know, as you are at the chalk face, as it were, like the rest of the panel.

Time is running on, so do not feel obliged to raise anything else, but is there anything that we have not touched on that you wanted to raise? I think that we have given the subject a good airing, but there might be something that we have not asked about that we ought to have discussed.

Silence is wonderful. Thank you all for your contributions, which have been very useful.

11:10

Meeting suspended.

11:18

On resuming—

The Convener: I welcome our second panel of witnesses. Dr Colin Lancaster is director of policy development and Kingsley Thomas is manager of criminal legal assistance at the Scottish Legal Aid Board. Professor Alan Miller is chair of the Scottish Human Rights Commission.

I thank you all for your written submissions. The fact that you listened to our previous evidence session is helpful to us all. I invite questions from members.

John Finnie: I would like to get panel members' views on paragraph 92 of the policy memorandum, with which Professor Miller will be familiar. It states:

> "There is nothing in the provisions of the Bill which has a practical effect on the extent and quality of the preparations for the trial and the right of the accused to have effective legal assistance. There is nothing which puts the fairness of the trial at risk."

Will you please comment on that?

Professor Alan Miller (Scottish Human Rights Commission): Thanks very much for the opportunity to speak with all of you and thanks for the question. That is precisely where I had my folder open and I had underlined that sentence, because I think that the committee is presented with a real challenge in deciding what to do with part 2 of the bill in two respects.

First—and this answers your question directly—the Government seems to be making assumptions that there will be no risk to the right to a fair trial from any of the measures in the bill. Like you, I have listened to the past hour's evidence and clearly there are a number of significant risks to be considered, whether or not you agree with or accept them all. Do you want more assurances, rather than the assumptions that the Government is asking you to make, that there will be no risks attached to the bill in its present form? I think that you should seek more assurances, either through a proper human rights impact assessment to identify—as we have begun to do—what some of the risks are, through a pilot that would gather evidence, or through a sunset clause that would allow the risks to be re-evaluated. The first challenge that you have is around assumptions and assurances—which will you look for?

Secondly, I think that there undoubtedly are risks, so the question is whether, depending on the weight that you give them and how much quality you think there is to them, they are proportionate to the potential savings of around £3 million that the Government has assumed. If the view is taken that there are real risks here, which we may or may not be able to manage or mitigate, members must take a step back, look at the Government spending priorities and consider whether the impact is worth the candle in going further down this road.

Roderick Campbell: Mr Thomas, do you have comments on the matter that I raised in the first evidence session about ABWOR and non-contributions? Does the board have any information about the level of non-collection of contributions for ABWOR that it can share with the committee?

Kingsley Thomas (Scottish Legal Aid Board): We are finalising our end-of-year information for

2011-12. For that particular year, the total contributions assessed for ABWOR cases was £154,000. Of the ABWOR cases that were granted and submitted to us, 6.2 per cent had a contribution payment—that is a relatively small figure, but the amounts are not insubstantial.

Roderick Campbell: Do you have any information about the levels of contributions that were not paid?

Kingsley Thomas: No, because we do not collect them; it is solicitors who would collect contribution payments. We heard from Mr Harrower that not many do, although we are aware that some firms do collect them. How it works in practice is that we pay the solicitor's account net of any assessed contribution.

Roderick Campbell: I have a question about a matter that is not in the bill. If the board were to collect the contributions for summary legal aid in particular, or indeed for ABWOR, for consistency, what would the cost to the board be? What level of expenditure are we talking about?

Kingsley Thomas: We have done initial analysis of that and we reckon that the extra resources, staff and systems would cost about £600,000 each year.

Roderick Campbell: Do you have any general comments about what I think are the modest savings that are referred to in the financial memorandum?

Kingsley Thomas: Do you mean in terms of the £750 threshold for disposable capital?

Roderick Campbell: No. I was referring to the general estimates of £1 million for ABWOR, £2 million for summary criminal legal aid, and £830,000 for solemn criminal legal aid. They seem quite modest.

Dr Colin Lancaster (Scottish Legal Aid Board): The savings figures are calculated on the basis of the figures that are elsewhere in the policy memorandum on the rate of contributions, the number of people who would be likely to pay them and how those contributions would be calculated. One is a direct result of the other, so if the thresholds were set differently, or the rate of contribution—the percentage of disposable income that would be taken—was set higher or lower, the savings that flow from them would also change. The policy memorandum sets out a scheme of contributions that would deliver that level of savings. If a different level of savings was wanted, a different scheme of contributions could be constructed to deliver that.

Roderick Campbell: So against the current budget of £20 million for ABWOR and £35 million for summary criminal legal aid, the saving is actually quite modest.

Dr Lancaster: Nevertheless, such a saving balances the need to reduce overall expenditure on legal aid with the recognition that it would be problematic to ask clients to pay substantially more. We must strike a balance in order to achieve meaningful savings and should put these proposals in the context of the wider savings packages that have been introduced for legal aid over the past couple of years. Although we have a demand-led budget for legal aid—there is no cap on the legal aid fund—obviously Government has to make provision for legal aid; however, notwithstanding its commitment to paying more if demand requires it, the provision that it has felt able to make has gone down. To deliver savings, therefore, it has put in place a number of measures in civil and criminal legal aid, eligibility, scope and fees.

Although ministers here want to try to achieve savings while preserving access to justice, other jurisdictions have found different ways of achieving savings. In England and Wales, for example, large parts of social welfare law have been taken completely out of the scope of civil legal aid. That is not what ministers in Scotland have said that they want to do; instead, they want to preserve scope. However, in order to find savings, they have to look at each of the areas and have said that, as a general principle, those who can afford to contribute to the cost of the help that they receive should do so. The question is how much they should pay and how one determines who can afford to pay, which is what much of the discussion with the previous panel was about. The levels of income and the contribution rates that have been set produce a saving that, alongside the other savings measures that have been introduced, should result in legal aid coming down to a level that the Government views as sustainable in the longer term.

Roderick Campbell: In the previous evidence session, there was a lot of talk about having to produce various bills to show income levels and so on. In practice, what should be the mechanism for completing the application online as far as the financial information required is concerned?

Kingsley Thomas: The mechanism should not have to change. Legal aid applications for summary and solemn legal aid already have to provide the kind of financial verification information that we are looking for. We should not forget that a substantial majority of clients who apply for criminal legal aid are in receipt of benefits and our automatic link to the DWP to verify such benefits means that we do not actually need much information from clients in that respect. The current online system, in which legal aid applications are sent to us and bank statements or any other information to confirm income or outgoings can also be scanned in and sent, works

pretty well and will not change with the introduction of contributions.

The Convener: Is the £3.9 million saving calculated on the basis of 100 per cent recovery?

Dr Lancaster: The figure in the financial memorandum is the maximum saving achievable under this contributions regime if there is 100 per cent collection. As Mr Harrower mentioned earlier, we have looked at various sensitivities with regard to our collection of solemn contributions and have set out a range of what we might be able to collect.

As for collection by solicitors, the collection arrangements in the bill mean that the savings that are achievable do not depend on the extent to which the contributions are collected by the solicitor because the current system for ABWOR that Kingsley Thomas described would also be adopted for summary criminal cases. Under that system, the solicitor's account would be submitted to the board and paid net of the contribution—in other words, there would be an assumption that the contribution was collected.

The Convener: So solicitors would carry the loss.

Dr Lancaster: If they did not collect the contribution, they would carry the loss. If they did collect it, they would get their payment—and, in some cases, get it earlier than they would from the board.

The Convener: So that is how you get 100 per cent collection. You are basically saying, "If solicitors do not collect—tough. They'll take the loss."

Dr Lancaster: The bill does not assume 100 per cent collection. It is simply that once the contribution is assessed the saving is achievable.

The Convener: Is the £3.9 million net of administrative costs? Even with the online application system, the board might still refuse legal aid to a certain client and the solicitor might have to come back with further information. Are there really no administrative costs in running the system?

Dr Lancaster: I think that the financial memorandum sets out a small amount for that.

Kingsley Thomas: Yes. It is £103,000, which is to cover a few extra staff in my criminal applications department and in our department that deals with the recovery of sums for solemn cases. However, we are used to the kind of thing that you are talking about, convener: we do it day in, day out with cases that are initially refused.

11:30

The Convener: I asked whether the figure is the net figure. You have explained about the 100 per cent collection, and I understand that losses will be carried by the solicitors, as you will take the contributions off their bill. You have also said that the administrative costs are peanuts—£100,000-odd—so I should not bother. The figure is £3.9 million.

Dr Lancaster: I suppose that, if we take the two figures that are in the financial memorandum and net one against the other, the figure will be £3.8 million.

The Convener: The figure is £3.8 million. I have taken a little bit off it. Right.

Jenny Marra: Excluding the transfer of liability that SLAB might have to pick up as a result, to which the convener has just alluded, how much more onerous would it be for SLAB to collect criminal summary contributions? You are already collecting civil contributions and you will collect solemn contributions.

Kingsley Thomas: The financial memorandum quotes figures for the number of cases in which we expect that we will have a contribution to recover. We reckon that we will have a contribution to recover in just under 2,000 solemn procedure cases. That accounts for the small extra resource that we thought that we would need. If we were to recover in relation to summary and ABWOR cases, there would be an increase of just over 17,000 cases. We would go from collecting in 2,000 solemn cases to dealing with a total of 18,500 combined criminal cases. Therefore, there would be a significant increase for the board to deal with.

Jenny Marra: What does that equate to in day-to-day operations? Does it equate to three, five or 20 members of staff? What is the comparison with solicitors making all of those collections? The Scottish Legal Aid Board already has a system in place—I presume that it has the information technology to collect the contributions and staff who are trained up to deal with mechanisms to collect them. Practically, how much more onerous would the extra 17,000 contribution cases be for that organisation?

Dr Lancaster: While Kingsley Thomas is looking for the extra staff numbers, it is worth pointing out that we open perhaps a couple of thousand civil legal aid contribution cases each year. The average value of a civil legal aid contribution is around £2,300. We set up an instalment arrangement with the applicant to pay a fair sum of money over an extended period of time. We are talking about 2,000 cases at around £2,500 each. We would be looking at a far larger

number of cases, the vast majority of which would be very much smaller.

The earlier evidence seemed to imply that all the people would meet the full costs of their cases and that the maximum contribution of £1,000 would be extensive, but that would be the case for a very small minority of all applicants and a very small minority of all contribution cases. The contributions would far more typically be under £50, or between £50 and £100, or between £100 and £300. We are not talking about the size of contributions that we typically deal with and the instalment periods that we typically allow for civil legal aid. With civil legal aid, we are looking at somebody paying a third of their annual disposable income by way of contribution at the basic level. In many criminal cases, we are looking at people who will pay perhaps 10 per cent over a 13-week period.

Jenny Marra: I understand that there would be many cases and that many of the payments would be quite small, as you have just said, but how much of an impact would there be on the Scottish Legal Aid Board in collecting the contributions? I am talking about the costs, staff numbers and hours. Has any assessment been made of the impact?

Kingsley Thomas: Yes. As I said, the additional cost of us collecting summary and ABWOR contributions would be just under £600,000—it is £594,904. That is largely for the additional staff who would be required. If my arithmetic is right, we would be talking about an extra 16 collection staff, a team leader and a deputy team leader.

Dr Lancaster: I think that that would be more than a quadrupling of our current Treasury complement for debt collection.

Jenny Marra: It would be a quadrupling of what, sorry?

Dr Lancaster: It would be a quadrupling of the current arrangement. The team that collects the civil contributions is relatively small and we would need a far larger team to be able to collect the volume of contributions that would be involved in summary cases.

What I was trying to say earlier was that the cost of setting up all the collection arrangements centrally would be disproportionate to the value of many of the contributions that would be collected in such cases. The same is not true of civil legal aid, in which the contributions tend to be higher.

Jenny Marra: The convener made the point to the earlier panel of witnesses that somebody could be represented by a solicitor, not pay their contribution and then go to another solicitor, who would not know that they were a non-payer or non-contributor. However, if SLAB managed the system centrally, that issue, which will be a problem, would be overcome. Perhaps you are not concerned about it, but I would like to know your opinion.

Dr Lancaster: I do not know how significant a problem that is likely to be. We have no way of knowing that.

The previous witnesses seemed to imply that every client was a new client and the solicitor had no knowledge of them, whereas we know that many clients are repeat clients and solicitors are well aware of their circumstances, their behaviours and how to interact with them. On the basis of that extended, continuing relationship between solicitor and client, we think that the solicitor is in a good position to manage the relationship and the collection of the contribution.

Jenny Marra: Dr Lancaster, do you agree that the repeat client pattern may not continue as a result of the bill because the client is not likely to go back to the solicitor to whom they owe money and the relationship might break down as a result?

Dr Lancaster: Solicitors will make a commercial judgment about how to respond to a client who does not pay, just as they do at present and just as they will with private clients. The solicitor will consider their history with the client and work out whether it is worth severing ties with them for, perhaps, a small contribution from a client who has delivered repeat business to the firm, is likely to deliver repeat business in future and may well deliver solemn business, in which, of course, a contribution would be payable to the board.

The Convener: That is a special way of looking at the justice system. A solicitor decides to invest in a client because they will commit murder or rape at some point.

Dr Lancaster: No, I am not saying that. I am saying that many solicitors have long-standing, continuing relationships with their clients and, on the basis of those relationships, would form judgments on whether they were willing to forgo some of a contribution.

Graeme Pearson: Many of the substantial questions that I wanted to ask have been asked. I invited the earlier witnesses to give a view about what would happen if someone who had failed to pay their contribution even after the case concluded came back into the system on a fresh charge. If SLAB were to take responsibility for the contributions and it was not for solicitors to take the hit—if I can put it in the vernacular—would the board's policy be that, if somebody had failed to pay in an earlier case, they would not be able to access assistance until the bill was paid or would each case be considered as separate?

Dr Lancaster: We would have to consider that carefully. I can see where you are going with that question. There might be risks to the operation of the system if we took a blanket approach that, if somebody had an outstanding debt, they could not access legal aid. That would not be a reasonable position for us to adopt. People's circumstances change and there can be legitimate reasons for their being unable to make a payment at a particular point in time. We must consider whether a person commits to make a payment to us in relation to the case in front of us. However, we would continue to pursue the contribution.

Graeme Pearson: Indeed. I am grateful for that answer.

I return to your point about the solicitor being responsible for obtaining the payment. Do you accept that, in some areas, the proposal might be anticipated as being a new discount to the fees, that solicitors would be unlikely to be able to collect 100 per cent of the fees from the client group involved and, therefore, that the policy presupposes that a private company would merely take the hit in the interests of the longer-term business?

Dr Lancaster: There was no discussion earlier in the meeting about how solicitors currently get their fees from their private clients. We know that solicitors have private clients and many firms do quite a lot of criminal business, for private clients, particularly in relation to road traffic legislation work; obviously, they have measures in place for recovering their fees from those clients. There will also be a point at which solicitors might decide to write off some of those fees, and we imagine that the same thought processes will go on in relation to legal aid clients who owe those solicitors. The solicitors might come to the judgment that they will let a bit of the contribution go. Again, there will be a commercial reality around whether it is worth pushing it with a particular client if there is a risk of the client going to another firm. Solicitors will form a judgment about what they are willing to take, on a client-by-client basis.

Graeme Pearson: You used the word "reality". Do you accept that, for many clients, £100 is a king's ransom?

Dr Lancaster: Again, the earlier discussion did not distinguish adequately between income and disposable income. The bill proposes that ABWOR should move from a system of taking the income, deducting allowances for dependants and arriving at a figure that can be looked up on the advice and assistance keycard to see whether the client is eligible and what size of contribution they will have to make.

For summary criminal legal aid, we have a more bespoke assessment that considers income and outgoings. For civil legal aid, we make a very bespoke assessment that looks at income and outgoings to arrive at a figure for disposable income. The disposable income figure is often very much lower than the income figure.

As we say in our written submission, our modelling suggests that the £68 is, on average, equivalent to the current lower income limit in ABWOR of £105. That gap is made up of outgoings that are currently irrelevant for ABWOR purposes. If a solicitor has a client who has to pay rent, council tax, childcare costs, transport costs, and so on, those will all be deducted from their earnings. We wanted to find some examples for the committee of the difference between the gross income approach and the net disposable income approach and we can send some examples to the committee after the meeting if that would be helpful.

However, just to illustrate the point, we have an example of a cleaner who has been charged with drink-driving. He earns £321 per week, which is well above the Joseph Rowntree Foundation figure that Mr Moir quoted. The cleaner has no dependants but he has outgoings for rent, council tax, a car loan and car insurance, which reduce his disposable income substantially down to £90. He is therefore eligible for summary criminal legal aid. However, for ABWOR purposes, his income would have been assessed as £321, which is well above the current upper limit of £245.

That is an example of a client who would have been eligible for summary criminal legal aid, but who would not have been eligible for ABWOR. Under the new system, he would have to make a contribution of £56, which we worked out as being 3 per cent of his disposable income over the 20-week assessment period. For ABWOR, he would have to make a contribution of £44. That is the ABWOR for which he would have been ineligible by around £100.

That is the difference between disposable income and gross income. It is a very big difference, which would make a substantial difference to a number of people who currently have outgoings and inescapable commitments that mean that they do not have the flexibility that would enable them to meet the cost of a lawyer. That inflexibility is taken account of in the assessment.

The people for whom the proposed change would be less of a benefit are those who have a reasonable income but no outgoings. Again, as we say in our submission, such people might reasonably be regarded as having more flexibility to meet unanticipated costs than the person whose entire wage packet is spoken for.

Kingsley Thomas: The person to whom £100 was a king's ransom would probably qualify anyway and would not have that contribution to pay. An example was given of the person on the minimum wage with no outgoings. The reality is that we would find it very difficult to find an example of a person who had absolutely no outgoings. Even a youngster on the minimum wage and living at home would more than likely be paying some kind of rent or board payments to their parents and would have some kind of loans or outgoings that we would take into account in the calculation.

Much has been said about the £68 threshold and, as Colin Lancaster mentioned, it should be stressed that that is a disposable income threshold not an actual income threshold. It also equates to the same free threshold for civil legal aid. The point has been made whether there should be a higher free threshold for criminal legal aid than there is for civil legal aid.

11:45

Graeme Pearson: I understand your point. The science of it may seem lovely in a project but many of these families do not exist in a bubble. They support others in the network. It would be difficult for someone, in filling in a form, to say for example they had to give their daughter £15 because she had nothing or that they had to give something to a friend. That is the kind of social life that many in this client group will have. I cannot see how your system will be able to capture that information in such a way that you can either tick a box to acknowledge the outgoing or decide that the £15 was not well spent.

Dr Lancaster: That is what we do.

Graeme Pearson: Even if a client group's daughter-in-law is short of money for that month and they hand them the cash, would you take that into your computations?

Kingsley Thomas: We can look at such aspects. That was the reason we were really keen on promoting the undue hardship test, which gives us flexibility to look at assessments in a sensible way according to the individual circumstances. What we did not want was a hard-and-fast rigid test such as the ABWOR test, which asks what the client's income is, takes off an allowance for dependants and that is it. If the client has to pay out extra in the month, that is too bad because nothing can be done about it.

Every day we take judgments based on individual circumstances and although the applications for legal aid are made online and we receive the information electronically, we can step back from that. The applications are read by humans who can look at the situation and take a sensible approach to such financial matters.

The Convener: That is the discretionary part of the undue hardship test. Currently, in solemn procedure, it is the court that applies—

Kingsley Thomas: Not any more.

The Convener: That is my question.

Kingsley Thomas: That transferred to the board in November 2010.

The Convener: So everything went to the board—everything is within your ambit with regard to the undue hardship test. I take this to mean that even if on paper, or by the ticking of boxes as referred to by Graeme Pearson, a person is deemed to be required to make payment, you could look beyond that. That must imply more work for the solicitor who must submit further information to you on the undue hardship test and for which they are not being paid.

Kingsley Thomas: That may be the case. The ABWOR test is currently a rigid test that is applied by the solicitors. The nature of the undue hardship test will be fully explained to them and published. The flexibility will remain because people's individual circumstances and how their contributions or eligibility are assessed cannot always be fitted to a policy document.

In the ABWOR situations, if the solicitors who are doing the test think that there is something else that ought to be taken into account and which is not covered by any of the guidance that we have issued, they can ask us for our view on that. We do not know how often that will happen, but I can assure the committee that my department is well able to deal with such matters on an urgent basis.

The Convener: Urgency is the key. In civil proceedings the pursuers are given time. They are thinking about legal aid before they raise the proceedings. The defenders are given time to make an application for legal aid. However, what we were hearing from solicitors was that somebody might just walk into their office with a complaint or a summons. That is urgent business and they may not have time for the niceties that occur in civil legal aid applications. How will that operate? I refer to a case of undue hardship in which, on paper, a person is not entitled to it but the background information shows circumstances such as those that were referred to earlier of a girl getting money, for example, and the person could be required to be in court the next day. How will that work in practical terms, so that they are represented by a solicitor who is covered by legal aid?

Kingsley Thomas: That happens currently, when a solicitor who is in that situation phones us

and asks for advice there and then. We would therefore be able to deal with the situation that you describe. I do not see that as—

The Convener: What about an appearance, not advice? If someone had an appearance the next day, would they be covered?

Kingsley Thomas: Yes.

Dr Lancaster: We can give them advice. They can tell us there and then what the circumstances are and we can give a view. In terms of our turnaround time for returning a grant once an application has been made, we do a ridiculous proportion of such cases very quickly. Kingsley Thomas knows the numbers better than I do.

Kingsley Thomas: It takes us an average of 1.1 or 1.2 days to assess the cases for which we do an assessment—that is, the summary and the solemn cases. We prioritise cases. Cases that come to us that are within four weeks of the next court appearance are dealt with on the same day that we receive them. We would continue to do that.

The Convener: You are saying that for an accused with a complex financial background, who has a court appearance the next morning, say, the solicitor would be able to know one way or the other whether they had cover for that appearance.

Kingsley Thomas: Yes. They would seek advice from us.

The Convener: Okay. That is all I wanted to know.

Dr Lancaster: The other point relates to the verification of information and whether it all needs to be provided at that initial point. That is another of the concerns that have been raised regarding custody cases when somebody does not have that information to hand. A solicitor will assess their client on the basis of the information that they have before them, but information that came to light subsequently and which suggested that the client had outgoings that would either make them eligible when they had been assessed as not being eligible, or would reduce or remove an assessed contribution, could be forwarded when it came to light.

The Convener: It would be backdated.

Dr Lancaster: We would say that the information that was provided at the point when the grant was given meant that the grant was still valid, but that the client's financial circumstances had since become clearer and as a result the contribution could be reduced on that basis.

The Convener: Or it could be increased, or they would get no cover at all.

Dr Lancaster: If there was a change in circumstances such that somebody came into money—

The Convener: No, I did not mean that.

Dr Lancaster: Again, we have this situation at present. If the information that is given is incomplete and it subsequently comes to light—

The Convener: I am not talking about someone winning the lottery. I am talking about a solicitor taking, in good faith, financial information in urgent circumstances from an accused and getting it off to you that day because they have to be in court the next day and they need to know that they will have cover. You give them cover but they then find out that, although they provided the information to you in good faith, the accused had told them porkies. Would they still be covered for the court appearance in such a case?

Dr Lancaster: I ask Kingsley Thomas to say what happens at present if verification is not produced.

Kingsley Thomas: Solicitors make grants day in and day out on ABWOR cases, but the board requires the solicitor to have seen evidence of the client's financial circumstances before it makes the grant. Legal aid is a state benefit that must be verified. If the solicitor was not able to see the verification but can explain to us why that was the case, we can judge whether the grant was valid and, if so, pay the solicitor. However, if the solicitor has just chosen not to seek any verification—

The Convener: The bona fide situation that you have described when the solicitor acts in good faith is different—that is parked.

Kingsley Thomas: There are a lot of elements to legal aid, but if the solicitor does something in good faith, they will be paid for doing the work that they have done.

The Convener: That is fine. That is now on the record. If a solicitor fills in the form in good faith and is told that there is no contribution, or such and such a contribution, but then it all changes because they find out after they have made a court appearance that in fact the information that they were given is not correct and the man or woman involved should never have been given legal aid in the first place, the solicitor will still get paid because they acted in good faith.

Kingsley Thomas: It is difficult to say, but we would look at the circumstances and where it was fair to do what you describe, we would do it.

Graeme Pearson: That was a maybe.

Dr Lancaster: But we do not envisage there being any change from the current—

The Convener: Sorry, but I think that Graeme Pearson is right in saying that Kingsley Thomas's response was a maybe.

Dr Lancaster: We do not envisage there being any change to the current situation in that regard. At present, solicitors must do an assessment and then provide the verification. We would then question whether the verification satisfied us. The bill's proposals would not change that situation.

The Convener: So it is all steady as she goes. Was that a yes? A smile does not appear on the record.

Dr Lancaster: That was a yes. There will be no change to the current process.

The Convener: Right.

Alison McInnes: This is all very illuminating, but it is not transparent and it is not my idea of 21st century access to justice.

You heard Mark Harrower from the previous witness panel say that this is basically a back-door attempt to reduce solicitors' fees and that you know that they will not be able to collect the fees. If the Government had concluded that you should collect all the contributions for the summary cases and the other cases, would you be telling us that it was such a good idea?

Dr Lancaster: That contributions were a good idea?

Alison McInnes: Yes.

Dr Lancaster: We think that, in principle, contributions are absolutely right. In the paper, "A Sustainable Future for Legal Aid", the cabinet secretary made it clear that, as a general principle, those who can pay should pay; those who can afford to make a contribution towards the costs of the assistance that they are provided with should pay towards those costs. That happens in ABWOR cases and in civil legal aid. There seems to be no reason why we should have in criminal legal aid a system that requires us to grant free legal aid for a case that will cost £300 to someone whose disposable income would require them to pay a contribution of £2,500 were they to have a civil case. It seems absolutely reasonable for a person in those circumstances to make a contribution or, indeed, to meet the whole cost of their case, but the current system does not allow that.

Alison McInnes: You said earlier that collecting fees and charges was your daily bread and butter. Why would your collecting all the charges not be the most efficient way of rolling things out?

Dr Lancaster: I think that we said that assessing eligibility and taking decisions on cases was our bread and butter. On the civil legal aid side, we also collect contributions.

You mentioned collecting fees. This is where the discussion is a little bit strange. We are talking about a system whereby the state pays fees to solicitors on behalf of people who cannot pay those fees. We are talking about a system in which we would collect the fee from the client and give it to the solicitor, rather than the client give their fee to the solicitor for the work that the solicitor is doing for them. It is the solicitor's fee, so it would seem unnecessary for us to become involved in that process. We do not get involved in that process for private clients. I am not sure why one would say that we would need to collect the fee from a client who was receiving legal aid when solicitors have mechanisms to collect their fee from their private clients. They would not suggest that we should be an intermediary in those circumstances.

Alison McInnes: You heard the previous panel say that it made administrative sense to do it that way, because we do not want to see further churn in the system at intermediate diets, at which people say that are not ready to roll because they are not sure that they will get paid. Do you not think that that confuses the whole landscape?

Dr Lancaster: I am not aware of solicitors turning up in court and saying that they cannot proceed with a case for a private client because the private client has not given them the latest instalment. I am not sure, but that does not sound like a legitimate reason to give to the court for seeking an adjournment. Not having been provided with funds by a client is not the same as not being ready to proceed, and I do not think that solicitors do that in private cases.

I will try to put the issue in context. Again, we can provide this information after the meeting. We looked at a number of firms to find out how often they would have to collect contributions and what the scale of those contributions would be. We looked at a number of medium-sized firms that have fair volumes of summary and solemn business. I will give an example.

Between December 2010 and November 2011, a firm in Glasgow received 256 grants of summary criminal legal aid. We reckon that 17 of those would involve a contribution and that the total value of those contributions would be just under £5,000. That is in the context of the firm earning £138,000 from summary criminal legal aid. As a whole, the firm would be looking at collecting contributions worth £8,300. Its total income from legal aid is £323,000. In total, contributions would have to be collected from 29 clients out of 396 cases a year. We are talking about a small percentage of the firm's business and a very small percentage of its income. At that level, we are talking about less than 3 per cent of its total

income from legal aid being obtained directly from its clients.

Our best estimate is that between 5 and 10 per cent of many firms' criminal income comes from private clients. We are talking about firms being required to collect a lower value of contributions than the value of the contributions that they are currently collecting from private clients. When firms say they have no mechanisms to collect fees, I do not know how they get their private fees.

The Convener: Why bother?

Dr Lancaster: Why bother collecting from private clients?

The Convener: Why bother means testing a contribution system? If there is such a substantial number of summary cases and such a substantial number are already on benefits, and we are putting in place a system that will possibly—just possibly—save £3.8 million, that is a small saving for a lot of work. We heard earlier that there could be ramifications in some cases—perhaps not the majority—for human rights, the pursuit of justice, and self-representation.

12:00

Dr Lancaster: The evidence from England and Wales is that since contributions were introduced in Crown Court cases in 2010 there has been no change in pleading patterns and the number of unrepresented accused. There has been an increase in the number of privately funded accused.

The Convener: I understand that in England and Wales, clients can recover their contributions if they are successful and are acquitted—

Dr Lancaster: And so can private clients—

The Convener: But we do not have that, so it is comparing not apples and apples but apples and pears.

Dr Lancaster: The English system is different. The recovery of costs from the state is part and parcel of the criminal justice system in England and Wales. It is not part and parcel of the criminal justice system here.

The Convener: Sorry, I had to come in there because I thought that you were getting away with some stuff—not to put it as roughly as that, but I wanted to persist a bit more with you.

Alison McInnes: Professor Miller, in your written submission you pointed out that you would like clarification of the Government's intention in section 17 of the bill. Will you elaborate to the committee your concerns about seeking legal advice while in detention?

Professor Miller: In answer to that, but also more broadly, the issue of who should recover contributions is clearly one of concern. Is it solicitors? Is it SLAB? The level of eligibility is a real concern. I do not want to dwell too long on those individuals who might bring solemn business to law firms. I am more concerned about the individuals we all know who come into contact with the criminal justice system because of various vulnerabilities, for example mental health issues and physical disabilities. We heard from Capability Scotland about where such individuals come from in society and their socioeconomic status.

If we take a step back from the mechanics—legitimate though they are—and look at access to justice, fairness and proportionality, I am not at all convinced that a sufficient assessment has been done of the impact of the bill on vulnerable individuals who come into contact with the criminal justice system and are unable to pay for proper legal representation. They will either have to represent themselves—which can cause difficulties for them and for the criminal justice system—or, as we heard this morning from the Law Society of Scotland and others, it is easier and cheaper just to plead guilty than to go through it all. That is where we will have invisible human rights breaches. They may not be in the newspapers and they may not go to the European Court of Human Rights.

After three years, we have just finished mapping the extent to which human rights are realised in Scotland, particularly by the most vulnerable. What we have found is that although the laws and the policies appear to be quite good, for many people, real life gets in the way and they do not get the outcomes that all of us sitting round here assume that they do. Those are invisible human rights breaches, whether they affect older people, disabled people or those who are charged with criminal offences and do not have access to effective representation.

That is why I said earlier that we need more assurances that that will not happen. A lot of the assumptions that are being made by the Government and by my friends and colleagues here are a bit superficial and life gets in the way of some of them.

John Finnie: I wonder whether Professor Miller can expand on his comment about the lack of clarity in appeals in which the appellant dies but would have been entitled to have their expenses met.

Professor Miller: We can discuss only what is in front of us and I believe that there are enough unknown risks about that. Indeed, I think that the policy memorandum's statement on human rights, which says that there are no risks attached, is grossly inadequate.

Of course, there are a lot of unknowns. I am not going to get into the whole Donald Rumsfeld thing, but the fact is that we know some of them. For example, we do not know what the levels of contribution will be or anything about a deceased's contributions in appeals. An awful lot has been left to either subsequent regulation or the discretion of the Scottish Legal Aid Board, and the legal profession—or at least some of it—is sceptical about relying on either of those things. The committee needs a lot more information up front about the impact of not only what it sees, but what it does not see, and a proper impact assessment would benefit the committee in its efforts to weigh up what is being said in the bill's defence and what appear to me to be legitimate concerns about its impact on real life and real people.

Roderick Campbell: You have largely answered my question, but my understanding is that the equality impact assessment has not yet been produced. Disability issues have featured quite strongly in our discussions, but is there any flesh that you want to put on anything else? What other matters should the impact assessment cover?

Professor Miller: You are fortunate, because your first evidence session was trying to do what an impact assessment should have done. There is no public association for the accused that can tell the committee, "This is our experience—listen to us." The closest you have to that is Capability Scotland, which represents a section of the community that comes into contact with criminal justice, and the lawyers who have daily face-to-face understanding of what life is like for many of those who come into contact with the system. Their evidence raises a very big question mark over the human rights policy statement in the bill that there is no risk to the right to a fair trial.

Without being excessively legalistic, I think that we all sign up to values and principles such as access to justice, fairness and proportionality. Article 6 of the European convention on human rights, which covers the right to a fair trial, is the hard-wired guarantee on this matter, and it is largely missing from the policy assessment and the debate about the collection of fees and eligibility levels. The question is whether there is a real risk that someone will not a get a fair trial under the measures proposed in the bill. You might think that that is inevitable. If so, the next question is whether that is a risk worth paying. Are the savings so good that we are prepared to run the risk and hope that no one gets an unfair trial? Are the savings proportionate to the risk that we seem to be running and the thin ice that we seem to be skating on—given the problems that the Law Society has identified—and sufficient to outweigh those concerns, legitimate though they might be? That is a matter for the committee, but I think that it must be open to question.

David McLetchie: Dr Lancaster, did I hear you say that changes to contribution rules in England and Wales had not changed pleading behaviour?

Dr Lancaster: Yes. Over the past five years, the percentage of people pleading guilty has remained pretty much flat.

David McLetchie: I find it slightly difficult to square that evidence with paragraph 11 of the SLAB submission, which states that alignment of the rules for ABWOR, criminal legal aid and so on will effect change as a result of "changes in pleading behaviour".

Dr Lancaster: It will surprise you to hear that I do not think that those two positions are inconsistent. That part of our submission relates to the timing of a plea rather than entering a plea of guilty where one would not otherwise do so.

The issue at present—as the example that I gave earlier suggests—is that some people are not eligible for ABWOR and if they wanted to have a lawyer represent them when they appeared in court, including for any subsequent plea in mitigation or deferred sentence, their only option would be to apply for summary criminal legal aid. In other words, they would enter a plea of not guilty and apply for summary criminal legal aid so that they could get funding under the disposable income and due hardship test.

Under the proposed change, if a plea of guilty is the appropriate plea to make at the outset, people will be able to do that with the benefit of a lawyer representing them because they will be more likely to qualify for ABWOR than they are at present. The change actually increases eligibility for ABWOR.

David McLetchie: Yes, I can see that, but your evidence on behavioural change—although, as someone once said, "They would say that, wouldn't they?"—seems directly to contradict Mr Harrower's responses to my questions. He seemed to think completely the opposite to what your submission and the Scottish Government's consultation document say. There must be some way of reconciling that, must there not?

Dr Lancaster: I think that we may have been looking at slightly different parts of the evidence and the provisions. We are talking about people who do not qualify for ABWOR pleading not guilty so that they can get the benefit of summary criminal legal aid.

In future, there will be no reason for those people to enter a plea of not guilty to apply for summary criminal legal aid. They will be able to enter the plea that they want to make, and they will have taken advice from a solicitor on the

consequences of doing so. If the advice is that that is the best thing to do, and the client is instructed that a plea of guilty should be tendered at the pleading diet, they will be able to do that and a grant of ABWOR will be made to cover it.

When changes were made to payment regimes under summary justice reform, there was a big increase in the number of people who were pleading guilty at the pleading diet. There was no increase in the number of people who were pleading guilty overall, so there is no suggestion that those pleas were inappropriate, but people who would in the fullness of time have pled guilty at the intermediate diet, or possibly at the trial diet, were pleading guilty more often at the pleading diet, which is the most appropriate point at which that plea should be tendered.

We say that the financial arrangements currently pose a barrier to some people for whom that is the appropriate plea, and we will remove that barrier.

The Convener: I was not a criminal practitioner, but I am sure that people might plead guilty later because the complaint has been amended and reduced, so they are not pleading guilty to the same thing.

Dr Lancaster: No one is suggesting that the only point at which one can or should plead guilty is the pleading diet, because things might change. There are discussions between the Crown and the defence and, if new evidence becomes available, charges can be dropped or amended.

The Convener: A solicitor raised the point that some very smart accused—there are quite a lot of smart accused—in a domestic abuse case, for example, would delay their contributions and refuse to pay them to delay their imprisonment and the criminal prosecution process. Could that be done?

Dr Lancaster: Again, that all hinges on whether the solicitor not having been put in funds would be a valid reason for the continuation of a case.

The Convener: I understand that. If the solicitor is not in funds they will not appear, and they have to ask the court for a continuation. There is a knock-on effect, and Professor Miller referred in a broad way to the impact on justice. I think that we all agree that it is a good idea that people who can afford to pay should pay when they are in court, but it is not as simple as that, as all those other issues that are now emerging show.

Dr Lancaster: The individual's behaviour is a key element in that regard. Someone on the previous panel talked about a safety net, which I think that we need to consider for that sort of scenario. Although the accused should not be able to dictate the terms of the criminal justice system by refusing to pay, we recognise that it is important for proceedings to be able to go ahead as scheduled.

12:15

Mr Harrower said that some at SLAB would love to see an expansion of the PDSO, but the fact is that the PDSO is available and it could act as a safety net. In 1999-2000, when fixed payments were introduced and the Law Society, the Edinburgh Bar Association and the Glasgow Bar Association said that people up and down the country would be appearing without representation, regulations were put in place to provide for a safety net whereby the PDSO would act in circumstances in which an accused could not find a solicitor to act for them. The safety net was in place but it was never called upon.

We could put a safety net in place for the proposed scenario as well. We could say that, if there was a risk to proceedings, we would appoint a solicitor to act for the accused for the purpose of those proceedings. To be honest, having the PDSO do that is simply a way of minimising any additional cost to the public purse. If the PDSO provides the safety net, there is no additional cost to the public purse.

The Convener: Would that have to be put in the primary legislation?

Dr Lancaster: No, I do not think so. We would have to consider whether regulations would be required for a transfer in those circumstances, but the kind of system that is being proposed would work.

The Convener: We will have to pursue that. You are thinking about it, but we have a timescale and we have to ensure that there are no gaps.

Dr Lancaster, we have had quite a good session. I want to put Professor Miller on the spot now. The bill is in two parts and we cannot reject one part without rejecting the bill in its entirety. Any such amendment would also sabotage the civil part of the bill. How should the committee handle concerns about the operation of the legislation to ensure that the bill proceeds, while taking account of all the serious points that today's panels have raised? How do we resolve that?

Professor Miller: The committee can take a number of steps to satisfy itself that the proposed legislation is good. A more thorough impact assessment is needed than has been done so far. A pilot could be done to test whether the measures work and whether the concerns that have been raised are legitimate or ill-founded. A sunset clause could be inserted that would allow the legislation to be evaluated to see what impact it had had after a period of time. All those measures are possible.

It might be good to get some clarity on the PDSO issue. I think I picked it up correctly that Mr Pearson asked whether contributions would have to be made directly to the PDSO by the accused. My concern is about someone who is not trying to manipulate the system, but is simply unable to pay the contributions. Having the PDSO as a safety net would not be a safety net for that person if they had to pay. That is my continuing concern.

The Convener: I was not talking exclusively about someone manipulating the system, but about either of those circumstances. We need to ensure that justice continues. That was useful; thank you.

Thank you all for your evidence. We now move into private session.

12:18

Meeting continued in private until 12:46.

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