The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 4 September 2012

Session 4

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JUSTICE COMMITTEE
24th 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:

Ronnie Conway (Law Society of Scotland)
Lord Gill (Lord President and Lord Justice General)
Richard Henderson (Scottish Committee of the Administrative Justice and Tribunals Council)
Louise Johnson (Scottish Women's Aid)
Lauren Wood (Citizens Advice Scotland)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 4 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 24th 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 they are switched to silent. No apologies have been received.

Under agenda item 1, the committee is invited to agree to consider items 4, 5 and 6 in private. Do we agree to do so?

Jenny Marra (North East Scotland) (Lab): No, convener. I oppose taking item 6 in private, as I think that the committee's work programme is a matter of public interest and should be on the public record. The discussion should therefore be in the *Official Report*.

The Convener: Do other members have any comments on that?

Roderick Campbell (North East Fife) (SNP): Obviously, that would be a change from what we have done until now. The general point probably merits more debate, rather than saying a quick yes or no now.

The Convener: We will perhaps discuss possible witnesses under the item, and if the committee were to comment out loud on whether or not it wished, for very good reasons, to have certain witnesses, it would not be appropriate to have that on the public record. I also think that such an approach would inhibit discussion. There is nothing untoward about such an approach; there would simply be a free discussion of possible committee witnesses. I do not know what members' views are on that.

Graeme Pearson (South Scotland) (Lab): Could we deal with the matter later on? We could deal with the next item of business and come back to it later.

The Convener: Yes. I am certainly happy to defer the matter and move it on in the agenda. We can discuss the matter after we have taken evidence on the Scottish Civil Justice Council and Criminal Legal Assistance Bill. That will be after a break.

That is the way to start, isn't it? That was unexpected.

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

10:02

The Convener: Item 2 is our second evidence session on the Scottish Civil Justice Council and Criminal Legal Assistance Bill. Today, we will concentrate on part 1 of the bill.

I welcome to the meeting the Lord President and Lord Justice General, the right hon Lord Gill, who is accompanied by his legal secretary, Kathryn MacGregor. I invite Lord Gill to make a short opening statement.

Lord Gill (Lord President and Lord Justice General): I am very grateful to the committee for the opportunity to address part 1 of the bill.

We are just beginning a remarkable process of legislative reform in Scotland that will profoundly affect civil justice for—I believe—the benefit of the whole system. The Scottish civil courts review was the first major exercise of its kind for more than a century, and the bill marks the first stage of the implementation of the review's recommendations in legislation.

I have seen many law reform projects run into the sand during my career, but my colleagues and I, who carried out the civil courts review, are gratified by the Scottish Government's positive response to our recommendations and the prompt and committed way in which it has proceeded to implementation.

In general, I am entirely content with the terms of the bill. As far as I can see, it will fully implement the recommendations in chapter 15 of the "Report of the Scottish Civil Courts Review", and it is entirely in keeping with the spirit of the recommendations. I think that the creation of the Scottish civil justice council will ensure an integrated and systematic approach to keeping the civil courts system under review so that it can deal responsibly and flexibly with changing needs and problems as and when they emerge.

I see the bill as the first stage of a package of legislative reforms under the making justice work project. The creation of the council will lay the foundation for the implementation of further projects and will be the vehicle for the implementation of all the legislative reforms that we have recommended.

I am pleased that this part of the programme has been devised in such a positive spirit, and I hope that the Scottish Government will continue to legislate in the same spirit at later stages of the programme of implementation. I will be happy to answer any questions from the committee in relation to part 1 of the bill.

David McLetchie (Lothian) (Con): Good morning, Lord Gill. It is inevitable that when a new body is being set up many of the representations to the committee are about who will be on that body and who will be chair. This is no exception. For example, the Law Society of Scotland suggested that the representation of the solicitor branch of the profession is being considerably reduced compared with its input to the current rules councils, which are being absorbed into the new council.

Other bodies, such as Scottish Women's Aid, suggest that there is insufficient representation, from a user standpoint, of people involved in family law issues—obviously abuse may be a part of that. We have had insurers saying that they are major users of the court system and suggesting that their input would be valuable in determining rules and procedures. Will you comment on some of the apparent omissions that have been brought to our attention? What is your general view of the proposals for the composition of the new body?

Lord Gill: I would not see those as being omissions as the use of that term suggests that such interest groups would be excluded and, as far as I am concerned, that is not the case. In primary legislation of this kind, it would not be appropriate to be too specific or to itemise 20 representatives of various interest groups for a council of no more than 20 members. That would deprive us of the flexibility that is needed in setting up such a council.

As far as I can see, the list of people who have to be on the council is entirely appropriate. However, there is plenty of flexibility in paragraph (d) of section 6(1), under which there is to be a member appointed by the Scottish ministers. Furthermore, to comply with the requirements of paragraph (h) of section 6(1), there are to be two persons known as consumer representative members. There is also a catch-all at the end of section 6(1), under which up to six members can be appointed by the Lord President. As I envisage it, in the process of setting up the council there will be an opportunity to consider exactly which spread of interest groups would be most appropriate.

I envisage a process of publicly advertised appointments to the council. My experience has been that when you advertise and invite applications you tend to find that some remarkably suitable candidates emerge from quite unexpected quarters. At this stage, I do not think that we can say that any of the interest groups that Mr McLetchie has mentioned will not be appropriately represented on the council.

David McLetchie: Do you have any idea of the sort of people who might comprise the six-pack that you will appoint when the body is set up? Will they represent user groups other than members of the legal profession? Will the balance between representatives and members of the legal profession be as is provided in the bill, with other user groups being represented in the six?

Lord Gill: I do not quite see it in that way. At this stage, it would be wrong for me to reach any hard and fast conclusions about who should be any of the six people who could be appointed under paragraph (i) of section 6(1), but obviously one would look to canvas the widest possible range of relevant interests. At the end of the day, a great deal of the council's work will be quite technical because it will involve the drafting of rules. In the early stages of civil court reforms, the drafting of rules will be a substantial project and, for that, we will need strong legal representation on the council.

I entirely accept that it is desirable that a wide range of interest groups and users of the system be represented, and I am confident that they will be.

Graeme Pearson: My question follows on from some of the points that David McLetchie has made. There has been a lot of conversation in the committee about members appointed by the Lord President and what that means. Although you have indicated that you do not want to identify particular groups at this stage, outwith the technical element of the council, what kind of skills will you be looking for in the people who might join you as selected LP members?

Lord Gill: One would certainly consider users of the system and the various interest groups. As you can see, consumer representation is written into the bill in section 6(1)(h). The answer to Mr Pearson's question about the LP six is that we will look for people who have experience in business and commerce, such as economists and people like that. I am not trying to tie my own hands at this stage but we will look for the widest possible range of relevant skills.

The council will obviously have to draw up budgets and some sort of corporate plan, so we will look for people who also have experience of that work.

I emphasise that I would not exclude anyone at this stage.

Graeme Pearson: That is a nice position to be in, I am sure.

Some concerns have been raised about the ability of lay members to influence the council, especially given the fact that it will be heavily populated by people who have a good technical understanding of the system. Some have commented that a lay person should be the chair or at least the vice chair. What is your response to such a proposal? How do you see the lay influence playing out in the council?

Lord Gill: I do not think that it would be appropriate for the body to be chaired by a lay person because much of the work will involve technical drafting questions. For that, a person needs to have some experience of draftsmanship in the legal context. In addition, they will also need some experience of how the rules of court work in practice, as well as the background to understand when a problem is genuine and the appropriate ways of resolving it.

The vital priority of drafting rules means that it is essential that the body should be chaired by an experienced lawyer. I intend to chair it, because I am keen to see that it gets away to a good start. It is critical to the overall implementation of the civil courts review, the recommendations of which are obviously very dear to me.

10:15

Graeme Pearson: You would expect, and one would hope, that it will be important that the people who use the courts—the lay element that we discussed—should see a change in the culture, because there has been some disquiet at the previous lack of reform. They want to see that change implemented and brought in through the council. Do you see that as an important part of the chair's responsibilities?

Lord Gill: Absolutely. If you read my introduction to the report on the civil courts review, you cannot be in any doubt about where my sympathies lie and what I would like to see from the civil justice system. So far, I have been dealing only with questions of technical draftsmanship of rules, but another important part of the civil justice council's work will be the formulation of policy: the sort of system we want to have, how we want it to work and whose interests we want to protect. Those are all matters of policy where lay input is vital.

The Convener: You have touched on policy. How does that match the fact that Government ministers and Parliament agree policy matters? How will that approach work with your relationship with Government?

Lord Gill: It is not entirely a straightforward matter for Government, because the rule-making powers in, say, the Court of Session are statutorily conferred by the Court of Session Act 1988 on the court itself. Rules are not imposed externally on the civil courts; the civil courts devise their own rules in the light of their appreciation of current needs. That will continue to be the case with the

civil justice council because it will not be imposing rules on the courts; it will be making recommendations. However, it is obvious to me that the process by which those recommendations will be reached will involve input from the judges anyway, so I do not see any risk of conflict in that matter.

John Finnie (Highlands and Islands) (SNP): Good morning, Lord Gill. On the question of the appointment process, there is a requirement in the bill that you

"must prepare and publish a statement of appointment practice".

The committee has received a lot of evidence about the appointment process and, in particular, the desire that we all have for it to be open and transparent. Might that be achieved by having the appointment practice that you adopt follow the principles of the Office of the Commissioner for Public Appointments in Scotland? Supplementary to that, do you agree that a written procedure for removal of people from office would cover the aspect of open and transparent governance?

Lord Gill: Under the bill, I will be required to prepare and publish a statement of appointment practice that sets out the processes that will be followed for the appointment of various members. I intend to draft a statement of appointment practice based on the principles set out by the Office of the Commissioner for Public Appointments in Scotland. That will safeguard the key principles of merit, fairness and openness, and it will be published.

John Finnie: Can you clarify whether that would also apply to removal from office?

Lord Gill: The question of removal is rather different. The appointment itself will set out what is expected of members by way of their commitment to the work, attendance at meetings, and so on. It is obviously essential to appoint people who can be depended on to commit themselves fully to the council's work, and that will be part of the selection process.

My experience of the public bodies on which I have had the privilege of sitting is that the question of a member's removal arises seldom, if ever, because—again in my experience—people who do public service do so in a committed way. As a result, I do not think that one needs to be too prescriptive about rules for removal, although the matter can be discussed in due course.

Jenny Marra: I want to return to the issue of policy, which you touched on. The thing that jumped out at me from the bill is that civil justice policy should be part of the remit of Government ministers and be subject to the scrutiny of a democratically elected Parliament. Will you expand on your definition of policy? What scope will the new body have with regard to a policy remit?

Lord Gill: You are absolutely right to suggest that justice policy is entirely a matter for the Parliament. Of course, the recommendations in the civil courts review report make it very clear that the major proposals will require primary legislation, which is what we are discussing this morning.

When I was speaking about the rules councils, I was referring to policy in a rather different sense. At present, when Parliament decides the courts' structure and the remedies that the courts can grant, it is for the rules councils to decide how to make that work in practice under the rules of court relating to time limits, the documents that must be lodged and so on. These are all detailed matters of practice, and it was policy in that respect that I was talking about.

Jenny Marra: So you were talking about policy in relation to the rules.

Lord Gill: Yes.

Jenny Marra: In that case, do you agree that the bill is a bit ambiguous in that respect and might need to be tightened up?

Lord Gill: I do not think so. In part 1, for example, section 3 makes the council's powers very clear and section 2 contains broad general statements about the council's functions. As you will see, the council will not only

"keep the civil justice system under review"

and

"review the practice and procedure"

but

"prepare and submit ... draft ... procedure rules"

and give

"advice and make recommendations to the Lord President on the development of, and changes to, the civil justice system".

I envisage that, under that power, the council might in future recommend that the jurisdiction of a certain court be enlarged or reduced or that certain types of cases be transferred to the sheriff court or to the Court of Session. That sort of thing is envisaged under section 2(1)(d). I am quite happy with that provision, because it not only gives a great deal of flexibility but ensures that the council is not buried in rules, as it were, and can stand back from the system and see how it can be improved.

At the end of the day, of course, the council can only make recommendations; it is for Parliament to decide whether they should be implemented.

The Convener: Does your question follow on from that, Roderick?

Roderick Campbell: Well—

The Convener: I do not know what that gesture means. Does it mean "sort of"?

Roderick Campbell: Yes, convener. It is about the operation of the rules.

You have already touched on this, Lord Gill, but in one or two submissions people have suggested that the Court of Session's powers be curtailed with regard to taking a view on any draft rules that might be presented. Can you put a bit more flesh on how the draft rules produced by the new council—and their presentation, under section 4, to the court for approval, rejection or amendment—might operate in practice?

Lord Gill: I do not foresee the slightest difficulty in that. The council will have a strong representation of judges, the bar, the solicitor profession and the various interest groups that we talked about earlier. Before a recommendation goes from the council to the Court of Session—

The Convener: Forgive me. I wonder whether it would be useful for Roderick Campbell to say that he is still in the Faculty of Advocates.

Roderick Campbell: Sorry. For the record, I should have declared my interest as a member of the Faculty of Advocates.

The Convener: It is belt and braces, just to make him—

David McLetchie: More deferential.

The Convener: You are very naughty. We have missed you. Mr McLetchie, behave.

Roderick Campbell: Sorry, Lord Gill.

Lord Gill: What I was trying to say is that, by the time a recommendation emerges from the council, it will have gone through extensive discussion by people on the council who have considerable knowledge and experience of the matter. There will have been strong judicial input, and the likelihood that a recommendation that emerges from the council will then be rejected by the court seems to me to be remote in the extreme. However, the language of recommendation has to be used for the technical reason that, under the Court of Session Act 1988, it is the court that makes the rules.

The Convener: Thank you for that. I apologise for the interruption. We have just come back and heads are not together yet. Mine is not, anyway.

Humza Yousaf has been very patient—

Humza Yousaf (Glasgow) (SNP): It is most unlike me.

The Convener: —which is unusual, but there you go.

Humza Yousaf: Yes, I know. Thank you, convener.

Good morning. I want to move on to the specific issue of alternative dispute resolution, or ADR. In the written submissions that we have received, the proposals have largely got a positive write-up and a positive welcome, but one or two organisations have raised concerns about the idea that ADR should be promoted "where appropriate", and about what that caveat might mean. In particular, Scottish Women's Aid made the point that family law cases involving domestic abuse might well be swept into the caveat. Can you give any reassurance on that?

Lord Gill: The question of ADR was specifically considered in the review. For a number of reasons that I need not go into in detail today, we came to the view that it would be wrong to make ADR compulsory in the civil justice system and that everyone should have the right of recourse to the courts. However, we also recognised that, in many cases, ADR is the ideal method of resolving a dispute. As you know, there are some cases that would never be appropriate for ADR, but in my experience there are some cases that are never quite appropriate for the courts. As long as the option of ADR exists, and as long as facilities are made available for it, I think that one has to leave the choice to the profession, to advisers and to the litigants. I cannot see that there is any obstacle in the way of ADR in any of the proposals.

Humza Yousaf: I imagine that we will pursue—

The Convener: Humza, I think that it would be helpful for the record if you said what ADR is.

Humza Yousaf: It is alternative dispute resolution. Sorry—I thought that I said that.

The Convener: Thank you. Other people might not have known what it is.

Humza Yousaf: I understand exactly what you are saying, Lord Gill, but I wonder whether those who have been involved in domestic abuse cases would say that the courts and the legal profession have not dealt with such cases as well as they could or should have done. It might be that they welcome the reforms for precisely the reason that they might enforce a culture change, if nothing else. Perhaps you could expand on exactly how the "where appropriate" caveat will be determined. Will it be through solicitors or advocates, or will it be done through litigants themselves? If it is the latter, we can see exactly where the concerns arise.

10:30

Lord Gill: Unless there is a rigid rule that every dispute that comes before the court must be subject to ADR in the first instance—that is a possible way to approach it—the only way is through the encouragement of ADR by the court and the provision of facilities for ADR should the parties wish to resort to it. We were keen in our report to ensure that there should be facilities for ADR in the courts. I cannot see that there is anything in the proposals that would in any way inhibit that. It could be that, in due course, the civil justice council will recommend rules that provide for the consideration of ADR at an early stage in the resolution of a dispute.

Humza Yousaf: Much of what you say is perfectly logical, but I wonder whether the culture change has to come from lawyers and solicitors. Some of the evidence that we got, particularly from Scottish Women's Aid, was that lawyers were suggesting—mainly to women—that if a person chose not to take part in a dispute resolution mechanism, they would be seen as being unreasonable, obstructive and perhaps even hostile by the courts. Do your reforms deal with that?

Lord Gill: I am not aware that that is a problem.

Humza Yousaf: Scottish Women's Aid has said that it is a problem.

Lord Gill: All I can say is that my hope is that when the recommendations of the review are fully implemented there will be a huge culture change and people will look at the legal and civil justice systems in an entirely new light. The reforms are radical and should alter the climate in which disputes are resolved.

Jenny Marra: I understand that the civil justice council will be funded by increased court fees from civil cases. Is that correct?

Lord Gill: That is the intention.

Jenny Marra: With the new £150,000 threshold for civil cases going to the Court of Session, many more cases—thousands, it has been estimated—will be heard in the sheriff courts each year. If that is the case, will the Scottish civil justice council be properly funded if sheriff courts around Scotland close?

Lord Gill: You are right to say that there is no doubt that there will be a substantial transfer of business from the Court of Session to sheriff courts—that is the intention of the proposals. However, I do not think that it follows that the court fee income, which will fund the council, will necessarily be less. We are providing a specialist national personal injuries court and there will have to be a review of the fee charging for that.

When Sheriff Principal Taylor's report on litigation funding is published—I expect it to be published soon—that will necessitate a complete review of the whole question of court fees. At this stage, I am not prepared to assume that the income from court fees will be any less as a result of the jurisdiction changes.

Jenny Marra: Will there be a charge for all civil cases, whether they are heard in the Court of Session or in the sheriff court, which will go towards the funding?

Lord Gill: Yes, that is the expectation.

The Convener: I do not know whether you can comment on this, but it is interesting that the Scottish Legal Aid Board's written submission does not mention the charge, although in many cases it will carry the cost of the increase in fees in legal aid-funded cases.

Lord Gill: I am not fully conversant with how the system works in relation to legal aid, because there have been so many changes to it over the years.

The Convener: I just remark on it because the Scottish Legal Aid Board will be coming before us. If there is not an award of expenses for the legal aid-funded party, the board will meet the cost. The board has not put anything in its submission about additional costs for legal aid. I put that on the record so that the board can respond to it.

Colin Keir (Edinburgh Western) (SNP): Good morning. My question is based on a comment in Citizens Advice Scotland's written submission about the role of the Lord President. Citizens Advice Scotland reckons that there should be

"a clear separation of roles"

between the Lord President and the council to ensure impartiality. I do not know whether you have seen the written submission, but it says in effect that there could be a conflict of interest one way or the other. Could you comment on that?

Lord Gill: I can see where the origins of that objection are. However, section 2(1)(d) states that one of the functions of the council is

"to provide advice and make recommendations to the Lord President".

Section 2(1)(e) states that the council's other function is

"to provide such advice on any matter relating to the civil justice system as may be requested by the Lord President."

I therefore think that the fear that is expressed in that objection is completely overstated.

The role of the Lord President is at the heart of the rule-making function of the council, which makes it entirely appropriate that the Lord President should chair the council. At the end of

the day, though, the council will have a mind of its own and, if it takes a view about a matter on which it wishes to make recommendations to the Lord President, the fact that the Lord President is the chairman of the council does not seem to me to bring us into any situation of conflict; on the contrary, I would have thought that the Lord President will listen very carefully to the sort of recommendations that come from such a body.

I currently chair the civil and criminal courts rules councils, which at the moment have the function of providing advice to the Lord President, and that does not cause the slightest problem in practice.

The Convener: Humza Yousaf has a supplementary question.

Humza Yousaf: I suggest that not every Lord President would be as willing to listen to advice as Lord Gill or some other potential candidates out there might be. To expand on Colin Keir's point, does there need to be something further in the bill to dampen the potential for conflicts of interest or to provide more checks and balances for the Lord President's role?

Lord Gill: No. I would honestly not be worried about that in the least. In fact, I think that there would be greater cause for concern if I were not to chair the council, because in that case there would be a strong possibility that the council and the Lord President could take divergent views on some important matter. If the council deliberated on something under the Lord President's chairmanship and reached certain conclusions, a wise Lord President would listen to what it said and learn from its collective wisdom on the point. I do not consider that there will be a major difficulty.

Alison McInnes (North East Scotland) (LD): Let us take a moment to explore administrative justice. The policy memorandum proposes that the new council will take over at least some of the responsibilities that the Scottish Committee of the Administrative Justice and Tribunals Council carries out, but the bill does not contain any provisions on that role. Does that proposal need to be explained in the bill?

Lord Gill: This is not the correct moment in history to draft legislation on the administrative justice side of the justice system in view of the uncertain future of tribunals in Scotland and in view of resources. I favour our taking one step at a time. The new council's remit should be restricted to what the bill proposes for the time being. I think that, ultimately, it will be extended to include administrative justice and tribunals, but it would be premature for us to legislate about that at this stage.

Alison McInnes: I recognise what you say about such legislation being premature but, if it were to come to pass, would the council be able to balance all those responsibilities properly? You spoke earlier about the heavy workload that it will have in the initial years, such as writing the new rules.

Lord Gill: That is why we should keep the council to a fairly restricted remit at present. There is considerable cause for concern that if the council were given far too big a remit, it would be overstretched financially and administratively at an early stage and its resources would be spread too thinly. I am keen for the council to get off to a good start on a clear and defined remit, but I do not exclude the possibility of its being extended in due course. In fact, as I said, I would support the idea.

The Convener: There are no further questions from members. I thank Lord Gill very much for attending.

I will suspend the meeting for eight minutes precisely before we move on to the next panel of witnesses.

10:43

Meeting suspended.

10:54

On resuming—

The Convener: I resume the meeting by saying that I cannot count. I was thinking that eight minutes would take us to 11 o'clock, but that is far too long a break for anyone.

I welcome to the meeting our second panel of witnesses, all of whom, I believe, were present for the previous evidence. Lauren Wood is social policy co-ordinator with Citizens Advice Scotland, Ronnie Conway is from the civil justice committee of the Law Society of Scotland, Richard Henderson is the chair of the Scottish Committee of the Administrative Justice and Tribunals Council, and Louise Johnson is national worker on legal issues with Scottish Women's Aid. I thank you all for your written submissions.

Before we move to questions, I should say to witnesses that if a question is directed specifically at you, your microphone will come on automatically. However, if another witness wishes to come in on a question, they should indicate as much to me and I will call them. No one needs to press anything; everything in here is technologically perfect—I hope that everyone heard that. The light will come on and the microphone will be activated.

I seek questions from members.

Roderick Campbell: First of all, I wonder whether the Law Society will comment on my

assessment of the costs of collection with regard to summary legal aid. My understanding is that summary legal aid comes to about £35 million, but the Government estimates that under the new proposals about 80 per cent—

The Convener: Wait, wait, wait.

Roderick Campbell: Am I not being precise, convener?

The Convener: Ronnie Conway is looking a bit discombobulated because the Law Society will come back next week to deal with part 2 of the bill. We are discussing part 1 this morning.

Roderick Campbell: I am sorry, convener. I am having a good morning.

The Convener: Your moment will come next week. We will move on.

Jenny Marra: The two current rules councils deal with a large number of very technical procedures, so how will the proposed structure and membership of the new council be able to handle these changes? I guess that what I am asking about is technical expertise.

Ronnie Conway (Law Society of Scotland): First of all, I thank you for the invitation to address the committee this morning.

Jenny Marra has raised a concern that the Law Society itself has expressed. Under the bill, the Sheriff Court Rules Council and the Court of Session Rules Council will be abolished and replaced by the civil justice council. I understand that concern has been expressed about the number of lawyers that might be on the council, but I think that we should, before we look at what we are getting, think about what we are replacing.

As a Sheriff Court Rules Council member for three sessions—or nine years in total—I should explain the kind of work that a rules council carries out. When primary legislation is passed, either here or at Westminster, it has to be integrated into the existing civil court rules. We get a pile of papers from the draftsperson, and various proposals, then there is a meeting, at which the proposals are nit-picked and quibbled over. The detail is mind numbing; I have to say that it was—even for a lawyer—one of the most boring jobs of my career.

Let me give the committee a taste of the work. The first document that I am holding up is the sheriff court rules, which run to 900 pages, and the other document is the rules of the Court of Session, which run to 2,500 pages. I am in full agreement with Lord Gill's proposal that the rules be harmonised and be written in English that everyone can understand.

The Convener: Are you saying that not even lawyers can understand the rules? That is breaking news from the Law Society.

Ronnie Conway: I cannot possibly agree with that proposition, but I must admit that, from time to time, the rules are impenetrable, even to lawyers.

My point is that the Lord President has set himself a mammoth task. As well as reforming the system, the civil justice council will have to do all the things that the rules councils do at present. As the Law Society suggests in its submission, that will be a job for technicians for the next five years at least; we think that the committee's proposed make-up is light on such technicians.

At the risk of offending the Lord President, I say that it appears that there will be too many judges on the council and that we could lose a member of the Faculty of Advocates as well—I am sorry, Mr Campbell.

The Convener: He looks wounded.

11:00

Ronnie Conway: I said that because, although it is all very well to talk about justice being accessible, efficient and fair, with these reforms the key is in the minute particulars. The persons who know about them are those who are doing it day in and day out, and who have learned from the grind of representation and casework. In its written submission, the Law Society has asked for six council members instead of two. Having considered matters—and recognising the disquiet or unease that it might turn into a council of lawyers talking to themselves about themselves—we suggest today that there should be four council members from the Law Society. Those should be drawn from the specialist parts of the profession, which would give them an advantage over a Court of Session judge, a sheriff or a member of the Faculty of Advocates.

I will make specific proposals. First, we should have a member from the claimant side of the profession for personal injury work. Secondly, we should have a member from the defender side of the profession for personal injury work, which makes up a huge proportion of the work of the courts at present. That would also meet the requirement or suggestion that insurers should be represented somehow on the council. Thirdly, there should be a family law representative and a commercial practice representative. Without those placements, I wonder how the detail of the rules will be properly written.

The Convener: Are there not members of the Faculty of Advocates who specialise, as solicitors do?

Ronnie Conway: Some members of the Faculty of Advocates specialise, but there is no suggestion in the bill or in anything that I heard from Lord Gill today that persons other than generalists will be appointed.

Lauren Wood (Citizens Advice Scotland): Thank you for asking CAS to come and give evidence. I will pick up some of the points that Ronnie Conway has made.

There will be a lot of change in all aspects of the civil justice system, particularly over the next five years. The rules will have to be drafted and change will also have to be monitored in terms of implementation of the making justice work programme. Monitoring will concern not just the technicalities, but how implementation has impacted on the professionals who sit in courts as part of the making justice work programme; how alternative dispute resolution and administrative justice have changed as part of the making justice work programme; and how users are accessing the system differently after five years of implementation.

It is perhaps slightly unrealistic to see the council as a body that will have to cope with all those things at the same time. The way to make the fullest use of the council will be to use committees and sub-committees to deal with various aspects of the changes to the landscape; for example, the rules, how users and judges are accessing the new system, and how alternative dispute resolution sits within it. The council could be used more as a facilitator whose role would be to listen to those committees and sub-committees.

The Convener: Is not that possible under section 13(1)?

Lauren Wood: I think that it is possible. In our written submission, CAS welcomes the fact that the bill provides for committees and sub-committees, but discussions about who is going to sit on the council are difficult because there are so many competing interests. At 20 members, the council will have probably the maximum number of members that it should have. If there were any more members, too many different interests would be represented.

One way of making the council function as effectively as possible might therefore be to use section 13(1) and committees and sub-committees to achieve the technical detail that is required for drafting rules, and to achieve the policy and research functions that are an encompassing part of the changing civil justice landscape.

The Convener: I think that that is quite possible under the terms of the bill. We do not have to have 20 people. Section 12(1) says:

"The Lord President may determine the number of members required to constitute a quorum".

There is also elasticity that allows other committees and sub-committees. Is your point not dealt with in the bill?

Lauren Wood: I suppose that the point that I am trying to make is that, in arguing for extra members, one thing to remember would be the opportunity to have committees and sub-committees. The extra members might not need to be appointed for the whole length of the time of the council. If we think of the council as a body that will last for the next 20, 30 or 40 years, perhaps extra members who can deal with the initial technical details will not have to be appointed as legislative members but could go on sub-committees.

Louise Johnson (Scottish Women's Aid): Good morning, convener and committee members. We appreciate the opportunity to speak to you.

On the point about the technical aspects of the civil justice council, it will not exist just to produce rules. Its functions will include working, under section 2,

"to keep the civil justice system under review"

and

"to provide advice and make recommendations to the Lord President on the development of, and changes to, the civil justice system".

Another of the powers under the bill is to

"provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system".

Lord Gill has just said—I hope that I am quoting him correctly—that the council will

"lay the foundation ... of other projects and will be the vehicle for all legislative reforms"

to be implemented under the Gill review and the making justice work programme. The council is not going to be just about rules.

There is also a concern that the rules are far too technical; courts and their processes should be accessible, but without being over-simplified. There is certainly merit in having—as my colleague Lauren Wood said—individual sub-committees to deal with those issues, but the overall membership of the council must be able to reflect court users. There is no point in having rules, processes or references to legislation or changes that do not take into account the needs and rights of court users, or on which they have not been consulted. To see the proposed council as being a vehicle for looking only at technical aspects narrows it down; its functions will be much broader than that. In the circumstances, Scottish

Women's Aid will certainly push for a broader membership.

Richard Henderson (Scottish Committee of the Administrative Justice and Tribunals Council): I find myself in a somewhat difficult position in that my council has come before the committee because of what is not in the bill rather than because of what is in it, and the consequences of what is not in the bill becoming part of it mean that we will have to look at the whole structure and nature of administrative justice to see how it can be absorbed into a structure that will deal primarily with civil justice. If the civil justice element of the council is reduced—if I may put it that way—to rule making, it will be much more difficult to broaden the council's structure appropriately to bring in administrative justice.

The Convener: I think, however, that you accept Lord Gill's point that constitutional issues that are in the air might impact on your area.

Richard Henderson: Absolutely. There are many balls in the air at the moment, some of which might land fairly soon—as long as they do not hit me.

Jenny Marra: We have had an interesting discussion about the council's members. I want to play devil's advocate for a moment. You talked about technical expertise—I appreciate completely that we are talking about complicated stuff. You also held up the book of rules. If the council is comprised completely of lawyers, the rules are less like to be comprehensible to the lay person.

Ronnie Conway: I think that you heard what the Lord President said: there is no prospect that the council will be completely comprised of lawyers.

Jenny Marra: What about the extra members that you have proposed?

Ronnie Conway: I am looking to shove people out of the balloon, so to speak. I do not quibble with the number of lawyers that is proposed in the bill. What I am saying is that the make-up should be different to reflect specialties.

Jenny Marra: Given the concerns among people who are not necessarily practising law in that area—you cited the example of insurers and family law practitioners, and people who have legal experience or qualifications in that area, who are perhaps working in different fields now—would it be possible for such people to be part of that council, rather than practitioners themselves?

Ronnie Conway: It comes back to what is going to happen over the next five years. If this meeting were to take place five years from now, the answers might be rather different.

Louise Johnson spoke about policy. As the Lord President indicated, policy comes from the Government, first of all. We are not starting with a blank sheet of paper; we have the Gill review, which is—whatever one thinks of the minutiae of it—a tour de force and a tribute to the Lord President's power of analysis. The review sets out what he wants to have done over the next five years. We are talking about mechanisms that will ensure that that is done for the benefit of the people of Scotland, and a huge element of that relates to the rules.

Before I came here, I wondered whether the Lord President would suggest that we could outsource rules to a rules committee, which is what happens in England, where there is a Civil Justice Council and the Civil Procedure Rule Committee. However, I think that the Gill review says that for reasons of economy everything has to be lumped together.

As I have said, the council will be implementing harmonisation, simplification and so on—it will deal with all the new stuff. However, it will also have to integrate the Gill reforms into rules that are workable. Lawyers have a vested interest in that area, which is that they have a system of rules that is workable for clients and for the people of Scotland. That is such a central point that it would not be appropriate to outsource rules, for example to a sub-committee, and for those rules then to be handed up to a civil justice council that does not have the necessary technical know-how. It is a question of nuts and bolts.

The Convener: Forgive me if I summarise this wrongly, but I think that your line is, "Too many judges and too many advocates."

Ronnie Conway: Yes.

The Convener: There are practising solicitors who instruct counsel, and those solicitors understand the rules of the Court of Session as well as the sheriff court rules. However, there are lawyers who, because of the areas in which they practise, do not know the Court of Session rules. Such lawyers are similar in many ways but are also different.

What is the problem with having a balance of practising advocates, who would be much more au fait with the Court of Session rules, practising solicitors, who are more au fait with the sheriff court rules, and—I am looking at section 6 on the composition of the council—one judge of the Court of Session and a sheriff principal or sheriff?

Day to day, rules are like the carpenter's tools; you know what to apply at certain times and you know whether you have applied the wrong thing. If you practise for years, you get to know the rules because it would get you in the soup if you did not. What would be the problem with such a balance? I

was, in my time, a solicitor who instructed the Faculty of Advocates. I will say for the faculty, in its defence, that there are specialists; one goes to certain advocates for certain things—commercial law, family law, delictual actions, reparation or whatever. That seems to me to be a reasonable balance of the technicians, as it were—the people who have to know when to apply the tools that are the rules.

Ronnie Conway: To use your analogy, convener, a carpenter will probably know how to make one kind of thing. I suggested that we are talking about a number of different kinds of things. The main areas—as I indicated—are personal injury, family law and commercial practice. There is no doubt that there are advocates who are specialists, but as far as dealing with day-to-day business—the grind of casework—is concerned, I suggest that solicitors have unparalleled experience and expertise. On the constitution of the current rules councils, there are five solicitors on the Sheriff Court Rules Council and five solicitors on the Court of Session Rules Council, so the proposed change is certainly in favour of the Faculty of Advocates.

11:15

The Convener: I did not think that I would be defending the faculty so robustly, but I am afraid that I have to challenge you. I cannot see how having two practicing advocates and two practicing solicitors on the council is not a balance in the circumstances, when there will also be a Court of Session judge and a sheriff principal or a sheriff, who are all very familiar with their own and the other territories. To suggest that the faculty does not have specialists and does not have specialist knowledge of Court of Session rules, and conversely, that solicitors have specialist knowledge of sheriff court procedure is really quite wrong. In my time, I have certainly found some advocates to be unaware of certain things in sheriff court procedure and, vice versa, I have found some lawyers, especially those from out of town—outside of Edinburgh—to be unaware of Court of Session rules, which they and the faculty have to keep their eye on. I think that there is a reasonable balance, to be frank.

Ronnie Conway: It is a question of how the council is described and who is invited. I suggest that the solicitor profession is underrepresented and that a better balance would be to have four solicitors representing the particular specialties. For example, I made the point about the personal injury bar. No faculty member considers himself or herself to represent the pursuers or the defenders, whereas organisations exist that would represent claimants and defenders. That would be an easy way of getting those interests directly into the council.

The Convener: I do not want this dispute to dominate the meeting, but I disagree quite fundamentally with some of what you have just said.

Roderick Campbell: I am still a bit troubled. You talked about specialist solicitors, but what is there to stop there being a sub-council specialising in, for example, personal injury practice and rules, with a big complement of practicing solicitors of the type that you described—pursuers and defenders? Why could they not contribute on a sub-council basis?

Ronnie Conway: As I said, I expected to hear the Lord President say that today, but there has been no suggestion that sub-councils will be formed in those ways. That would be one way of addressing the problem, but there would still be the difficulty that things would go to the rules-making body, on which there would be generalists who would not really know what they would be signing off. That is really what I am saying.

Graeme Pearson: I will not presuppose the answer to this question; I am spectating on this conversation. Lord Gill, in his review, identified 206 recommendations for improving the administration of civil justice—despite the tomes of rules that you have in front of you. Will the council perhaps have an actual function of changing the experience of the customer—the client group—rather than engaging in the technicalities of the people who are involved as technicians in the system? Will it have not quite the same focus on your rule book, and be more about trying to draw the outcome to counsel's attention, so that they understand whether or not the system works? Is not that really the function that the council will have, rather than re-writing your rule book?

Ronnie Conway: I am repeating what is said in the bill, Mr Pearson—it is one of the things that the council will be tasked with. The idea that the rules are somehow just technical matters and do not impinge on the customer experience is not correct. It is easy to make rhetorical statements about the need for justice to be fair, accessible, free for all and so on, but it is only once we get down to the minutiae—the minute particulars—that that promise is kept or broken. In my submission, the rules are of critical importance.

Graeme Pearson is right—you heard Lord Gill say that he hoped that there would be a culture change—but I would like to raise two cheers for the civil justice system that we have at present. Not everything that Lord Gill said in his review was critical of that system. There have been two recent reviews by Elaine Samuel, who is a well-known Government researcher. The first was a review of

personal injury procedure in the Court of Session and the result was the best report card that any justice system could ever get. The result was the same with the review of the Glasgow commercial court system. The challenge as far as personal injury is concerned is not to replace what is there, but to replicate it in a different forum—in the sheriff court.

There will be a massive downshift of work from the Court of Session to the sheriff courts. In some respects, that is counterintuitive, because the sheriff courts are where the problems are, at the moment. The sheriff courts do not have the resources, the work is logjammed and there is a culture of delay, adjournment and so on. The idea is for that to get downshifted again to summary sheriffs, which is a massive undertaking. For what it is worth, I think that Lord Gill is entitled to expect much assistance from the people here and from the legal profession to make that work. That is the change in culture and the improvement for the customer that the civil justice council would—one would hope—achieve.

Louise Johnson: It is interesting, following the comment about a change of culture, that one of our concerns is the focus of the work of the council on commercial, personal injury and consumer issues: there has been no mention of family. Given that a major case has just been decided in the United Kingdom Supreme Court—the B v G case, as it is referred to colloquially; I can give the committee its full citation—in which Lord Reed criticised the culture in the Scottish civil justice system and the way in which it approaches family and child welfare, and given that the Sheriff Court Rules Council is looking at child welfare hearings and has been tasked with continuing that work, there will be a strong emphasis on looking not just at the rules, but at the procedures of family law.

The Gill review covered issues such as bar reporters, case management by the judiciary, hearings and agreeing evidence—matters that, technically, are not strictly rules but are procedural, but which affect court users. Whatever the spread in the council, it will be necessary to have, as my colleague Ronnie Conway said, solicitors who are cognisant of the day-to-day running of the sheriff courts—especially if there is a move to bring business down from the Court of Session to the summary sheriffs.

We completely opposed the suggestion that summary sheriffs deal with child welfare hearings, because we saw that as a deprioritising of cases involving children. Regardless of that, a lot more business involving children and families will fall within the ambit of sheriff and sheriff summary courts, so it will be necessary to have professionals who are cognisant of the changes and how to effect them; to have a judiciary, whether Court of Session judges or sheriffs, who can get to grips with those changes; and to have organisations—I make it clear that I am not referring only to Scottish Women's Aid—that represent court users on family issues. One of our major concerns about the proposals was that they seemed to be heavily loaded towards dealing with consumer and personal injury issues. Family matters, which form a major part of the business of the courts and are incredibly important for the welfare of children, should be prioritised. Any changes must include user involvement.

Lauren Wood: To go back to the point that Mr Pearson made, we said in our submission that we see the body taking "strategic oversight" of the civil justice system as a whole for end-users and practitioners and for the system as it functions and interacts. For us, the experience of end-users is of ultimate importance, but that depends on the experience of the practitioners within the system—whether judges or lawyers—and on the interaction of different tiers of the legal system.

The Gill review and the making justice work programme see alternative dispute resolution as playing a bigger role as part of the civil justice system. We believe that that should be considered from the outset of the civil justice council. In looking at the civil justice system, we should look at not only the Court of Session and the sheriff courts, but administrative justice and alternative dispute resolution, how they fit together and how the experience of practitioners impacts on end-users. The rules are certainly very important for that, but the culture shift is equally very important.

We also see the council as having not just oversight of how things change as the Gill review and the making justice work programme are implemented, but a vital role in a sustainable civil justice system. For such a system, it is important to look at the council as being a thing of longevity. We certainly see it as having not just a rules function but as something that will look at the whole system as it relates to every person who is likely to participate in it and that will look at the system for the long haul.

Richard Henderson: Once again, I am hesitant about entering into the debate, because what I will talk about is simply a possibility. If we begin to talk about administrative justice and tribunals being brought within the purview of a civil justice council, we must ask ourselves what we will bring in. Administrative justice and tribunals are dealt with separately. In this context especially, civil justice is seen as civil courts and civil court reform, down as far as rule making. Administrative justice and tribunals deal with an area of policy making that is quite separate and distinct from civil justice policy making. Administrative justice exists in the context

of the citizen and the state and their disputes, which is where tribunals come in.

The current committee and council are, for example, looking at the principles that should underlie administrative justice. Yesterday, the Scottish committee published a report on decisions for which there is no appeal. In areas such as housing and community care, decisions are taken by Government or Government agencies and no appeal is open to the citizen. That is a pretty sensitive area of policy work, and you need to ask yourself how appropriate it would be for that type of policy work to go to a civil justice council that would start out looking at civil court rules. Is it appropriate or likely that you would get the end result that you might be looking for in a body that is composed principally of lawyers?

Roderick Campbell: For the record, I want to follow on from a point that Lauren Wood made. Louise Johnson referred to a Supreme Court case. Perhaps it is important to stress that one of Lord Reed's comments was that it is rather easier to change the rules of the court than to change a prevailing culture. Do you agree with that?

11:30

Louise Johnson: Not necessarily. Rules can be changed, but that does not mean that people will follow them. Last Friday, the Murray stable of advocates and the Scottish Child Law Centre held a seminar on those issues. We came to the conclusion that what was needed was not a change in rules, but a change in training and attitude. Rules exist to be followed, but they can be followed only if we have the culture of following them. We can create all the rules that we like but, if people do not want to follow them, there is no point in creating them. The change in attitude is the most important change.

There is no point in reinventing the wheel. We have a wheel, and we need to work with what we have. The issue with B v G and the proposed Scottish civil justice council is that we need to ensure not only that the processes are fit for purpose, but that people get the best out of their interaction with the civil courts.

It is not only a case of changing the rules. We can have all the rules that we like, but if the correct culture does not exist, they are no use. The culture must change. We cannot reform the system without a change in mindset. Lord Gill suggested some such changes in, for example, his proposals on judicial case management. They are not necessarily about rules alone, but a matter of thinking about how the process works.

Does that make sense? You do not look as though you are convinced.

Roderick Campbell: It sounds to me as though you agree with Lord Reed.

Louise Johnson: It is not simply a case of producing rules because, if we have rules and people do not want to follow them, they are entirely inconsequential. The way forward is to create an overall mindset that wants to follow the process. However, it is not a question of mindset on its own; we must have the processes to follow in order to bring about the change.

The problem is that the way in which some cases are dealt with means that the rules are not right. Therefore, people have the mindset of not following the rules for whatever reason or those rules do not work for court users. For instance, I have heard a lot of comment that form F9, which is used for taking children's views, is not very useful for children. We have a rule and we might have a mindset about changing how to use it but, unless people understand why they have to change in the first place, it will not happen.

The Convener: I assume that you would make a distinction between not following the rules and rules not being appropriate. Any solicitor or advocate who did not follow the court rules would soon find that the judge or sheriff was telling them something. However, I think that I follow your argument and that you are saying that the rules do not always act in the interest of fair process and justice rather than that they are not obtempered by the lawyer or the advocate.

Louise Johnson: Yes. It is not that they are not obtempered, but that they are not applied in the intended spirit. That is the problem, as is the fact that they are perhaps too complex or too difficult in their construction to do what they are trying to achieve. Therefore, we need to ensure not only that the processes are simplified, but that we want the processes to be simplified in the first place.

The Convener: As distinct from saying that people should not follow the court rules; that would be inappropriate.

Louise Johnson: Yes.

The Convener: I got there before you, Mr Conway. I am beginning to slip back into a previous profession. I must not do that.

Lauren Wood: There has to be a culture change, even if there is a change to the rules.

In our submission, we mentioned the Citizens Advice Edinburgh in-court mediation service, which works in Edinburgh sheriff court. I admit that I noticed a mistake when I read over the submission again this morning, so I will submit an amendment. The sheriffs do not send on more than 90 per cent of the civil business in the court to the mediation service, because that would be overwhelming; they send on 90 per cent of the

small claims business. More than 80 per cent of the cases that they submit to the service are resolved through mediation very quickly—often within an hour.

The mediation project has been going for 10 years—perhaps just slightly less than that—and, if we track the number of referrals over those 10 years, they demonstrate a significant culture change. The sheriffs in Edinburgh sheriff court are now open to mediation and to making referrals to the service. Thus, they are open to alternative dispute resolution as an effective means of resolving disputes. However, it takes a long time for a change in culture to filter down through the system and to be implemented.

Culture change and rules have to go hand in hand, but there also have to be opportunities for that culture change to happen. For the civil justice council to look at the civil justice system as a spectrum that includes many tiers is the best way in which to encourage that change to happen alongside the rules.

David McLetchie: I suppose that the public would look at all this and ask whether the change will make civil justice more accessible to people, whether we will get speedier resolution of cases and whether we will have a reduction in the costs of resolving cases and disputes. Why is the creation of the civil justice council more likely than the sustaining of the existing system of rules councils to achieve those positive outcomes?

Lauren Wood: The initial perceptions of people who enter the civil justice system as users—people who seek justice—are often different from the justice that they end up following. A person who has a claim against somebody who has not built their fence properly does not necessarily expect at the start of the process that they will end up standing in front of a sheriff in a sheriff court and following all the rules that go along with that.

In terms of streams of accessible justice, to look at the civil justice system as a broad spectrum is the best way in which to ensure that people can access justice more effectively. It is important to have opportunities for mediation and other forms of dispute resolution where they are called for. Such options are not the best thing for every case, but they are certainly the best thing for some cases. Some cases should never make it as far as the sheriff court. The sheriff court process puts people off pursuing their civil claim if they are not supported by lawyers and professionals in the field. If alternative dispute resolution is embraced as much more of a cultural part of the civil justice system, people's access to that outlet will be a lot easier, and if their claim is not resolved there, it can be referred on.

One problem with the in-court mediation project at Edinburgh sheriff court is that cases have to be referred to it by a sheriff, and the case then has to be closed in front of a sheriff. Although 80 per cent of the cases are resolved in mediation, a lot of court time is still spent on referring cases to mediation and then closing them. We could take things a step further and let people access alternative dispute resolution at the earliest stage in their dispute, without having to go before a sheriff first. That would remove another barrier to people being able to access justice quickly and efficiently. The approach will not be appropriate in every case, but it is certainly appropriate in many cases that might otherwise end up before the sheriff court.

The Convener: How would that be achieved under the bill?

Lauren Wood: We see the policy role of the civil justice council as something that will deal with that. It will deal with practitioners' preconceived ideas about what alternative dispute resolution is and what it can be. We see a possible research function for the council, which could commission research on how people access justice and how people's perceptions of access to justice change during the implementation period of the making justice work programme.

We envisage that the council's policy function will be very different from being just about rules, and we see that as an important aspect of maintaining access to justice for end-users of the system.

The Convener: That is interesting. However, you are not saying that ADR should be mandatory. Lord Gill said that he would not want it to be mandatory for there to be ADR before someone goes to litigation, and you would not want that either.

Lauren Wood: No, but that is part of the culture change that must be considered. An important function of the council will be to monitor the change in culture whereby solicitors understand what alternative dispute resolution is.

I graduated from university quite recently—in the past five years. I studied law, but during that time alternative dispute resolution was not mentioned once. Perhaps culture change could start there, by letting law students know that such a mechanism exists and that the courts are not the only way forward.

The Convener: I am quite shocked at that, because around eight years ago I went to an event in Baltimore as convener of the Justice 1 Committee and saw that ADR mediations were taking place in major commercial actions, not just in family law and so on. At the end of the day, something must be agreed, someone will win or

there will be a compromise, so the process saves everyone a lot of money.

Lauren Wood: When I left university, I was particularly interested in mediation and I pursued the subject to expand my knowledge, but it was not mentioned at all during my university career.

The Convener: Well, Mr Conway, we will not go down that track just now with the Law Society of Scotland—I guess that that is for another day. Do you wish to come in at this point?

Ronnie Conway: To answer Mr McLetchie's question, there will be a single overarching organisation with responsibility for what are currently disparate strands. It will be obliged to publish an annual plan and to be accountable to users in a way that one must concede that the current councils are not, and—to pick up on what Lord Gill said—it will be the vehicle for implementing the Gill reforms.

Do I think that the Scottish civil justice council will result in cheaper, better access to justice? It should do.

Richard Henderson: As we are talking about cultural change I do not feel the same trepidation about coming in, but we are talking about a long-term process and getting it right before we start. If we start by saying that we will have a civil justice council but we have not defined what it is going to do, and if we say that we will look at the rules and implement the Gill reforms, we have two competing policy objectives. One is narrow—to implement the vital Gill reforms—and the other is to achieve a culture change in the way in which justice is delivered in this country. If we are going down that road, we might be able to put in administrative justice.

In September 2010, the Ministry of Justice under Kenneth Clarke said that it was going to merge the tribunals and the uniform branch courts of judiciary in England and Wales. We are still waiting for the consultation document on that, because it is a vastly more complex operation than may have been understood, and certainly more complex than the Ministry of Justice understood it to be at that time.

If you set up a civil justice council and then you want to tack on administrative justice, you are tacking one culture on to another while trying to change the culture overall. We submit that that would not work.

Lauren Wood: We said in our submission that the civil justice council should be considered in relation to the outcome of the making justice work programme, rather than just in the context of this point in time. The programme's outcome will represent a very different civil justice landscape than is currently the case, and will include things such as alternative dispute resolution.

The best way to embed the culture for which we are aiming from the start would be to consider the council's make-up. There should be people who represent interests such as alternative dispute resolution so that that is embedded in the council's culture and functions from the outset, and not just bolted on as and when it comes up as an issue in the civil justice landscape.

Louise Johnson: On the theme of culture change, one change that the council must achieve is to ensure that court users are central to the process, because people going to court and being represented is what it is all about. We must ensure that, when all the recommendations of the Gill review are processed, court users are at the centre of the system and that the Scottish civil justice council takes that into account.

11:45

I was pleased that Humza Yousaf mentioned domestic abuse. Part of the culture change is to recognise that it is not a dispute, so it cannot be dealt with by dispute resolution. Domestic abuse is not about two parties warring; it is about power and control. In relation to the culture change and involvement of court users, we must be aware that ADR mediation is not appropriate in domestic abuse cases, because it is not safe. When there is any channelling, triage or a process that would lead people towards mediation as a first opportunity to resolve the problem, it should be made very clear that the person does not have to go down that road. The opportunity for mediation is there but it is vital that if the person does not want to take it, they do not have to and there will be no adverse implications or adverse suggestions as a result of the fact that they did not want to use it.

As Humza Yousaf said, we have come across situations in which it has been suggested or implied to women that if they do not try mediation, they will be regarded as being obstructive and so on. We want people to feel that they can access the civil justice system at the level that they want and that no punitive measures will be taken and it will not have an adverse influence if they do not want to go down a certain course. That will have to be taken into account in the change of culture and mindset in the justice system.

The Convener: Is it not fair to say—heaven forfend that I paraphrase Lord Gill—that Lord Gill did not want ADR to be mandatory because that is just not appropriate?

Louise Johnson: He said that it should not be mandatory, but it depends on how you frame the system and the processes that people have to go

through in the first place. If ADR is an option and, even though it is not mandatory, there is a presumption that it would be considered before you do anything, that is fine as long as no adverse inference is drawn from the lack of mediation or the reluctance to undertake it. There must also be a realisation that in some cases it is not appropriate.

We are concerned about the end-product. It is vital that you enter the civil justice system at whatever stage is appropriate for you and that it is not considered that you should have done something else before you get to that stage.

The Convener: Does Mr Conway want to comment?

Ronnie Conway: Yes.

The Convener: I have become good at interpreting hand signals.

Ronnie Conway: I will comment briefly on ADR. I mirror what the Lord President and Louise Johnson have said. First, ADR covers a range of possible scenarios, including arbitration and mediation.

A practical issue that I should have mentioned in responding to Mr McLetchie's question is that pre-action protocols currently exist for certain types of claims. They are very successful, but they do not bite because there is no mandatory sanction on either lawyers or insurers to comply with them. It is anticipated that the civil justice council would integrate those protocols into the rules so that there would be sanctions for failing to abide by and comply with the protocols.

As far as mediation is concerned, I confine myself to saying that it is not the silver magic bullet that some of its proponents claim it is.

The Convener: Would Humza Yousaf like to come in now?

Humza Yousaf: Yes, but not on that issue. I was interested to hear what was said and it is something that we will follow up—I certainly will—to see how it progresses.

The discussion that has taken place between the panel members has been incredibly informative. It probably reasserts the maxim that the less the politicians talk, the more sense things seem to make.

The discussion that has flowed, especially the first half of it, reaffirmed for me that the flexibility in the bill in respect of membership of the council is probably a good thing. However, my concern is that if the composition of the council is to be as suggested in section 6, there must be more checks and balances with regard to the Lord President's power of appointment. Although the Lord President will have to consult advocates, the Law Society and Scottish ministers, do you feel that there need to be more democratic—if I can put it that way—checks and balances?

Of course, that leads to a wider question, which was raised by one of my colleagues in the previous session, about the Lord President's role and general powers with regard to disqualification, appointments, the chairing of meetings and even setting the quorum for a meeting. Does that concern you?

In summary, I am interested to hear your views, first, on the council's composition and, secondly, on the Lord President's powers.

Ronnie Conway: You have already heard what the Lord President has said. I might well answer your question differently at a different time. As well as highlighting the challenges of what the Lord President has to achieve over the next five years—which I will not repeat—I should mention the kicker: there is no money. We are asking him to undertake what I think is a colossal and extremely ambitious job. As I have said, I might not give the same answer at another time, because I appreciate the points that Mr Yousaf has made, but for what it is worth I think today that we should let him get on with the job and we will put our shoulders to the wheel.

The Convener: I do not think that you responded to a question that has not really been delved into: whether there is too much power in the hands of one person—in this case, the Lord President.

Ronnie Conway: I do not think that this Lord President has too much power in his hands at this point in time.

Lauren Wood: I was pleased to hear the Lord President's comments about the public appointments process, which I think mitigate a lot of our concerns about the appointment of members and how democratic the process might be.

As for the Lord President's powers, we harbour concerns that there is not much of a separation of power between the Lord President and the council, particularly if the council itself is to be standing in 40 years' time. The council is to act as an advisory body but that advice will always be slightly compromised if the issues that it is advised to look into are suggested by the Lord President. With this Lord President, that is not so much of an issue, because Lord Gill is the person best placed for the council's oversight of the next five years of the making justice work programme. However, at the very outset of the process, we should not be skewed by the thought that Lord Gill will be Lord President for ever; there is always a chance that, in years to come, the separation of powers will

become an issue. The issue certainly needs to be looked at again.

Humza Yousaf: I wonder whether you share another concern that I have in this respect. During the break, I and a colleague were discussing an issue that I should have pursued slightly further with the current Lord President, who is wise and about whom I agree there is not so much concern. As you have said, we need to take into consideration that a future Lord President might not be as wise or as benevolent as the current one.

I do not wish to quote the Lord President unfairly but there was a suggestion that an issue would arise if his or another Lord President's opinion diverged from the council's. That suggests to me that one opinion—in this case, the Lord President's—would be asserted over that of the council. Do you share that concern or did I mishear what the Lord President was saying?

Lauren Wood: It is a concern, particularly given the Lord President's range of powers in relation to the body. Again, I do not think that it is fair to make a judgment on the basis of the person who is Lord President at this time and who, as I have said, is best placed to lead this programme. There is a concern about whose opinion will prevail if the independent advisory body is advising the chair one thing and the chair is the person who is making the decision.

One possible way to get round that would be by presenting reports and recommendations not only to the Parliament but to Scottish Government ministers and requiring them to take account of the recommendations that are made. That goes back to our interpretation of the council's policy function. If the council were to look at the policy relating to end-users, in order to take the independent advisory function a step further, it should present its advice to the people who are making the policy.

Humza Yousaf: That is interesting.

Richard Henderson: The Tribunals, Courts and Enforcement Act 2007 followed the Leggatt report. That report said that the primary interests in tribunals and administrative justice should be the user. If the bill aims to implement the Gill reform, the most efficient way will undoubtedly be for the Lord President to chair and deliver that reform. If, on the other hand, you are looking for the culture change in a broader policy context as far as civil justice and its development are concerned, placing the user at the centre—as is the case in administrative justice and tribunals—becomes, in our view, essential.

That means that there must be something that is separate and distinct from the Lord President. I am absolutely sure—I am not just saying this—that he would do the job properly. It is simply the niceties—the appearance—that we are talking about. However, to put the user at the centre means that there is a structure that is separate and distinct from the courts, rather than being led by the courts.

Louise Johnson: I echo the concerns and comments that have been made by my three colleagues on the panel.

In terms of representation, the Lord President was clear in saying that it would be appropriate to consider what interest groups it would be appropriate to include in the public advertisement of the process and therefore to sit on the council—that is absolutely right. However, that is the view of the current Lord President. Without safeguards being written in—especially relating to the council's membership—we cannot ensure that we would always have such an enlightened view and that, as Richard Henderson said, court users would be regarded as central to the process. For that reason, and to give a better spread of representation, it would be preferable that the

"up to 6 other persons considered by the Lord President"

—known as LP members—should certainly be court users, lay members and representatives.

Although the current Lord President is open and inclusive on the matter, we echo the concern that we must ensure that future Lord Presidents, including how they run and focus the council and how it will report, will be equally democratic. That underlines how important it is that the council should report and be accountable to ministers and Parliament.

Alison McInnes: I want to push a little further the issue of administrative justice and tribunals. Lord Gill and Mr Henderson have alluded to it perhaps being premature to discuss the council's role with regard to administrative justice and tribunals, but there is a real danger that if we do not talk about that a vacuum might be created.

Do we therefore need a mechanism in the bill that could be triggered in the future? Perhaps more fundamental than that, are the two cultures incompatible? I would be interested to hear from other panel members as well as from Mr Henderson whether that is the case or whether there are benefits to be had from both the organisations being under one umbrella.

12:00

Richard Henderson: The cultures are different, but that does not mean that they are incompatible. The cliché is that tribunals are inquisitorial and courts are adversarial, but it is better to see things as a spectrum. Employment tribunals are in the middle of the spectrum and they are, in effect—Shona Simon probably would not forgive me for

saying this—courts by any other name. They are adversarial, with a highly legalised procedure. However, a tribunal such as the private rented housing panel focuses much more on the resolution of user problems and will, as it were, get its hands dirty in trying to solve the problem.

There is therefore a spectrum in that regard, as in all things, but I believe that the culture of a tribunal is to seek to solve a problem and that that of a court is to resolve a dispute on the basis on which the dispute is brought to it. One body therefore seeks to resolve something, while the other seeks to take the pleadings as they are presented and make a decision on that basis. If your pleadings in a court are wrong, justice may be on your side but you will not win. However, one hopes that if justice is on your side in a tribunal, you will win.

There is a cultural difference at that level between courts and tribunals. There is also a cultural difference in the sense of the formality or informality of the proceedings. Again, though, that is not a permanent situation or a question of incompatibility.

If we get beyond courts and tribunals into the administrative justice area and talk about policy, the nature of the policy is markedly different from that which one would talk about in a civil justice council context. The focus of administrative justice is on the citizen and the state; therefore, of necessity, a body that looks at that relationship is looking at the position of the powerless against the powerful and at issues that have a political overtone. A recent example of that from the south was the Home Office decision to withdraw London Metropolitan University's accreditation, which affected not only the university's ability to undertake its function but the position of individual students. Their position is a consequence of an administrative decision that was taken on a different set of circumstances.

Another situation in England and Wales, although it is perhaps slightly further removed, is the current difficulty regarding the examination diet. From one point of view, if it was the case that the criteria for making examination awards were altered in the course of the year, that is perhaps slightly disturbing. That takes us into the question of the principles that underlie the operation of the administrative justice component in the examination board's decision and how the board came to think that it could do that sort of thing. I am prejudging most awfully on the basis of what I understand to be the position, but it becomes a significant political issue.

The classic separation of powers is that between the Executive, the legislature and the courts. That separation allows courts to deal with what happens in the courts and we should not expect the courts to come out of that and begin to operate in the Executive area. Administrative justice requires us to begin to look in detail at the interplay involved in how Government works. There is therefore a real cultural difference at that level between civil justice and administrative justice. Does that make any sense to you?

Alison McInnes: Absolutely. Thank you.

The Convener: I think that we should keep them separate, because administrative justice seems so different from the court process and court rules.

Richard Henderson: Again, I think that, at this stage in the development, if you were to put the organisations together, you would be doing so on a wing and a prayer. Until you have analysed the differences and decided whether they are fundamental, that will be the case. In some areas, the differences are utterly fundamental; in others, they are cosmetic.

The Convener: I think that it is the political implications that follow from the differences that make the proposal incompatible with the depoliticisation of courts, in a sense.

Jenny Marra: I have a very quick question, which I address to all of you.

The senior public law professors of Scotland have recommended that the deputy chair of the council be a layperson. Do you agree with that proposal?

Lauren Wood: That is something that we state in our submission. We think it would be a positive way of maintaining the user interest if there were at least the opportunity for the deputy chair to be a layperson.

Ronnie Conway: I have no particular views on the matter. I keep going back to the same chorus, as it were. I am content that the current Lord President resolve these matters. If this committee were somehow to take comfort from the deputy chair being a layperson, I would, on behalf of the Law Society, have no objection to that.

Louise Johnson: I agree with my colleague that the deputy chair should be a layperson. That would take forward the spirit of inclusion and consideration of court users' interests and would effect the culture change that has been so great a focus of the discussions today. Allowing a layperson to have an opportunity to chair such a high-level committee will help to ensure that the discussions have parity and that court users are represented in discussions not only of rules but of policy, procedure and, perhaps, legislation.

Richard Henderson: Apart from that, if you are trying to signal that the user is coming to the front and that matters are not in the hands only of the

professionals, it would be immensely valuable to have a layperson as the deputy chair.

The Convener: This should be the last question. I should not have said that—nobody put their hands up now, please.

Graeme Pearson: I have what is, I hope, a practical question. Given what you have said about your confidence in Lord Gill and your concerns about the ability of a future Lord President to match his wisdom, do you think that, in order to achieve reform and progress in civil justice, we should confine ourselves to what is in the bill and put a mark on the calendar to revisit circumstances two or three years down the road to see how the measures have worked and decide at that time whether we want to insert some balancing measure to take account of the fact that Lord Gill has achieved his reform and whether we want to address what might be termed the broader, more philosophical issues?

Ronnie Conway: For what it is worth, I think that that point is well made, Mr Pearson. It is unlikely that the role of Lord Gill or any Lord President is going to provoke any kind of constitutional crisis but, if it does, I am sure that the people in this building will be the first to know about it. Further, one would hope that this committee would take an active interest in the progress of the making justice work reforms.

The Convener: I saw nods of agreement among panel members, so we need only have brief answers.

Louise Johnson: We need to start as we intend to go on. The reforms to the structure, the membership, the powers and the functions should be implemented now. We should have benchmarking in five or however many years' time to see how things have gone, because we might then need to extend user membership, to use committees more or to consider how the council's powers and functions operate. To indicate the intention of the Parliament, of ministers and of everyone who is involved in the process to ensure that the process is accessible, democratic and accountable for court users, all the suggestions that have been made should be implemented now.

Richard Henderson: The suggestion of a staged approach from James Wolffe in the second submission from the Faculty of Advocates is excellent. The process is so complex that it must be undertaken in a measured and considered way over time, rather than in one big bang.

Lauren Wood: Such an approach is a good suggestion to mitigate a lot of the difficulties that we have discussed in relation to the priorities that we each bring to the table. It has been clear throughout the discussion that the rules-making function seems to be of primary importance at the moment, whereas it seems that the policy function will be considered later. I would worry if the policy function was forgotten and buried under the rules function until the council was reviewed.

The Convener: I thank you all for your helpful evidence.

Subordinate Legislation

Parole Board (Scotland) Amendment (No 2) Rules 2012 (SSI 2012/197)

12:11

The Convener: Item 3 is consideration of one negative instrument. The Subordinate Legislation Committee has drawn the rules to the Parliament's attention on the ground that they were not laid at least 28 days before coming into force—[*Interruption*.] I ask people to leave the room more quietly, please. However, the committee was satisfied with the Scottish Government's explanation for the situation.

As members have no comments, are they content to make no recommendation on the rules?

Members *indicated agreement.*

Decisions on Taking Business in Private

12:12

The Convener: We return to item 1. For clarity, I will take the issues separately. Does the committee agree to consider items 4 and 5 in private?

Members *indicated agreement.*

The Convener: I will clarify the position on item 6—the situation is partly my fault. We will look at our full work programme next week, after the Government has announced its legislative programme—we have to know that first. To allow invitations to give evidence to be sent in good time, item 6 has the narrow purpose of allowing the committee to decide whether to hold an evidence session on the impact of the media on the criminal justice system, on which we have a debate coming up.

The purpose of item 6 is to allow the committee to decide whether to hold an evidence session on Tuesday 2 October on the role of the media in criminal trials. If we agree that that would be sensible, we will agree on the witnesses for the session, because we need to give notice to people, particularly in certain areas of work. With the committee's leave, I intend to place consideration of the full work programme and of how we deal with it on the agenda for next week's meeting.

Is the deputy convener content with that? We will not discuss the full work programme today; item 6 has been narrowed down to a particular issue. Next week, we will discuss the full work programme and how we deal with it.

Jenny Marra: If item 6 is not a discussion of the work programme and is a discussion in detail of the witnesses whom we will invite for a specific session, I am happy for it to be taken in private.

The Convener: We will move into private for item 4.

12:14

Meeting continued in private until 12:43.

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