The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 18 September 2012

Session 4

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JUSTICE COMMITTEE
26th 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)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kenny MacAskill (Cabinet Secretary for Justice)
Gordon MacDonald (Edinburgh Pentlands) (SNP) (Committee Substitute)
Colin McKay (Scottish Government)
Dr Cyrus Tata (University of Strathclyde)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 18 September 2012

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

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 26th meeting in 2012 of the Justice Committee. I ask everyone to switch off completely mobile phones and other electronic devices because they interfere with the broadcasting system even when they are switched to silent.

Apologies have been received from David McLetchie and Alison McInnes. I welcome back Gordon MacDonald for perhaps his final time as a Justice Committee substitute. Is he here simply because he loves our company?

Agenda item 1 is a decision on taking business in private. Do members agree to take item 5 in private?

Members *indicated agreement.*

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

10:02

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

The first witness is Dr Cyrus Tata, who is a reader in law at the University of Strathclyde. I welcome him and thank him for his written submission, which we have all received.

I remind members that we will focus on part 2 of the bill in this part of the meeting, and I invite them to ask questions.

Roderick Campbell (North East Fife) (SNP): Good morning. I refer to the section in your submission entitled "2. No refund even if you are acquitted: can two wrongs make a right?" Can you talk more fully about international experience of the principle of reimbursing an acquitted defendant?

Dr Cyrus Tata (University of Strathclyde): I start with an apology for the committee's having received my evidence only recently. My excuse for that—if it is one—is that I was on paternity leave when the call for evidence was made, and I have been playing catch-up.

Roderick Campbell's question is interesting and important, and I have not yet had time to explore the matter fully, but my understanding is that the proposed approach is not that common. The committee may wish to investigate and take advice on whether it would be in compliance with article 6 of the European convention on human rights. I cannot give chapter and verse on the international comparisons, but I am not aware of too many nations that have taken up the practice of not refunding persons who have been acquitted.

If I might elaborate a little, a fairer approach would be to apply requirements to pay contributions towards the cost at the end of the case, when its outcome is known, rather than before it. It seems to me to be fundamentally unjust to require payment in advance and then not to refund a person if they are acquitted.

I suspect that it would come as a nasty shock to the person who had been through the harrowing process of being an accused person to find that even though they had been acquitted, they were not even to get the money back, having suffered the social stigma and the legal process, possibly having been detained, and having suffered personal collateral consequences such as family breakdown or even loss of employment. I suspect

that most members of the general public would also find that quite difficult to understand.

Roderick Campbell: Would it surprise you if I was to tell you that I have not, in the relatively short time for which I have been a member of the Scottish Parliament, had a single letter from a privately funded defendant who was acquitted and who was complaining about the system?

Dr Tata: That would not surprise me a great deal, mainly because there are not that many privately paying clients. There are a few, but most are very wealthy. I see where you are coming from with your comparison with such clients, but I am concerned that the bill seems to be motivated by a view that we should be concerned, first and foremost, about fairness to privately paying clients, and that if they do not get a refund when they are acquitted, neither should the rest of us. That seems to suggest rather odd priorities.

Roderick Campbell: Okay.

The Convener: You assert in your written evidence that it is "extremely rare" for there to be privately paying individuals. Can you tell us the percentage of such individuals?

Dr Tata: I do not have the percentage to hand, but I am sure that the Scottish Legal Aid Board could give you that information, or I can provide it later.

The Convener: I would like that, please. It would be useful, given your assertion.

In Scotland, we have a not proven verdict. Are you suggesting that refunds should be extended to that verdict?

Dr Tata: Absolutely. Not proven is a verdict of acquittal.

The Convener: Okay.

Dr Tata: I say that without getting into a discussion about that verdict.

The Convener: I just wanted clarification of that.

Graeme Pearson (South Scotland) (Lab): You talked about the unfairness of people having to pay for the process in the event that they are found not guilty or if the case is not proven. You state in your written evidence that you have looked at the system for the past 20 years. In circumstances where the verdict is not guilty or not proven, would it be appropriate for the judge to decide, based on the circumstances of the case, whether there should be a reimbursement of costs? What I have in mind—I am playing devil's advocate—is that, if someone's conduct is such that they have placed themselves before the court, even though it is decided that whatever they were involved in did not amount to their being guilty of a crime, it could be unfair for the state to have to bear the burden of that process. Would that be a fair approach, or would it be too complex?

Dr Tata: I think that the approach would be too complex, although I can see where you are coming from in playing devil's advocate.

The tabloids are always full of suggestions that, even though someone has been acquitted, they are really guilty. In our system of justice, however—or in any system of justice that is based on the rule of law—it is the court of law that determines whether a person is guilty or whether they are to be presumed innocent and therefore acquitted. It would be a dangerous situation were a judge to be asked to look behind his or her verdict, or the jury's verdict, and then to say, "Well, you were acquitted, but I really think you were sort of guilty, so we'll make you pay something." I am also doubtful about the legality of that, given the rule-of-law considerations that apply.

Graeme Pearson: I am grateful for that. The—

The Convener: Before you move on, Rod Campbell has a supplementary question on that.

Roderick Campbell: From what I understand of what Graeme Pearson said, it sounded similar to the practice in England and the opportunity that a judge there would have, so I am a bit surprised by your answer, to be honest.

Dr Tata: My understanding is that a refund is possible upon acquittal. I am not aware—it is something that I can look into or the committee might wish to look into—that a Crown Court judge, for example, can look behind a jury's verdict and say, "Aha! On the basis of the evidence, even though the jury has acquitted you, you still have to pay some of the costs." Perhaps I misunderstood you.

Roderick Campbell: No—the decision would be based not on the evidence but on the conduct of the defendant. Perhaps it would be prudent for you to consider that further and to come back to the committee.

Dr Tata: I am happy to do so. May I clarify what you mean by "the conduct of the defendant"?

Roderick Campbell: I mean how the defendant behaved throughout the process.

Dr Tata: Do you mean, for example, whether the defendant was unconvincing as a witness?

Roderick Campbell: I do not mean the defendant's being unconvincing as a witness; I am talking about a discretion being afforded to judges. I think that the committee would benefit from clarity on the point.

The Convener: I am long out of practice, but I think that in civil cases the sheriff will look at the

conduct of a pursuer or a defender in the broadest sense, in a case that has been prolonged unnecessarily and which has run up costs. There are things like minutes of tender in civil cases that are an alarm about expenses. The sheriff has broad discretion in civil cases to look at how a case has run and to consider how the expenses might be allocated.

Dr Tata: Indeed, convener, but we come to a fundamental distinction between civil and criminal justice, which I am sure you understand. I am concerned that the motivation behind the bill, when it talks about bringing criminal cases into line with civil justice cases, misses that fundamental distinction, which is that it is the criminal law and the criminal process that can deprive one of liberty. The stakes are distinct and are far, far higher. I am rather concerned by the language of consistency and uniformity, and the suggestion that there are anomalies between civil and criminal cases and that we should bring criminal cases into line with civil cases. That is not to discount the real problems in civil legal aid. The outcomes for people in civil legal aid cases are enormous—

The Convener: I do not want you to go into the detail of it. I was just making a comparison about the discretion of sheriffs and the conduct of cases.

Dr Tata: Indeed.

Graeme Pearson: In the final paragraph of your submission, your response to the question,

"Will the Bill really save the money envisaged?"

is brief. Will you analyse that a bit further for us? I think that the perceived savings were relatively small in the scheme of things. What would your forecast be?

Dr Tata: I am not sure to what extent, if at all, the financial memorandum takes account of behaviour displacement or the adaptation of behaviour that we can expect as a result of the bill. It may well reduce SLAB's overall costs, but I am sure that there will be knock-on consequences and displacement in the overall system.

There are two obvious consequences, which the committee has heard about before and I am sure come to the minds of members. One is that there is likely to be an increase in unrepresented cases. I know that it has been said to you that in England there has been no apparent increase in the level of unrepresented cases. The problem with that is that there are so many variables in the system, and the system has been in place for only a couple of years. It is hard to tell without a dedicated study and we really do not know. There may well have been an impact, but it may have been contradicted by other factors.

An increase in unrepresented cases will be a real headache for the courts. It is quite often said in the popular press that lawyers drag out cases. At the high end—the celebrity end—that may be true, but at the lower end, as I think Mr Pearson and others will be well aware, lawyers tend to deliver settlement. Compared with unrepresented defendants, they are pretty good at getting the case done and at persuading clients to plead guilty to something at some stage. They are very important. In fact, one of the drivers in the history of increases in legal aid has been that it is, in a sense, efficient to have defence lawyers representing clients and delivering speedier outcomes. There being unrepresented clients is bound to lead to delays.

The second factor that is likely to come up is collection of contributions. You have heard from representatives of the Law Society, the Edinburgh Bar Association, the Glasgow Bar Association and so forth on that. I think that their concerns are reasonably well founded.

10:15

SLAB has said that a defence solicitor should make a commercial judgment on whether a client is, if you like, a good financial bet overall and should, in some instances, take the hit if clients do not pay their contributions quickly. According to such commercial logic, the solicitor should drop clients who are considered not to be good bets—for example, the client who is not a regular customer. That might happen in quite a few cases, so there is a real danger of ending up with unrepresented clients as a result.

Those are two key worries. With regard to clients' not paying contributions—or what, given the suggestion in section 20, we should perhaps call "fees"—one can see defence solicitors using commercial reasons such as "I haven't had my contribution" or perhaps presenting the same argument in a different way to look for an adjournment, which is bound to slow the system down. SLAB is bound to be better at collecting contributions than defence solicitors; of course, no one wants to do such a dirty job and I think that the idea is to farm it out to individual defence solicitors. If they cannot get the money out of their clients, that will be too bad.

The Convener: As I suggested last week, would the Public Defence Solicitors Office not step in?

Dr Tata: I saw that suggestion in the *Official Report*. One would hope that it would. I have to say that I am an agnostic in the debate about the PDSO versus the private firm. The question is whether the organisation would have the capacity to do so; as I understand it, the PDSO, too, will have to collect contributions. I might be wrong

about that—I am not sure whether SLAB will do that for it.

The Convener: I think that you are right.

Dr Tata: If the PDSO, too, has to collect contributions, it will be up against the same problem. It might have better resources, but I do not know whether it is better plugged into information systems. If it is decided that the PDSO does not have to collect contributions and SLAB does, one would have to ask about the logic of such a move.

If there is going to be a system of contributions, it seems much fairer for SLAB to collect them, even though it does not want to do so because that would increase its headline budget. The proposal merely displaces the cost on to the Scottish Court Service and other budgets and will lead to adaptive behaviour. Solicitors will look for adjournments and will drop clients, which will slow things down. It seems fairer for SLAB to collect contributions and to do so once the outcome of the case is known—not before. Any other proposal is simply unjust; indeed, I simply cannot fathom the justice in saying that someone who has been acquitted should have to pay the costs of the state's putting them through the whole prosecution process without getting any refund. That seems a fairly astonishing thing to do.

Graeme Pearson: You might well find that astonishing, but it might be quite a challenge to reclaim costs from someone who did not get the outcome that they sought, and I do not think that anyone—whether SLAB or anyone else—would want to volunteer for it.

Thank you for your written submission and your evidence this morning. Having carried out 20 years' research into criminal legal assistance in Scotland, do you have any advice on how we might improve the system? Obviously, there is a concern about costs.

Dr Tata: I will deal first with your first point. You have hit the nail on the head when you intimate that the concern is about the practical difficulties in claiming back from people if that is left to the end of the case—that is true. We are talking about a relatively small sum of money, and that has to be weighed against the justice of the matter.

Graeme Pearson: I understand.

Dr Tata: Do I have advice for the committee? That is difficult. It seems to me that—

The Convener: We need not necessarily take your advice, but we would like to hear it.

Dr Tata: There must be a proper study of the impact of the proposals. The committee has heard from Capability Scotland, for example, about how the bill might impact on disabled people. There are potential questions about indirect discrimination in that regard, and it will probably hit women harder, too, ironically at a time when we are trying to bring women out of the justice system, particularly the penal system, following the report of the commission on women offenders. A proper pilot is needed.

The financial calculations must take account of not only the so-called savings to the legal aid budget, but the possible—and likely, I suggest—displacement factors in relation to the overall court budget. There also needs to be a proper study of what that will do to the levels of unrepresented clients and the levels of people who make insincere guilty pleas—by that, I mean people who do not think that they are guilty, but who plead guilty to get the case over with.

Jenny Marra (North East Scotland) (Lab): Will you unpack and explain what you meant when you said that the proposals will have a greater impact on women?

Dr Tata: I am no expert on income distribution, but members of the committee will be well aware that women tend to have lower incomes and often bear higher family costs. In its submission to the committee, Families Outside pointed out the collateral consequences of fee payments—or contributions, as they are being called—for families. One could see that having a potentially detrimental impact on women. That may be an issue that needs to be looked at properly but, obviously, accused people do not live in isolation from everyone else—they live as part of families. What consequences will the bill have for single mums, for example?

Where will all this end? Once one accepts the principle that there should be fee payments, even if a person is then acquitted, with even those with a disposable income of £68 a week having to make a contribution, there is a danger of a slippery slope. Will more and more people get drawn into the net? Once we accept the principle, why not ask more people to contribute? If the economic situation does not improve—we are told that the bill is motivated, or, in a sense, incited, by the economic downturn—in another five years' time, we will be back to discuss whether payments should be required in not only 18 but 30 per cent of cases. Why not go higher?

I appreciate that I have not fully answered your question about women: I am probably not best qualified to do so, but there is an issue there to look at.

The Convener: To clarify, I take it that when you say "pilot", you mean that, if the bill becomes law, it should run across Scotland for a period to see whether some of the concerns that you have raised happen, including concerns about the

fallout from unintended consequences. That would be rather along the lines of a sunset clause, in which the legislation continues if everybody is content but otherwise falls. Is that what you mean? You could not pick an area; the system would have to be run Scotland-wide.

Dr Tata: That is an interesting question. It would be an option to have a sunset clause and to see how things went, but we would need to leave it for two to three years. In previous research, we have tended to find that solicitors do not end up adapting their behaviour for a couple of years. For example, on fixed payments and the introduction of disclosure, it has taken a couple of years for defence solicitors to alter their practices, even though they have been aware of the commercial imperatives. Seeing how things went would involve allowing something to happen for three years that some of us think is fundamentally unjust.

As you say, the alternative is to look at having the system in one area. I do not have a definitive answer to give you.

The Convener: I do not see how we could do that—I do not see how one sheriffdom could run such a system, while contributions would not be paid in other sheriffdoms. I can see that giving rise to all kinds of unintended consequences. It seems to me that we must be extremely careful about using the word "pilot" in such circumstances, when we are concerned about justice, proper outcomes and a proper test of how a system operates in practice. From what you say, I take it that "pilot" is not the word that we would want to use; we would want a more Scotland-wide process.

What does Graeme Pearson have to say about that? I am not asking him to give evidence; I am asking whether he has a similar question.

Graeme Pearson: I put it to Dr Tata that the practice in Scotland nowadays is to collect together cases against a named accused from across the country, rather than to have trials in separate locations. How would a pilot operate in relation to such court cases?

Dr Tata: I take your point. The convener is right that that would lead to all sorts of anomalies and injustices. Equally, the system envisaged in the bill will lead to all sorts of anomalies and injustices. My suggestion to the committee is that it is fundamentally unjust to ask people to pay, especially if they are acquitted.

The Convener: We hear that, but we are testing your proposals and possible remedies.

John Finnie (Highlands and Islands) (SNP): Good morning, Dr Tata. My question is about an issue that arose in the written submission from Professor Alan Miller, the chair of the Scottish Human Rights Commission, which he followed up in oral evidence. It is certainly not one that you mentioned directly in your submission. It relates to section 21 and what Professor Miller felt was a lack of clarity on the appeals process. If an appellant who would have been eligible for aid dies and the family seek to clear his or her name, they will not be eligible for assistance. Do you have a view on that?

Dr Tata: Again, that is highly problematic. Are you asking about the family being asked to make a contribution in the case of a deceased person?

John Finnie: I am talking about cases in which the deceased would have been eligible for assistance to further their appeal, but the family—or rather, the "authorised person"—would not be eligible for such assistance.

Dr Tata: I do not really have a view on that.

Jenny Marra: I just wanted to add that a pilot was also mooted by Professor Miller last week, so it would be good to look at any joint proposals.

Dr Tata: Okay.

The Convener: Are there any more questions?

Roderick Campbell: I have a small question about the number of unrepresented accused. Would you accept that information on that statistic could be kept fairly easily and that, in a relatively short period of time, we would be able to establish whether there was a problem with the number of unrepresented accused increasing?

Dr Tata: Potentially. The problem with looking simply at whether there had been an increase—after 2013, say—in the number of unrepresented accused is whether there were any other factors that might have influenced that. A dedicated study would be needed that looked at accused persons' decision making and why they chose to do what they did. There is a potential danger in looking simply at whether the number of unrepresented accused has increased, which is what SLAB says may have happened in England and Wales. The difficulty with that is that other contributory factors to any such change may be masked.

10:30

The Convener: Do you agree with the Government's suggestion that allowing SLAB to collect contributions for summary criminal legal aid would create a perverse incentive for solicitors to encourage their clients to plead not guilty?

Dr Tata: You have identified what I suspect to be the driving motivation behind all this. Solicitors whom I have interviewed or studied in recent years have said that given the awful hassle in getting people to pay it is easier to enter a not

guilty plea. As a result, the point you have highlighted is valid.

However, there is an awful lot of discussion about so-called perverse incentives. When SLAB and the Scottish Government have talked about such incentives in recent years, the only one that they have in mind with regard to pleading is that more people should plead guilty. The Government says that all that it has in mind is earlier guilty pleas, but that has to be balanced against the reality for accused persons, which we must be careful not to be complacent about. People who are accused, including professional people—and, in some situations, solicitors—quickly realise that it is actually an extremely stressful and difficult situation—[*Interruption*.]

The Convener: I have to wonder why the police are not being as maligned as those in my former profession.

Graeme Pearson: I was merely expressing the view that surely a solicitor would not be involved. [*Laughter*.]

Dr Tata: There are famous cases of solicitors being victims of miscarriages of justice. Even they must have thought, "Surely that can't happen to me".

In making the arguments behind the bill, people forget that there are already some very strong drivers for guilty pleas; as research suggests, there is also the real danger that people who plead guilty do not always believe that they are guilty—and, indeed, their solicitors do not necessarily believe that to be the case, either. The bill's accompanying documents mention only perverse incentives and getting people who want to plead not guilty to enter a guilty plea. We need to balance that against the huge drivers that already exist, such as remand, emotional attrition—in other words, getting the whole thing over with—and the simple fact that most people are not that able to resist the pressure from the entire system and maintain their not guilty plea. Many accused people whom I have interviewed will say—as do defence solicitors in private—that people plead guilty to things that they do not believe themselves to be guilty of. The system contains plenty of drivers to encourage people who might not be guilty at all to plead guilty; instead of doing that, it needs to get things right and ensure that guilty people plead guilty and that those who are not guilty plead not guilty.

The Convener: Thank you very much for your evidence and your helpful written submission. I suspend the meeting for five minutes to allow for a changeover of witnesses.

10:33

Meeting suspended.

10:37

On resuming—

The Convener: I welcome the second panel of witnesses, which consists of the Cabinet Secretary for Justice, Kenny MacAskill, and Scottish Government officials. Colin McKay is deputy director, legal system division; Ondine Tennant is a policy officer; and Nicholas Duffy and Felicity Cullen are from the legal services directorate. I invite the cabinet secretary to make an opening statement.

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you, convener.

The Scottish Civil Justice Council and Criminal Legal Assistance Bill is part of a series of measures that are being taken forward under the making justice work programme. It takes forward two separate priorities: the creation of a Scottish civil justice council and the expansion of the scheme of contributions in criminal legal assistance.

The establishment of the Scottish civil justice council was an important recommendation of Lord Gill's landmark review of civil justice. I am pleased that there has been almost universal support for the creation of that body. For the first time, a body will have oversight of the entire civil justice system, including over vital matters such as divorce and the care of children, housing, debt and personal injury. As Lord Gill made clear, our justice system has a proud history, but its rules and procedures must be modernised if it is to continue to serve Scotland well.

The council's first—and very significant—task will be to take forward many of Lord Gill's detailed proposals through court rules. Establishing the body now will allow it to prepare for the legislation that will reform the structures of the courts, on which we will consult in the coming months. Once the Gill reforms are implemented, the council will continue with the wider policy function of ensuring that the system continues to improve.

We have listened carefully to the comments that have been made about the council's composition. Overall, we think that the bill strikes the right balance to allow the council to take account of the range of interests in civil justice and to have the technical expertise for its detailed work, without an unduly large and cumbersome body being created. There is also flexibility in the bill to allow the council to evolve as its role develops.

On the procedure for appointments to the council, we believe that it is right for the Lord President to have the lead role in determining the

make-up of the body. The council will primarily advise the Lord President in discharging his responsibilities to ensure the effective administration of the justice system, and we agree that the appointments process must be transparent and robust. I was pleased that the Lord President confirmed his commitment to those principles.

Part 2 sets out our proposals to introduce contributions in criminal legal aid. Again, I am pleased to see that many people in the justice system, including the Law Society of Scotland, have accepted the principle that it is right that those who can afford to pay towards the cost of their defence should do so, as happens in civil legal aid. That must be right when public finances are under such pressure. The expansion of contributions will allow us to target legal assistance at those who need it most and will correct the manifest injustice that a victim of domestic violence who goes to court to protect themselves may be liable for a contribution to their civil legal aid, while a perpetrator could receive criminal legal aid with no contribution.

I recognise, though, that concerns have been expressed about the detail of some of the proposals, particularly that the income levels are set too low, that collecting contributions will create difficulties for law firms and that it may affect the human rights of accused persons and interfere with the administration of justice. I would like to allay each of those concerns.

On the level of eligibility and contributions, it is important to remember that the starting figure of £68 a week is not gross income or even take-home income but the income that a person has after deducting a long list of costs, including housing costs, council tax, childcare costs, loan repayments, maintenance payments, costs associated with disability and an allowance for dependent spouses and children. On top of that, the board has discretion to waive a contribution if undue hardship would be caused. The Scottish Legal Aid Board has provided the committee with a number of scenarios showing that the level of contributions for people earning several hundred pounds a week will often be modest and some people who would already pay a contribution under the assistance by way of representation scheme will actually pay less in future.

I have listened particularly carefully to the concerns that Capability Scotland expressed about disability benefits. It is hard to give definitive reassurances on those benefits when the United Kingdom Government is in the middle of introducing major benefit reforms, but I am happy to give an undertaking that the Government and SLAB will discuss with Capability Scotland what further provisions can be made in the regulations to ensure that disabled people are not placed at a disadvantage.

I also appreciate that many criminal firms will feel that collecting their fees through summary contributions is a further burden being placed on them at a difficult time, but I do not think that it is unreasonable. Most contributions will be for modest amounts and the firm, which has a relationship with the client, will be far better placed to collect that money than the board. SLAB modelling that has been provided to the committee shows that the impact on a firm's business is unlikely to be large: medium-sized firms might have to collect from between 29 and 167 applicants a year and contributions would amount only to between 2.5 per cent and 4.2 per cent of the legal aid income, not total income. Frankly, I think that if we did not proceed with contributions, the impact on firms of any alternative saving measures would be significantly worse.

Following discussions with the Law Society, we took steps to reduce the impact on firms by, for example, ensuring that solicitors can treat contributions collected as fees. The Law Society has also pointed out that there are problems with collecting contributions when solicitors provide assistance at police stations. I am happy to discuss further with the Law Society whether we can remove those difficulties.

Finally, concerns have been expressed that people who fail to pay their contributions may lose their representation, causing problems for them and the courts. I do not believe that that is a serious risk. The vast majority of people will have no contribution and most people who will have a contribution will have only a small one and most of them will pay it. Currently, solicitors may choose not to collect contributions for advice and assistance in ABWOR and, as the board's modelling shows, just under half of those with a contribution under the new system will be asked to pay less than the current maximum of £142. There may be a small percentage of cases where a solicitor cannot get a contribution from the client and decides that they must withdraw. I accept that we may need a safety net in some of those cases, such as the PDSO stepping in if no other agent is able to act.

As we have done throughout, we will work closely with the board and the Law Society to ensure that practical arrangements can be put in place. I will be happy to report on the outcome of those discussions before stage 2.

I hope that that gives some helpful background and reassurance, but I am of course happy to take the committee's questions.

The Convener: Thank you, cabinet secretary. I remind committee members that, to aid the official

report and therefore our stage 1 report, we will start with questions on part 1 of the bill, and then we will move on to part 2.

10:45

Jenny Marra: Good morning, cabinet secretary. I have three points to put to you. The first two concern the balance of lawyers and laypeople on the council. Has the right balance been struck?

Kenny MacAskill: I think so. We have to balance experts from the legal profession, with their clear expertise, and others who are—"less jaundiced" is not the right phrase—able to bring a different perspective. Under the bill, we also have the flexibility to vary numbers. The numbers are slightly below what the current rules councils have, but I think that we have the right balance. If there are difficulties, we will seek to address them in due course, but it seems to me that we have a fairly balanced approach.

Jenny Marra: The balance between lawyers and laypeople falls far short of the 50:50 balance that was recommended by the Spencer review in England and Wales, following which a similar civil justice council was set up there. Is there any move from the Government to look at having a balance that is more in line with the Spencer review?

Kenny MacAskill: What exists south of the border is slightly different from what we propose as it is a non-departmental public body. We have the ability for the Lord President to include additional interests. It seems to us that the balance is reasonable, but the bill contains powers to make changes to the numbers if that is felt to be appropriate. I think that we should try out the proposed balance and see where we get to.

Jenny Marra: On that point, why is the council that is being set up in Scotland not an NDPB?

Colin McKay (Scottish Government): If I may assist on that point, there are various technical questions about what is and is not an NDPB, but we need to go back and consider the function of the council. In thinking about that, we also have to consider the changes that were made by the Judiciary and Courts (Scotland) Act 2008. For the first time, that act put the Lord President at the head of the Scottish judiciary and at the head of the Scottish Court Service as a non-ministerial department with a statutory responsibility for the effective and efficient running of the Scottish courts.

The 2008 act was said by the previous Lord President to be one of the most constitutionally significant acts of the Scottish Parliament. It placed the courts under a separate constitutional status, and it placed the Scottish Court Service under a separate constitutional status as a non-ministerial department, whereas the body down south is an executive agency. There are lots of good reasons why that is the case, but the approach in Scotland put the Lord President at the top with the responsibility to ensure the effective running of the system.

The purpose of the civil justice council is primarily to help the Lord President to do that job effectively and to ensure that he has a broad base of advice and expert support in doing that. The logic is that the body will be part of the framework around the Lord President and the judicial responsibilities of the Lord President and, as such, it does not fall to be considered as an NDPB, just as the current rules councils are not NDPBs. The approach relates to the constitutional architecture of the courts in Scotland.

Jenny Marra: That leads me to my third point. Would you consider using the public appointments procedure for the new body?

Kenny MacAskill: We do not rule anything out, but what we have is a system whereby vetting will have to take place. The Lord President, who will appoint all but the ex officio members and ministers' appointees, must publish a statement of appointment practice for non-judge members, which must include a requirement to consult ministers, as well as the Faculty of Advocates when appointing an advocate and the Law Society when appointing a solicitor.

I also understand that the Lord President stated to the committee his intention that appointments will be in line with the principles set by the Public Standards Commissioner for Scotland. I think that we have sufficient safeguards there. We should see how this operates. Given the Lord President's statement, and the checks and balances about whom he requires to consult, we can rest assured that we have adequate protections.

Colin McKay: A small supplementary point is that the public appointments procedure is specifically designed for ministerial appointments. It has been developed over a number of years with that focus. These are not ministerial appointments, so the public appointments procedure would have to be adapted in order to fit what is a different appointments regime, but I am sure that there is a lot that the Lord President would want to take from the public appointments procedure.

Jenny Marra: If there is no departure from the principles of public appointments—you are saying that the scrutiny and balance would be there—why not use the public appointments procedure, just to be completely robust and transparent?

Kenny MacAskill: I think that we have tried to establish in Scotland that the judiciary are separate from the legislature and the executive. That is why we passed the Judiciary and Courts

(Scotland) Act 2008, to which Colin McKay referred, which gives ministers special obligations. The judiciary are viewed separately and tangentially. However, you have an assurance from the Lord President, who is not a minister of the Crown, on the manner in which he will operate. I think that you would be seeking to make the Lord President act as a minister, or almost to be perceived as a minister, when that is addressed separately through the 2008 act.

Jenny Marra: The Scottish Legal Complaints Commission, the Scottish Legal Aid Board and the Judicial Appointments Board for Scotland are chaired by laypeople. Would you consider having a layperson as deputy chair of the new body, to provide balance?

Kenny MacAskill: That is a decision that I would prefer to leave to the board. The Lord President has to be at the pinnacle. Whether the deputy chair is a layperson or one of the other people on the board is a decision for the Lord President and the council and it would be best dealt with by them. I do not preclude the deputy chairman being a layperson, but I cannot for the life of me see why we should not allow them to discuss the issue and decide who it should be.

Colin Keir (Edinburgh Western) (SNP): At least one previous witness mentioned the powers of the Lord President and the ability of the Lord President to act completely independently and impartially with those powers. If memory serves me correctly, previous witnesses said that there could be conflicts of interest. We discussed that last week with various witnesses. No one is casting aspersions on the ability of the Lord President to carry out their function. However, is there too much of a conflict within the powers of the Lord President?

Kenny MacAskill: I do not think so. Under the system that was established by the 2008 act, and indeed previously, the Lord President is our most senior judge. The act tied that in more closely with the Scottish Court Service. It is appropriate that somebody has to be accountable and call the shots for the judiciary. The purpose of Lord Gill's review is to try to create a more tapered system. That is to be supported, which is why we support Lord Gill's view. It is important that somebody is held to account, which is why the Lord President came to the committee.

On the council and how it will operate, to be brutally frank, we are not talking about a bunch of patsies. We are talking about the chief executive of the Scottish Court Service, the chief executive of the Scottish Legal Aid Board and representatives from the Faculty of Advocates and the Law Society of Scotland. In my experience as a minister, they are no pushovers. Any worries that people may have about checks and balances are dealt with by the make-up of the council. As well as individuals with a great deal of legal expertise and knowledge, there will be lay representatives. I doubt that they will be put there on a whim and a fancy—they will be people who have contributed a great deal to public life and have a great many attributes and talents.

It is appropriate that the Lord President should be at the apex. Equally, I have every reason to believe that he will work in harmony with those on the council with him. If it is ever felt that he is getting out of line—I do not think that that would happen with this Lord President or that that has been experienced before—the council will have sufficient weight and gravitas to provide the counterweight to which you perhaps allude.

The Convener: It sounds as if you bear some scars from previous encounters.

Kenny MacAskill: Perish the thought.

The Convener: We will not investigate that.

Roderick Campbell: Good morning, cabinet secretary. In the first evidence session on the bill, which was before the summer recess, we heard considerable support from Professor Paterson and Professor Mullen for the use of sub-committees of the council that would involve a lot more specialists, particularly for drafting rules. The committee was probably slightly remiss in not addressing in detail the use of sub-committees with the Lord President. In the early years, a lot of the focus will be on rules, which will involve a lot of lawyers. Will you comment on the use of sub-committees? Might the number of lawyers involved drop off over time as we concentrate more on policy matters?

Kenny MacAskill: On your second question, the number of lawyers could change. We always work on the basis that changes occur from time to time to reflect social and societal issues. The number of lawyers might reduce, but that bridge would be crossed further down the line.

In the interim, the use of sub-committees makes an awful lot of sense. People from the Faculty of Advocates sometimes do not know a great deal about sheriff court rules, and people from the sheriff court might not know a great deal about Court of Session rules. Rather than addressing the issue when everybody round the table has limited knowledge, there may be benefit in leaving it to a sub-committee to consider. In this council, as with many others, the use of sub-committees for technical matters would make a lot of sense. I would be happy to leave that issue with the council.

Graeme Pearson: Good morning. There has been a lot of discussion about the six Lord President members. Briefings have suggested that

such members will broaden the experience on the council. Will you explain the thinking behind the provision for those members? What is it envisaged that they will reflect? In what way will they broaden the experience?

Colin McKay: I will build on comments that have been made about the council's broad make-up. As committee members have said, the council has a number of legal members—that partly reflects the nature of the legal profession. Realistically, the council must have judges from each tier of the judiciary, because we cannot have a council without a sheriff or a Court of Session judge on it. The faculty and solicitors must also be represented on it.

We must also have consumer representative members, but relatively few organisations and people specialise in consumer representation. As the committee may know, Consumer Focus, which is one organisation that would be drawn on, is under significant threat as part of the UK Government's streamlining of public bodies. We are therefore not necessarily hugely flush with laypeople who would have the right expertise to be on the council.

A lot of the evidence has said that, for example, people from the insurance industry, people with experience of alternative dispute resolution and people with experience of equalities issues might have a contribution to make. All such people could be added to the mix of the council. However, the view was taken that, instead of having a long list of every interest group that might be thought about, which might risk token appointments of people who have no contribution to make but who tick a box, the Lord President should have a fairly large pool of potential additional members from which to appoint people who would have a contribution to make because they represent an interest that might be pertinent generally or at a particular time. That might change over time; the view at one time might be that the needs of women, unrepresented litigants or whatever special interest have to be represented on the council. It gives the Lord President and the council some flexibility to add people as needed.

11:00

Graeme Pearson: Is it envisaged that the Lord President will take advice from council members about who might be considered as LP members, or is that a very individual decision for the Lord President himself?

Colin McKay: The Lord President makes the appointment, but I am sure that, under the statement of appointment practice, he would want to take advice—if the council wanted to give it—on the kind of people who might be needed to fill out representation on the council.

Graeme Pearson: Thank you for that clarification.

Although there have been references to who will fund the council, not much more has been said about funding. Have you made any projections or forecasts about how much the council will cost? Have you worked out the budget? Does the council replace any other expense that the Government faces?

Kenny MacAskill: I understand that, in its steady state after civil courts reform, the council will cost between £313,000 and £375,000 per annum, or between £87,000 and £149,000 on top of the cost of the current councils, which is £226,000. The bulk of the cost is staffing, which is estimated at between £274,000 and £311,000 to cover an additional increase in staff banding. The council will be funded by the Scottish Court Service through the intended increase in court fees.

Graeme Pearson: So it's good luck recovering the court fees.

Kenny MacAskill: That's about it.

Graeme Pearson: Earlier evidence suggested that, in some circumstances, it might be difficult to recover court fees. Will the business case surrounding the recovery of such fees and all that entails ensure that the council's costs are covered?

Kenny MacAskill: The court fees that we are talking about relate to civil matters, not criminal legal aid contributions. In my experience, such fees are simple to recover because, unless you pay, you cannot really get out of the starting blocks and move on. Given the incentive for people who want to keep their cases alive to pay their fees, we do not expect any difficulties in that respect.

The Convener: So it is pay before you go.

Graeme Pearson: Indeed. I just wanted to get that on record, convener.

The Convener: I am going to move on to part 2, on criminal legal aid. I expect that the questions on this matter will be more strenuous—but perhaps not. Perhaps everyone will be gentle now. John, are you going to be gentle?

John Finnie: I strive to be gentle, convener, particularly with the Cabinet Secretary for Justice.

The Convener: You are blushing. [*Laughter*.]

John Finnie: I have two questions on what could be seen as fundamental rights. First of all, do you feel that the discretion of SLAB to which

you referred is robust enough to deal with the unknowns of the UK Government's developing welfare reforms?

The Convener: Is this the point about undue hardship, John?

John Finnie: Yes.

Kenny MacAskill: SLAB has very wide discretion in respect of undue hardship; indeed, it will be a catch-all not just with regard to benefit reforms but for people who are caught in the poverty trap but who might have some income from capital or whatever.

The benefit reforms are a moveable feast. I have met Lord Freud to discuss not just legal aid but how we ensure that the people whom we release from custody do not reoffend, particularly by giving them access to benefits sooner rather than later. Some of these issues depend on certain changes, but legal aid regulations have enough flexibility to allow us to catch up. That said, it is very difficult for us to write regulations if we do not know where the Westminster reforms will end up. Nevertheless, as far as undue hardship is concerned, the board has sufficient flexibility to deal with not only benefit but capital-related matters.

John Finnie: Secondly, with regard to potential loss of representation, you alluded to the PDSO. Will you confirm that, regardless of location, no one who is accused will go unrepresented?

Kenny MacAskill: There are two matters here. First, the evidence from south of the border shows that there was hardly any increase in the number of unrepresented accused following the introduction of contributions. We are happy to discuss the issue with the Law Society, because I would not like to impose anything on it. I am happy to look at the provision of a safety net, which I know committee members feel strongly about, through the involvement of the PDSO. I think that we all know that the relationship between the PDSO and the Law Society can be rather fraught. I will not give the committee a formal commitment that we will do something in particular in case others do not accept it, but I am happy to give the committee an undertaking that SLAB will engage with the Law Society to offer the PDSO as a safety net in any court and consider how that can be done. The Law Society might prefer to deal with the issue in other ways, which is why I added that caveat.

The Convener: Would the PDSO collect contributions?

Kenny MacAskill: Yes. I can give you the assurance that the same procedure will apply to the PDSO as will apply to private lawyers.

Graeme Pearson: Cabinet secretary, you will be aware that solicitors and advocates have expressed a lot of consternation about the contributions proposal. There has been a focus on the savings that may or may not be achieved through it. In his evidence to us earlier this morning, Dr Tata wondered about the knock-on effect in terms of delays for trials and so forth of the non-payment of some costs. Has that all been thought through by those who put together the proposal? What is their estimate of the way forward in that regard?

Kenny MacAskill: Those matters have been looked at, and there are two aspects. The contribution proposals are driven by the requirement to address the cost of legal aid. If we are going to be able to target money to ensure that there is access to justice for those who are victims of domestic violence and those who have suffered from asbestos-related diseases, we need to make some savings.

As I have said, there has historically been a particular anachronism, which I think has been referred to in the chamber. It is manifestly wrong that the perpetrator of domestic violence can access legal aid with no contribution while the victim of domestic violence is required to make a contribution to obtain orders, whether an interdict, exclusion order, residence order or whatever protective order. There is therefore a point of principle, which is that in a time of austerity, when we have to impose restrictions on legal aid, perpetrators should also be prepared to contribute as the victims have to.

Equally, we are making the changes as part of the making justice work programme and we wish to reduce case churn. As I said, the evidence from south of the border shows that there was no significant increase in the number of unrepresented accused when a system of contributions was brought in. As you will know from your own experience, Mr Pearson, there still are cases—some high profile and some less so—in which people sack their lawyers, which is a matter that must be considered. However, our evidence is that that would not happen more frequently. Equally, I am happy to give you an undertaking that SLAB will discuss with the Law Society the prospect of the PDSO being prepared to pick up matters in various instances to ensure that an unrepresented accused is covered.

Graeme Pearson: If a person fails to pay their element of the fees in one case and becomes the subject of prosecution in a subsequent set of unrelated circumstances, will the failure to have paid fees in the first case ensure that they will not be considered for legal aid in the second case?

Kenny MacAskill: No, that would not be the case.

Colin McKay: I do not think that that would be the case. There might be ECHR difficulties in such an approach.

Graeme Pearson: Each case would be treated separately.

Kenny MacAskill: I think that each application would have to be considered on its merits, as Colin McKay suggested.

Graeme Pearson: So a person who regularly failed to pay their part of the fees would still come back into the system each time.

Kenny MacAskill: I do not think that that circumstance would arise. Either some arrangement would be made through the solicitor or there would probably be a desire to pursue and take the money back from the person if from the solicitor's perspective that could occur.

We can give the assurance that such a person would not be automatically precluded from receiving legal aid—we could not preclude them under the ECHR. Equally, I find the circumstances in which somebody would regularly avoid payment hard to imagine: there would be a custodial sentence, or some arrangement would be made.

The Convener: I would like to pick up on your language, cabinet secretary. You said that those who perpetrate should have to pay and then you referred to victims. The basic tenet of criminal law is that a person is innocent until they are proven guilty. The burden of proof is on the Crown, and the matter should be beyond reasonable doubt. It seems to me that you are working on the basis that, if a person is brought before the court, they are guilty.

Kenny MacAskill: No—

The Convener: I would like to develop the point. If a person is acquitted because the verdict is not guilty or not proven, it means that the Crown will have brought a case against them and failed to establish their guilt, but the person will have all the costs that are entailed. Is not that unjust?

Kenny MacAskill: No. I think that the circumstances are different. Currently, people countenance a victim of domestic violence having to go through proceedings and still perhaps having to meet her legal aid contribution, even though interim orders have become permanent. People can face an order for freeing to take their children from them. We have seen high-profile cases in Scotland that have ultimately not been successful, but people have not had a legal aid contribution to make. In civil proceedings, things are done on the basis that those who have the ability to pay should make some contribution, and I think that there should be some parity with criminal proceedings.

I accept that there are slight and significant differences. In some instances, there will be the possibility of a custodial sentence, but that will not be the case in many instances. As I have said, there is the parity argument involving those who are victims, those who face matters that relate to their children, and those who face the challenge of a criminal charge.

It is an absolute tenet of our legal system that a person is innocent until they are proven guilty, but the systems north and south of the border are different, and it seems to me that it is perfectly reasonable that, if a person requires to make a slight contribution to get legal aid, they should do so. If the person is acquitted, the approach simply reflects what happens in other areas of civil law, in dealing with freeing orders or domestic violence for example.

The Convener: I will not dispute the point further, but I do not really accept that argument. In civil cases, awards of expenses can be made and parties may have contributions, but if someone receives an award of expenses that will pay for their contributions. However, there will be no award of expenses in criminal proceedings.

Someone could be involved in an extreme case, taken to a criminal trial and found not guilty. It could be found out that the alleged victim concocted the whole story. The person who was found not guilty may have gone through hell and high water, their name could have been all over the papers, and they may have lost their job. We have heard about such things in previous evidence; we know that they happen. The person may be as innocent as the sky is blue, but they will have paid for the Crown taking them before the courts in the public interest. It seems to me that there is an injustice in that.

It is not a matter of like for like in the consequences to people through the processes of the system or in public through the newspapers. There will be no award of expenses, and the person will have been taken against their wishes. A defender in a civil case who does not want to be taken to court and succeeds may very well get an award of expenses against the pursuer.

Kenny MacAskill: We do not have costs in criminal matters—

The Convener: I know that we do not.

Kenny MacAskill: That is the circumstance south of the border. It is clear that expenses can be awarded in civil cases, but that does not apply in various other areas, such as in Her Majesty's Revenue and Customs investigations. Such matters can be extremely difficult and dangerous for individuals or firms that pay their taxes.

Let us remember what we are dealing with. Some 82 per cent of people will not have any contribution at all to make, and 44 per cent—almost half—of the remaining balance will pay less than £142. That seems to me to be a small amount.

Others will have a contribution to make, but it will not be a huge contribution; it will be related to their income. If we wish to be able to offer legal aid to people in fields other than criminal law—mention has been made of people who have been traumatised—we need to make savings somewhere, and it seems to me that those who face a criminal charge should have to make a modest contribution, when they can, just as those with children or a violent partner who find themselves in extreme circumstances have to do.

11:15

Graeme Pearson: I encourage the cabinet secretary to recognise the apparent inequality in circumstances of domestic abuse, to which he referred. In many cases, the violent partner continues to live within the family unit post the charge, so any contribution is likely to come out of the family budget rather than the perpetrator's pocket. The impact of that needs to be considered.

Secondly, I see nothing in the provisions on legal aid that would deal with a matter of some concern to many members of the public—the fact that there are people who are involved in organised crime who, despite having affluent lifestyles, still seem able to obtain substantial legal aid, for which they pay nothing. How will having to pay £140 help in those circumstances?

Kenny MacAskill: There are two aspects to that question. First, I think that many of the changes on bail that the Crown is making will address the issue of a partner continuing to reside in the household after a domestic violence charge. Such circumstances may arise, but in my experience they are becoming fewer and fewer as the police, the Crown and sheriffs understandably tighten up the approach.

On the second aspect of the question, such people should not be getting legal aid. We have all heard stories, although it would be wrong of me to talk about individual cases, as the committee will understand. It is fair to say that the Legal Aid Board will investigate matters. I put on record that legal aid in criminal cases should be subject to means testing. That is the case at present, but when I practised—I have not practised for 13 years—it was not something that was given a great deal of scrutiny.

It is a matter of making changes to ensure that the people to whom Graeme Pearson refers—who, I think we would all agree, are entitled to the presumption of innocence when they are subject to criminal charges—do not get legal aid, given the assets that we know they have, by subverting the system.

Graeme Pearson: I again make the point that in many domestic violence situations the various parties come back to live together in a family unit, so the proposed payments would come out of the family budget. I know that it is often difficult to understand why people continue to suffer in that environment, but the truth is that families come back together, often for the children's sake and so forth. Therefore, the contribution will come out of the family unit's budget, rather than just out of the accused person's pocket. I make that point in passing.

Colin McKay: There are a number of aspects of the scheme that could address that issue. In so far as the two people's resources are separable, if there is clearly a conflict of interest, the victim's income or resources will not be assessed as forming part of the contribution. Therefore, any savings that they had would not be part of the contribution. There are also allowances in the scheme for dependants. If there is evidence that what is proposed would cause hardship to a victim or an alleged victim, the board could take that into account to ameliorate the situation.

The Convener: Jenny Marra has a point on the spouse's income.

Jenny Marra: What legal advice have you taken on the legality of considering a spouse's income when a husband is accused? Is it fair to take his wife's income into account? Is that legal? Is it right?

Kenny MacAskill: Yes. That is what we do in civil matters. To some extent, the proposals replicate arrangements that have existed for a long time, whether in the context of divorce, protective orders, accident claims or whatever. Such arrangements have been around for quite some time.

The Convener: Before we deal with that, can I just return to the question of an unsuccessful prosecution? In an extreme case, for instance, where the trial collapses and the sheriff says the Crown has made a mess of the case and it should never have been brought before him, is there not room for the sheriff to have the discretion to rule on whether the accused should pay contributions? If the Crown has made such a mess, the accused should not be out of pocket.

Kenny MacAskill: I am happy to look at that in discussions with the Scottish Legal Aid Board. I think that people would be aghast if, for example, a case were to be subverted because a witness was intimidated or something happened that clearly was a great cause for concern.

The Convener: That is different.

Kenny MacAskill: However, if the committee is so minded, I will be happy to discuss with the Scottish Legal Aid Board whether there is any opportunity to seek such matters. It is fair to say that that would be a complex system, but we have seen matters given to the discretion of the sheriff—indeed, legal aid was at the discretion of the sheriff for solemn matters until the system was changed some years ago.

Such an approach would not be without its difficulties because we do not have the same concept as there is south of the border of people being fined or then having expenses awarded against them. We are talking about what is meant to be the justice system and, in the same way as people pay taxes into it, people will make a modest—I emphasise the word modest—contribution.

There might be an argument that seeking to claim back £85, or whatever, is more hassle than it is worth but, on the point of principle, the fact is that 82 per cent will have to make no contribution at all. Almost half of those who have to make a contribution will make a contribution of below £142. That is a small amount for people to contribute to ensure that we have a legal aid system that can meet the challenges we face and that can provide for everyone—not just for those who face criminal charges but for those who face other matters, such as a child in medical negligence circumstances. All such matters are hugely expensive and need to be supported.

The Convener: We accept the difficulties that you face on the budget, but the point that we are pursuing is that injustices may happen that, notwithstanding pressures on budgets, would not be appropriate, given Scots law and the fairness to the alleged accused in certain circumstances.

Jenny Marra: Cabinet secretary, I am a bit uncomfortable with your answer to my question about spouses. You said that the income of spouses is considered under civil law, but people enter into a civil dispute by choice. Presumably, that is discussed in the home with the spouse, and it is decided to spend money on the case. In a criminal case, a person finds themselves prosecuted not by their own choice. Therefore, do you think it might come into conflict with ECHR law that a spouse's income is considered as part payment in a prosecution?

Kenny MacAskill: No, I do not. I do not think you are correct in your concept of civil proceedings. I do not think people choose to have their children taken off them. They can volunteer that, but it is usually social workers and council lawyers who choose to apply for a freeing order. I do not think people choose to be beaten black and blue by a violent partner. Sadly, they may sometimes not get out of the situation, but they do not choose that and they have to take protective orders. People do not choose to suffer an industrial accident that affects them and requires them to take action.

I would dispute Jenny Marra's suggestion that we have litigation of choice. Sometimes, one is left with no alternative but to pursue a civil remedy. It is not a matter people would choose; rather, it is a matter that they must respond to or lose their children, be left incapacitated with no recompense, or suffer violence and abuse. None of those things is acceptable.

Roderick Campbell: We heard from some practitioners with concerns, which I presume relate to summary cases, that the periods of contribution would be so lengthy that the case would have finished before all the contributions could be collected. That could create additional difficulties. Have you had any thoughts about the period of contributions and how it might coincide more closely with the likely length of a case?

Kenny MacAskill: We are happy to look at that, although I do not envisage what you suggest happening. Given that, as the statistics suggest, 82 per cent will not pay anything and 44 per cent will pay less than £142, I think that the sums in question will be collected relatively speedily. In other cases, other arrangements can be made. I do not expect a huge churn, but perhaps Colin McKay has a comment to make on the matter.

Colin McKay: The supposition is that people paying a higher contribution have a reasonable income, which suggests that they have a steady job, a bank account or whatever, and are not the kind of people with chaotic lifestyles who sometimes come before a criminal defence solicitor. Even if, when the case is concluded, the person in question feels no pressing need to keep paying the contribution, the chances of recovering the higher contribution are greater than recovering £20 or £30 from someone who does not have very much money. We do not envisage the issue causing massive problems with collection.

The Convener: Perhaps you can clarify the issue of the parties' joint income. If, say, a wife is pursuing an interdict, exclusion order or whatever against a defender—whether her husband or partner—is their income considered jointly or separately with regard to legal aid?

Kenny MacAskill: They will be considered as separate individuals.

The Convener: I just wanted that to be clarified for the record. After all, in the circumstances that have been described, one party will be the pursuer and the other the defender. According to you, their incomes and capital are considered separately.

Kenny MacAskill: If there is opposition, such matters have always been considered exclusively.

Colin McKay: The same is also the case in criminal cases.

Roderick Campbell: On a separate point—I declare an interest, as a member of the Faculty of Advocates—last week I asked James Wolffe QC from the faculty whether he had any information on the likely level of reimbursement of expenses for acquitted defendants, particularly in current privately funded cases. I guess that I should also ask you as a member of the Scottish Government whether you have any information on the likely impact of reimbursing expenses to acquitted defendants.

Kenny MacAskill: I do not know whether we have such information; however, I can say that what you suggest has never been the case. Indeed, as the convener has indicated, a person who funds their case privately would not get their money back if they were acquitted and were found to be pristine and clean, and it transpired that the case should never have been brought. The cost simply falls to them.

Colin McKay: We do not have definitive statistics because the cost of privately funded cases is not a matter of public record. It would be difficult even to try to match up court and legal aid statistics to find out who had, among those who had been acquitted, privately funded their cases. However, if it assists the committee, we can see what information we can glean and what modelling we can give you on the costs of privately funding cases, although I imagine that what we can provide will be fairly partial. We can also try to find comparisons with English costs.

Roderick Campbell: My final question is about the general proposals for contributions and the impact on access to justice. If two or three years down the line we find that the move has created a great deal of difficulty or injustice, what steps will the Scottish Government take to improve access to justice?

Kenny MacAskill: Although primary legislation is required to begin with, most matters thereafter can—as with most legal aid matters—be dealt with through regulation. We would be able to—indeed, we will—review the system and make any tweaks or amendments that might be required with regard to civil or criminal matters, ABWOR or solemn and summary cases.

The Convener: I imagine that shrieval discretion to make an award if a case should never have been brought, and a person was found to be as clean as a whistle, would cover all parties, whether privately funded or in receipt of criminal legal aid.

On a separate point, it has been put to us that there should be a pilot, which we considered should be Scotland wide, although it would represent more a sunset clause. What is your view of our taking a kind of “Suck it and see” approach to deal with the stories of unintended consequences, distortion of processes in criminal courts, and dealing in cases?

11:30

Kenny MacAskill: I do not think that a pilot would be feasible. It would be better to deal with matters by way of regulations: I undertake that the regulations will be kept under review, as regulations normally are. Legal aid tends to be dealt with by regulations because—as you know and the committee will have seen—we have to update them, whether in terms of amounts that are paid or of the eligibility criteria. Whether it was conducted in one jurisdiction or across Scotland, a pilot would be a guddle, to be frank, so we would be better off just getting on and dealing with things.

I will go back to your comments about recompense and shrieval discretion. Those things are fraught. You may be suggesting that they should go across the board, whether costs are paid through legal aid or not. At the moment, those who can afford to do so can bring in a high-powered lawyer to find some technicality. If you want to argue that such people should be able to get recompense for that high-powered lawyer, who has come in and found something wrong with a tachograph or a speed camera detector, or whatever, I am happy to consider that. It has always been fairly clear in Scotland that people do not pay contributions or expenses that are imposed by the court, but that we have to make some contribution to meet the costs of legal aid.

The Convener: I was not talking about failure to prove the case evidentially; I am talking about the extreme end, where a case should probably not have been brought in the first place. When there is a good defence counsel, that is fine, but I was talking not about such circumstances, but about cases that the Crown has probably made a mess of and which should never have been brought in the first place. Those circumstances are very unusual, but they happen; sheriffs occasionally say such things. I am talking about only very specific cases having such shrieval discretion. Were sheriffs to start exercising that discretion in the wrong circumstances, there would soon be appeals to the Crown. I will leave that sticking where it is.

Kenny MacAskill: We will reflect upon that.

The Convener: The only thing that concerns me is that you are talking about being able to

change things by regulation, but of course the bill is primary legislation. If we were to find that contributions for criminal legal aid per se are not operating as they should, we would need to do something to the bill. We could amend it. There are two parts to the bill, and we cannot get rid of one part, as that would be a wrecking amendment. I am not suggesting that—I am just putting it out there. We might want to ensure that there will be a review section, or sunset clause, in the bill, although I am not saying that that is how we are thinking. You are quite right to say that a pilot would be "a guddle". Would you not even consider a review clause?

Kenny MacAskill: We are happy to give you an undertaking to review. The last thing that we want is to tweak one aspect of the legal system, only to have that result in difficulties in another aspect. That is why the bill is part of the making justice work programme. As you correctly said, it is primary legislation. However, as I said at the outset, it is not being proposed simply because we have to make savings in legal aid. If we are to provide for the areas that we all want to provide for, we have to balance the books.

There is a point of principle here: people who face criminal proceedings should also have to make some contribution, if they can afford to, just as those who face challenges in civil proceedings do. I am happy to give you a guarantee and an absolute assurance that we will continue to review the regulations and that if there are difficulties we will seek to amend them. That is how we deal with legal aid. I have been before the committee on a variety of legal aid Scottish statutory instruments in the past. Many of them go through on the nod, because they are just updates, or whatever. That seems to be the way to go, rather than a pilot, which is not feasible, or a sunset clause, which I think is unnecessary.

Colin McKay: I will give the committee some clarity about what can and cannot be changed. As the convener suggested, the principle of contributions is what the bill is about. Although the bill specifies £68 a week as the starting level at which contributions will be levied, that can be amended by regulations.

The Convener: We understand that.

Colin McKay: The issue about who collects it can be amended by regulations.

The Convener: We understand that some tweaking can be done in regulations; that is the process. However, we are looking at the principle and whether there might be unintended consequences.

Graeme Pearson: I am grateful to the cabinet secretary for his commitment to review the provisions. However, given that the legislation might well be passed this year, I wonder whether he can offer some comfort by putting a date on that review. Will it happen in three years' time, or whatever?

Kenny MacAskill: I am happy to work with the committee and to hear its preference. I meet the chair and chief executive of SLAB very regularly and am happy to raise in those meetings the committee's views on when such a review might be carried out. I presume that to do so after a year might be too soon; however, it might be appropriate to review the situation in three years. We could undertake to return at that time to see how things are working out.

The Convener: We can raise the issue during the stage 1 debate and put it on the record not just for the committee but for the Parliament as a whole. Thank you very much, cabinet secretary—that is lovely. We will move on to the next item, for which I believe Colin McKay and Felicity Cullen are staying. When I suspend meetings, members tend to run away and I have to catch them with nets.

Defamation Bill

11:36

The Convener: Item 3 is consideration of a legislative consent motion for the Defamation Bill, which is UK Parliament legislation. I thank the cabinet secretary, Colin McKay and Felicity Cullen for staying to give evidence on the LCM and invite the cabinet secretary to make a short opening statement.

Kenny MacAskill: I thank the committee for the opportunity to discuss a draft legislative consent motion in relation to the UK Defamation Bill, which was introduced in the House of Commons on 10 May 2012 to reform aspects of the law of defamation in England and Wales and followed a consultation that was carried out, again in England and Wales only. As the main reforms are designed to address widespread concern about defamation law in England and Wales, they involve amending Great Britain-wide legislation—the Defamation Acts of 1952 and 1996—for England and Wales only.

In Scotland, the law of defamation falls within the competence of the Scottish Parliament. It has not attracted the same criticism as the law south of the border and the Scottish Government has no plans for wholesale reform in this area. That said, the UK bill's reforms include provisions for qualified privilege for a limited range of academic activity, one of which was included in the bill only at introduction following a recommendation by the UK Parliament Joint Committee on the Draft Defamation Bill in its report.

The bill seeks to extend the defence of qualified privilege in relation to a defamation action to fair and accurate reports of what is said at a scientific or academic conference, and to create a new defence of qualified privilege for peer-reviewed articles in scientific or academic journals. Given that much academic research is done collaboratively across the border, and given that conferences are held throughout the UK with delegates attending from across the UK, the Scottish Government takes the view that it is desirable to extend to Scotland the provisions on qualified privilege. After all, parity of protection in this sphere will facilitate robust and constructive scientific and academic exchange.

The extension of the provisions to Scotland is the subject of the legislative consent motion. Although the Scottish Parliament is able to legislate for this devolved matter, there will be no suitable opportunity for it to do so in the near future. The Minister for Community Safety and Legal Affairs, Roseanna Cunningham, wrote to Lord McNally, the UK minister who is responsible for the bill, and he has agreed in principle to extension of the provisions. I therefore ask the committee to support the draft legislative consent motion that has been laid before it and am happy to answer questions.

Graeme Pearson: First of all, I acknowledge that it was David McLetchie who felt that we should examine the matter further. He would have been present this morning, but for other very pressing matters.

Recent press reports seem to call into question some of the points that you have made in your opening remarks. In particular, the justification that Scots law in this area is sufficiently robust has been challenged by Alistair Bonnington, who said that, having

"practised defamation law in Scotland for over 30 years and attended many conferences all over the world where expert media lawyers discussed the problems experienced when domestic law curtailed free speech"

he had found that the

"Scots law of defamation was one of the worst offenders found anywhere"

and feels that it is time for reform. His view seems to be somewhat in sympathy with the view of Professor Elspeth Reid of the University of Edinburgh law school. She said in a recent article that, although matters are not as urgent in Scotland as might be the case in England,

"the time has come for a fundamental review of the interests that defamation should seek to protect".

As a standard grade examination would say, "Discuss". What is your view, minister?

Kenny MacAskill: Alistair Bonnington has challenged many aspects of Scots law, on not all of which I share his opinions.

The law of defamation in Scotland has been relatively robust. We do not have the same issues that are arising south of the border with libel tourism and an array of other problems. However, we should never rest on our laurels.

The primary organisation to pursue the issue should be the Scottish Law Commission. I meet the commission regularly, but it has not raised defamation as one of the matters that it currently wishes to consider, although perhaps it will come to that in due course. If there is a desire to consider the law of defamation, it might be appropriate to discuss with the commission whether it thinks that the issue is urgent or should be addressed in due course, and whether it is prepared to consider a matter for which it would, ultimately, be responsible.

I suggest engagement with the commission to see whether it shares the concerns of Professor Reid and Alistair Bonnington, and perhaps to see

whether defamation—although it is not on the commission's current work programme—might be factored in by Lady Clark for the commission to examine in the future.

Graeme Pearson: When you say that the commission should be engaged in discussion, are you suggesting that the committee or you should do that?

Kenny MacAskill: Either of us could do that. I can go back to the commission and say that the committee has raised the issue with me, or the committee could write to say that the issue has been raised and to ask whether the commission has a view. I am in your hands with regard to what you would prefer.

It might, however, be better for the committee to do that so that the commission hears directly from you, rather than getting the information second hand from me. I have always found the commission to be perfectly happy to engage. It is not part of Government as such—indeed, when I was in opposition I met it just to be apprised of matters. I think that the commission will be perfectly happy to engage with the committee. There may be some merit in asking not only about the question of defamation, but about what other plans the commission is considering.

Graeme Pearson: Okay. I am grateful for that suggestion.

The Convener: My new phrase today is "libel tourism", which is very contemporary.

Jenny Marra: Why do we need consistency for scientific and academic material, but not for other published materials?

Kenny MacAskill: I do not think that there is a problem in that area. The reason why we need consistency for scientific and academic material is that the subject is being addressed in the UK bill. We could introduce primary legislation here in Scotland, but we can access the UK bill's provisions. Given that much of what is dealt with in scientific and academic journals is pan-UK, we as a Government recognise that the bill is sensible and that there is a gap that needs to be addressed.

The other aspects of the bill relate to the English law of defamation, which is not the same as the Scots law of defamation, which we think is fine. The bill responds to the needs of the academic and scientific communities so that there is peer review and free and frank exchange at conferences, but some protection is provided so that people will not be unjustly defamed or libelled.

Roderick Campbell: Just for clarity—contributions from Alistair Bonnington and Professor Reid notwithstanding—has the Scottish Government received any representations from the Law Society of Scotland or the Faculty of Advocates on the matter?

Kenny MacAskill: No. The major on-going discussions have related to defamation of the deceased, which was addressed by the Public Petitions Committee with engagement from my ministerial colleagues. Matters have been examined, but they are to some extent being held in abeyance, pending the outcome of the Leveson inquiry, given that defamation of the deceased has in many instances related to newspapers. It has been decided that we will await the outcome of the inquiry before we decide what to do thereafter. The matter has not been raised with me by the Faculty of Advocates or by the Law Society of Scotland.

I read Professor Reid's views and have some sympathy with some of her points. However, I would not put myself in the same bracket with regard to Alistair Bonnington's views, but there we go.

The Convener: Some of us might share that view. If there are no further questions, I must declare an interest—I have a son who engages in scientific and academic exchanges and research, and it is a dog-eat dog world. I have decided that it is far tougher than being a politician.

That concludes the evidence session, and I thank the cabinet secretary.

Subordinate Legislation

Charities Restricted Funds Reorganisation (Scotland) Regulations 2012 (SSI 2012/219)

Charities Reorganisation (Scotland) Amendment Regulations 2012 (SSI 2012/220)

11:45

The Convener: Item 4 is consideration of two instruments that are subject to negative procedure. The Subordinate Legislation Committee has not drawn Parliament's attention to either instrument. I see that members have no comments. Are members content to make no recommendations?

Members *indicated agreement.*

11:46

Meeting continued in private until 12:08.

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