The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 13 November 2012

Session 4

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JUSTICE COMMITTEE
32nd 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) (Ind)
*Colin Keir (Edinburgh Western) (SNP)
Alison McInnes (North East Scotland) (LD)
David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kenny MacAskill (Cabinet Secretary for Justice)
Margaret Mitchell (Central Scotland) (Con) (Committee Substitute)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 13 November 2012

[The Convener *opened the meeting at 09:50*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 32nd 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.

Apologies have been received from Alison McInnes and David McLetchie. I welcome Margaret Mitchell, who is substituting for David McLetchie.

Under item 1, the committee is invited to consider whether to take item 3 in private. Is that agreed?

Members *indicated agreement.*

The Convener: Thank you. We have to reach that item today as we must sign off our report on the budget, so I intend to be finished with the cabinet secretary by 11.15. Members have been told.

Scottish Civil Justice Council and Criminal Legal Assistance Bill: Stage 2

09:51

The Convener: Item 2 is stage 2 proceedings on the Scottish Civil Justice Council and Criminal Legal Assistance Bill. I welcome the Cabinet Secretary for Justice and his officials. Members should have copies of the bill, the marshalled list and the groupings of amendments for consideration today.

I hope that you are all ready. I will take the amendments at a reasonable pace; I say that for some of the elderly members of the committee who have said that I accelerate too much—naming no names, Mr Campbell.

Section 1 agreed to.

Section 2—Functions of the Council

The Convener: Amendment 25, in the name of Jenny Marra, is grouped with amendments 26 and 28 to 30.

Jenny Marra (North East Scotland) (Lab): Amendment 25 would give the Scottish civil justice council a duty to advise the Scottish Government on civil justice matters and a duty to consider how to make the civil justice system more accessible, fair and efficient. The bill gives the council a duty to advise the Lord President on changes to the civil justice system, but not a duty to advise the Scottish Government on that, and there is no duty for the council to consider how to make the civil justice system more accessible, fair and efficient. I believe that to afford the council a duty to advise the Scottish Government as well as the Lord President on civil justice matters is the right way in which to ensure that civil justice policy remains the preserve of our democratically elected Parliament and Government.

Constitutionally, it is for the Government to make policy and for the Parliament, including the Justice Committee, to scrutinise it. Although I was reassured by the Lord President's interpretation of the bill, that reference to policy was in relation to policy of rules of court. I believe that the bill should be beyond interpretation, and the insertion of the provision that I propose will allow the Government to continue to execute its obligation over civil justice policy in its wider definition, should the council take it upon itself to consider that.

Both the Cabinet Secretary for Justice and the Lord President have concluded that the council will be tasked with implementing the Lord President's recommendations from the Gill review. Those are wide ranging and they touch on a number of areas

of civil justice policy. For that reason, both the obligation to advise the Government on the changes and the obligation to consider how the reforms will make our civil justice system fairer, more accessible and more efficient are important provisions.

I move amendment 25.

The Cabinet Secretary for Justice (Kenny MacAskill): I will discuss amendment 25 and its consequential amendments 26 and 29 first. I appreciate that Jenny Marra is seeking to ensure that the bill is clear about where responsibility for justice policy properly lies. However, I do not agree that the bill is unclear in that respect. I hope that I can provide some reassurances on what I agree is an important constitutional issue.

The council will essentially be an advisory body. It must advise the Lord President on improvements to the civil justice system and it must assist the Lord President in the Court of Session in preparing rules of court.

The council's duties to advise the Lord President should be understood within the context of the Lord President's statutory functions under the Judiciary and Courts (Scotland) Act 2008

"for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts."

It is in that context that the council's duties to advise the Lord President should be viewed. The council's advisory functions are intended to assist the Lord President in fulfilling his duties under the 2008 act.

The bill makes it clear that the council "may" advise ministers. I see no need to compel it to do so. Ministers and the Parliament can take the council's advice into account if we so wish. The Lord President discussed those issues when he appeared before the committee and I understand that the committee was largely reassured by his evidence.

Comparisons have been drawn with the Civil Justice Council in England and Wales. That body is a non-departmental public body under ministerial direction. I believe it appropriate that responsibility for the Scottish council, which will differ in several ways from the Civil Justice Council in England and Wales, will rest with the Lord President. The Government will remain the body responsible—and responsible to Parliament—for the development of wider justice policy. Nothing in the bill will affect the capacity of the executive, the legislature and the judiciary to continue to make the decisions that appropriately rest with them.

I am unsure whether amendment 25 would achieve the clarity desired. I submit that the proposed dual function might even blur the lines, as it suggests that the council must consider matters that properly sit with ministers. With regard to the proposal to place a duty on the council to

"consider how to make the civil justice system more fair, accessible and efficient",

the bill as drafted provides at section 2(3) that the council does not have to merely "consider" that issue but that for all its functions, which encompass the whole civil justice system, it must have regard to the principle that the civil justice system should be fair, accessible and efficient. I believe that that is a stronger protection that will permeate as a guiding principle for all the council's functions.

Amendment 28 would add the ability to make proposals for research to the council's powers. Although I consider that there is little doubt that the council would be able to do that under the bill as drafted, I am happy for the bill to highlight that. Amendment 30 seeks to insert a reference to the sections under which the council may make recommendations. Section 3(2)(g) already provides that the council may publish "any recommendation it makes". I believe that amendment 30 is therefore unnecessary.

I invite the committee to reject Jenny Marra's amendments, with the exception of amendment 28, which I am pleased to support.

Jenny Marra: I have said what I want to say on the amendments, and I press amendment 25.

The Convener: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)

Against

Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 25 disagreed to.

The Convener: Amendment 26, in the name of Jenny Marra, has been debated with amendment 25.

Jenny Marra: As amendment 25 has been defeated, I will not move amendment 26.

Amendment 26 not moved.

The Convener: Amendment 27, in the name of Jenny Marra, is grouped with amendments 1 to 4 and 11.

Jenny Marra: Amendment 27 would give the council an obligation to consult on changes to the rules of court. Given the complexity of many rules of court, organisations have frequently raised concerns that court users do not have an adequate understanding of the rules. Organisations such as Scottish Women's Aid have said that having the opportunity to engage with the council on proposed changes would improve the service that they provide by ensuring that they are informed and engage in the decision-making process. I believe that the council would benefit, too. To afford it the ability to consult on rule changes would ensure that it made decisions with the benefit of the views of all interested organisations.

I move amendment 27.

Kenny MacAskill: Jenny Marra's amendment 27 would require the council to consult

"such persons as it considers appropriate before preparing draft rules".

However, the bill gives the council flexibility in that regard. Under section 3, the council will have powers to consult on any issue within its remit.

10:00

As I have mentioned previously, the expectation is that much of the council's work will be carried out at committee level where there will be ample opportunity for individuals and organisations to contribute. The Civil Procedure Rule Committee in England and Wales, which drafts rules and has no policy function, is required under section 2(6) of the Civil Procedure Act 1997 to

"consult such persons as they consider appropriate, and ... meet (unless it is inexpedient to do so)"

before making or amending rules. The Scottish council, which will have the power to consult on any matter within its remit, will have much broader functions than the Civil Procedure Rule Committee and will necessarily operate in a more inclusive manner. I do not think, therefore, that a statutory duty to consult is needed.

I appreciate Jenny Marra's concern and the concern of some stakeholders that the council might operate as a closed shop. However, I do not believe that that will happen. Indeed, I do not believe that the bill, which opens up the current arrangements significantly, would allow it. The estimated costs of the council that are provided in the financial memorandum to the bill include the costs associated with public consultation, which are up to £10,000 a year and significantly more during civil courts reform—potentially, up to £50,000 at the busiest period. Those figures were developed in collaboration with the Lord President's office. I hope that the committee will take that as a good sign that the council will consult.

Although the existing councils carry out consultations—such as on the new rules on the inner house of the Court of Session, for which the consultation extended to the holding of a public meeting—I consider that it would be disproportionate and undesirable to require the council to consult prior to preparing every set of rules. In many cases, rules will make technical changes purely to give effect to primary or subordinate legislation, the subject matter of which may have already been subject to extensive consultation and which, in any case, will have been considered by Parliament. I believe that the broad power to consult is sufficient and do not, therefore, consider it necessary to place upon the council the statutory duty contained in amendment 27.

Amendments 1 to 4 and 11 in my name have been identified as necessary to ensure that, should proposals for any new court be brought forward, the council would be able to consider and prepare draft rules for that court at an early stage. As members are aware, the council's immediate task will be to prepare the draft court rules for implementation of the Scottish Government's planned programme of civil courts reform. One of the proposals under consideration is the creation of a sheriff appeal court, as recommended by the Scottish civil courts review. The amendments ensure that, should such a proposal be brought forward at any time, the council would be able to give it due consideration and make the necessary preparations for implementation.

I urge Jenny Marra to withdraw amendment 27 and invite the committee to agree to my amendments 1 to 4 and 11.

Roderick Campbell (North East Fife) (SNP): I have difficulty with the statutory duty that Jenny Marra proposes, as it seems unnecessarily to tie the hands. There may be occasions on which consultation would be appropriate, and making a statutory duty before anything is produced by the council seems to be the wrong way forward.

Jenny Marra: I feel that the statutory duty to consult would strengthen the new council and its ties with the public at large. Organisations' right to be consulted would enhance the public's understanding and appreciation of the civil court rules and make the court process a lot smoother for those who use it. I press amendment 27.

The Convener: The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)

Against

Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 27 disagreed to.

Amendment 1 moved—[Kenny MacAskill]—and agreed to.

Section 2, as amended, agreed to.

Section 3—Powers of the Council

Amendment 2 moved—[Kenny MacAskill]—and agreed to.

Amendment 28 moved—[Jenny Marra]—and agreed to.

Amendments 29 and 30 not moved.

Section 3, as amended, agreed to.

The Convener: Am I going slowly enough?

Roderick Campbell: Just about.

Jenny Marra: Nearly.

The Convener: That is faint praise.

After section 3

The Convener: The next group is on consultation of the council. Amendment 12, in the name of Margaret Mitchell, is the only amendment in the group.

Margaret Mitchell (Central Scotland) (Con): Amendment 12 seeks to clarify an issue that I raised at stage 1. Part 1 of the bill establishes the Scottish civil justice council, which will be led by the Lord President with a membership comprising legal and consumer representatives. Although the council will have a predominantly advisory role, it will clearly be a significant player in the law reform world, and its opinion will obviously carry weight.

Given that part 1 allows the council to offer advice and make recommendations to Scottish ministers on the development of the civil justice system, I have lodged a probing amendment to allow a discussion on whether the bill might go further than that and introduce a presumption that the council must be consulted in certain circumstances. For example, if a policy were to be introduced that either directly or indirectly affected the civil justice system, would Scottish ministers be compelled by law to consult the council? I can cite other examples of statutory consultees that have been created by legislation, mainly within planning law under which it is necessary to consult local authorities.

Other amendments that will be debated this morning seek to better define the council's policy functions and remit. Amendment 12 has a similar objective in that it clarifies that, notwithstanding the council's power to offer advice, nothing in the bill places a requirement on ministers to consult the council. I am interested to hear the cabinet secretary's view on the effect of the bill's current drafting in this area.

The Convener: It might be a probing amendment, Mrs Mitchell, but you are still required to move it.

Margaret Mitchell: I move amendment 12.

Kenny MacAskill: I appreciate what Margaret Mitchell is seeking with amendment 12, and entirely agree that the bill should not oblige ministers to consult the council. That is why nothing in the bill will have that effect.

We have already discussed the separation of powers, and I am happy to restate my assurances that the council is an advisory body and that nothing in the bill will interfere with the powers of ministers or the Parliament. That said, I do not believe that there is any doubt within the bill that needs to be addressed by amendment 12.

I therefore ask Margaret Mitchell to withdraw amendment 12.

Amendment 12, by agreement, withdrawn.

Section 4—Court of Session to consider rules

Amendments 3 and 4 moved—[Kenny MacAskill]—and agreed to.

Section 4, as amended, agreed to.

Section 5 agreed to.

Section 6—Composition of the Council

The Convener: The next group is on composition of the council. Amendment 31, in the name of Jenny Marra, is grouped with amendments 32 to 34 and 36 to 39.

Jenny Marra: Amendment 31 seeks to afford the council flexibility in the number of judicial members that can be appointed by changing the wording of the current proposal from "at least 4 judges" to "at least 2 and not more than 4". It can be seen as a consequential amendment to facilitate the changes that are outlined in

amendment 34, which seeks to increase representation by lay members on the council.

Convener, do you want me to speak to amendments 32 to 34?

The Convener: Yes. This is your opportunity to speak to all the amendments.

Jenny Marra: Similarly, amendment 32, which seeks to afford the council two practising advocates instead of "at least 2", and amendment 33, which seeks to afford the council two practising solicitors instead of "at least 2", can be seen as consequential amendments to facilitate the changes that are outlined in amendment 34.

Amendment 34 seeks to give the council a greater number of members who do not work specifically within the legal sector, in order to reflect the desire of many organisations that made representations to the committee on the council's composition. In any consideration of the workings of our civil justice and court system, it is important that we have representation from a broad range of interests. I understand that one concern about limiting the number of legal professionals on the council may be that rules of court are too technical to be understood by groups that represent litigants. However, many organisations with legally trained personnel would bring both the necessary legal knowledge and insight of their particular areas of the civil justice system to the council.

I move amendment 31.

Graeme Pearson (South Scotland) (Lab): I will merely add to what Jenny Marra has said. The cabinet secretary will be aware that a number of witnesses expressed concern to us about the closed nature of the legal establishment and their inability to influence discussions within the civil court environment. The suggestions that Jenny has made in amendments 31 to 34 would open up that closed environment and give opportunity to public members to influence the way forward. It seems that we have an opportunity now to show a sign for the future, which will likely not be available to us in the next few years. I encourage the cabinet secretary to look well on amendments 31 to 34.

Roderick Campbell: I ought to declare an interest: I am a member of the Faculty of Advocates.

Although I have some sympathy with the line that there may be too many prescribed lawyers, I also think that we should bear it in mind that this may be the starting point for the rules council. After rules are up and running, it would be possible to change the mandatory appointees, albeit by secondary legislation. I think that that would be the better way forward.

John Finnie (Highlands and Islands) (Ind): I disagree with Rod Campbell and I agree with Graeme Pearson. This is the opportunity to set the position from the outset. The danger is that we will establish a group of legal people without the necessary range. I am thinking particularly of the environmental people who should be involved.

Colin Keir (Edinburgh Western) (SNP): I firmly agree with Rod Campbell. Going by what the Lord President explained to us in his testimony, things will be far more technical in the initial period. I will not support the amendment.

Margaret Mitchell: Jenny Marra's amendments look very reasonable, so I would be interested to hear what the cabinet secretary has to say about why they should or should not be agreed to.

The Convener: He is going to do that anyway, but I do not mind you saying it.

Kenny MacAskill: Amendments 31 to 33 would set the maximum number of lawyer and judicial members at what the bill currently provides as a minimum. Amendment 34 would increase the mandatory minimum membership from 14 to 18 and would provide that none of the Lord President's discretionary appointments may be judges, practising solicitors or advocates.

The group of amendments would fundamentally alter the council's membership and deprive the council of the flexibility and capability that the Scottish Government believes are necessary for the council to carry out its functions most effectively.

Amendment 34 would also specify that none of the Lord President's discretionary appointments may be judges or practising advocates or solicitors—a point that was touched on by Graeme Pearson and John Finnie. The removal of practising solicitors in particular from eligibility for appointment as LP members could lead to a number of worthy candidates—who would not sit on the body as representatives of the profession—being precluded. For instance, lawyers who work for voluntary organisations, consumer bodies, or environmental bodies, or academics who also practise, might be unable to become members. I am sure that that is not what is intended.

The provision for flexible appointments strikes the right balance to allow the council to take account of the range of interests in civil justice, and to include technical expertise for its detailed work, without creating an unduly large and unwieldy body. It will allow the membership to evolve as its role develops. I have no doubt that Mr Pearson and Mr Finnie both know that lawyers are, precisely because they add value to an organisation's aims and ethos, frequently employed and appointed by the types of organisations that I mentioned. To preclude them

would be detrimental to that interest or group. I note that lay membership of the Civil Justice Council in England and Wales was strengthened following the Spencer review recommendations in that regard.

The bill as it stands would allow up to 11 non-legal persons to be appointed—more than half the maximum membership of 20. The establishing legislation for the Civil Justice Council in England and Wales specifies only the categories of members, not the numbers. The numbers, and therefore the balance, are set by ministers in consultation with the Lord Chief Justice. Further, and importantly, that body does not have responsibility for drafting rules of court. The arrangements for the Civil Procedure Rules Committee therefore need to be borne in mind when making comparisons with the situation across the border. That committee has between 6 and 9 judicial members, 6 lawyers and 2 lay members.

10:15

I have heard from a variety of groups that are seeking greater representation on the council, including the judiciary, the legal profession and the insurance industry, which has been in touch with many members. Rod Campbell has raised that issue with me. I consider that the range of views that have been expressed and the lack of consensus on the issue suggest that there is a need for flexibility, and that that flexibility will be achieved by allowing the Lord President the discretion that is provided for in the bill. The membership of a body such as the council, with its technical drafting role and policy function, must reflect both roles, and the bill's provisions will allow the council to evolve as its focus shifts from the initial rule-drafting task towards its function of systematic review.

The argument has been made that the technical work can be carried out through the council's committees instead. That may be true—it is equally true for activities other than rules preparation—but given that the technical work will be the body's bread and butter for the next two to three years, it seems to be appropriate that the membership should adequately reflect that.

Users' and the public's interests must be included at the heart of the council's work, of course. I expect that there will be an adequate number of lay members on the council and that court users' interests will be represented by all members of the council—not just the lay members—which is why the bill requires the council to have regard to the principles of fairness, accessibility and efficiency in carrying out all of its functions.

Capping of the number of judicial, advocate and solicitor members would limit the council's capacity to carry out the complex technical work that is needed to implement the many procedural changes that civil courts reform will require, and it could impact on the organisations that many people wish to see represented. The bill provides for an appropriate balance of technical expertise in membership of the council, both on the rules of court and policy issues.

The bill will allow the council to evolve as its focus changes over time. As the Lord President identified in his evidence to the committee, after the proposed programme of civil courts reform has been implemented, the membership composition of the council may require to be amended to reflect changing priorities, and ultimately ministers will retain the ability to amend the membership through subordinate legislation, if necessary. Rod Campbell mentioned that.

I therefore urge the committee not to support the amendments.

Jenny Marra: Before I decide whether to press the amendments, I am interested to hear whether the cabinet secretary might be open to making the provision for lawyers. He explained that lawyers who work for external organisations and who might still be practising would be precluded from being included. Would he be open to including in the provisions lawyers who are also practising?

Kenny MacAskill: I am happy to consider anything. A person either is or is not a lawyer. If a person specifies that they cannot be a lawyer, that rules them out, whether they are there as a representative of the Faculty of Advocates, the Law Society of Scotland, a consumer group or an environmental group. I think that drafting that would be very difficult, but I am happy to consider such matters. People tend to wear particular hats. If a person is a lawyer, he or she is a lawyer unless they specify that they are representing the Law Society of Scotland, for example. I can reflect on the matter. The Lord President must also have flexibility to deal with claims that we know are being made from the Association of British Insurers and those who represent consumer interests. He is aware of the competing groups, which will ebb and flow in time as issues matter. That is a matter for him, but I am happy to reflect on that.

Jenny Marra: I thank the cabinet secretary for undertaking to reflect on that. In the meantime, I would like to press amendment 31.

The Convener: The question is, that amendment 31 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 31 disagreed to.

Jenny Marra: I am sorry, convener, but was not the vote three for the amendment and three against it?

The Convener: No.

Jenny Marra: Okay. Thank you. I am sorry.

The Convener: I do not mind being corrected. Two people are correcting me now. If anybody else wants to join in, they should feel free to do so.

Am I going slowly enough?

Jenny Marra: Not quite slowly enough for me, obviously.

The Convener: I was just checking.

Amendment 32 moved—[Jenny Marra].

The Convener: The question is, that amendment 32 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 32 disagreed to.

Amendment 33 moved—[Jenny Marra].

The Convener: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 33 disagreed to.

Amendment 34 moved—[Jenny Marra].

The Convener: The question is, that amendment 34 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 34 disagreed to.

Section 6 agreed to.

Section 7—Lord President appointment process

The Convener: Section 7 is on appointments by the Lord President. Amendment 35, in the name of Jenny Marra, is grouped with amendments 5 and 13.

Jenny Marra: Amendment 35 would ensure gender parity on the council. It would guarantee that council membership would be gender balanced, with a minimum 40 per cent of men and 40 per cent of women being appointed. The other 20 per cent would be flexible.

A large gender gap still exists in Scotland's legal sector, not least in its governing bodies over which the Government has power. For example, as of June this year, the Judicial Appointments Board

for Scotland comprised 70 per cent men, the Scottish Legal Complaints Commission comprised 66 per cent men, the Scottish Law Commission comprised 80 per cent men, and the Scottish Court Service comprised 68 per cent men. I could go on.

It is also true to say that many cases that go through our courts affect women disproportionately. It would show leadership and foresight if we were to ensure gender parity on such a public body.

I move amendment 35.

Kenny MacAskill: Amendment 35 deals with a very important issue, which we have discussed before in relation to the Scottish police service and the Scottish fire and rescue service when considering the Police and Fire Reform (Scotland) Bill. My view remains that equality of opportunity for women and men—indeed, for many groups—needs to be addressed, but I am not persuaded that quotas for specialist expert bodies are the right approach. I hope that amendment 5 in my name, which will insert the principle that appointments be made fairly—I will speak to that more fully in a minute—will help to address some of Jenny Marra's concerns about appointments.

Margaret Mitchell's amendment 13 would require that the code of practice for making ministerial appointments, which is set by the office of the Public Appointments Commissioner for Scotland, apply to the Lord President's statement of appointment practice "as far as practicable" and

"with such modifications as the Lord President considers to be appropriate".

It would also require the Lord President to

"consult the Public Appointments Commissioner for Scotland"

before publishing the statement.

The majority of appointments to the council will be made by the Lord President, rather than by Scottish ministers, who will appoint one member of staff of the Scottish Government. The Lord President indicated to the committee his intention to draw on the principles in the Public Appointments Commissioner for Scotland's code of practice on making appointments. I welcome that commitment. However, I do not agree that those appointments should be tied by statute to that code, which is designed specifically for ministerial appointments to public bodies, is non-statutory, and may change from time to time. It does not seem to be appropriate to bind the Lord President in primary legislation to a set of principles that are not in primary legislation, that are designed for a different purpose, and that are susceptible to change, nor does it seem appropriate to introduce a role for the Public Appointments Commissioner for Scotland in that regard.

Instead—I note Margaret Mitchell's and others' concerns—I offer amendment 5, which adds to the commitment that has already been made by the Lord President and embodies what I consider are appropriate principles to guide the making of appointments, while ensuring that a proportionate approach is maintained. By specifying that the Lord President, when drawing up his statement of appointment practice,

"must have regard to the principles"

that appointments

"be made fairly and openly"

and that "all eligible persons" have the "opportunity to be considered", I submit that amendment 5 goes further than amendment 13 in some respects.

I urge the committee not to accept Jenny Marra's and Margaret Mitchell's amendments and invite it to approve amendment 5.

Margaret Mitchell: Amendment 13 seeks to address the widespread concerns about the process of appointments to the council. Many witnesses told the Justice Committee at stage 1 that the process should be more prescriptive, and in particular that it should comply with the guidelines that the Public Appointments Commissioner for Scotland's 2011 code of practice sets out.

I note that appointments to the Civil Justice Council in England and Wales are expected to comply with standard public appointments procedures. The commissioner's guidelines also apply to appointments to comparable organisations such as the Scottish Legal Aid Board, the Scottish Legal Complaints Commission and the Judicial Appointments Board for Scotland.

The Scottish Government has taken the view that the council should be given the status of a statutory advisory body rather than a non-departmental public body. Significantly, that departs from the recommendations of the Gill review. The effect of designating the council as a statutory advisory body is that the important accountability mechanisms—including the public appointments procedure—will not apply.

The council has been described as an NDPB in all but name, and it is clear that there is little distinction between the council, which is to be an arm's-length body with an advisory remit that is paid for by the public purse, and other NDPBs. The council will have an advisory role in an important part of our justice system, and appointments must be made in an open and transparent way.

I accept that the Public Appointments Commissioner for Scotland regulates ministerial appointments, and that is why amendment 13 does not seek to bring the council completely within the remit of the Public Appointments and Public Bodies etc (Scotland) Act 2003. However, it is important that appointments be made as far as possible within the rules that are laid down by the commissioner.

Amendment 13 would require the Lord President to prepare and publish a statement of appointments practice, which would, as far as appropriate, follow the commissioner's code of practice. The words "as far as appropriate" are included in the amendment to provide the necessary flexibility for appointments that are made by the Lord President.

Amendment 13 is, therefore, similar to amendment 5 in the name of the cabinet secretary, which broadly states the code of practice and requires that the Lord President

"have regard to the principles"

that are embodied in the code. However, the significant difference is that amendment 13 would additionally require the Lord President to

"consult the Public Appointments Commissioner for Scotland"

when drawing up his statement.

That is important, because it will involve an independent external expert in the appointments process and help to provide the transparency that we need and which is necessary for the council. For that reason, I reject the cabinet secretary's arguments on that specific point. Without that additional provision, the Lord President would be tasked with interpreting the code of practice both in drawing up the statement of appointment practice and in making the actual appointment. That seems largely to amount to a tick-box exercise that would not provide transparency at all. In contrast, under amendment 13, the commissioner would be able to advise and make recommendations to the Lord President.

I understand that the terms of the Standards, Procedures and Public Appointments Committee's remit would enable parliamentary scrutiny of the appointments that are made by the Lord President, if the committee so wishes. I would welcome confirmation from the cabinet secretary as to whether the Scottish Government shares that view, as it is important that Parliament has a mechanism for considering and reporting on those appointments.

Kenny MacAskill: These are matters about which the Lord President has indicated a willingness to be as open, fair and accessible as possible. I have no doubt that he will be appearing before this committee in connection with a variety of matters and will doubtless be prepared to discuss issues at that point.

This is about showing some respect and keeping the separation of powers. I believe that amendment 5 in my name provides the necessary assurances.

10:30

Jenny Marra: I support the remarks of Margaret Mitchell on the code of practice and the issues of public appointment and public bodies.

On amendment 35, in my name, on gender parity, I heard no reason from the cabinet secretary for why my proposal should not happen. He heard me make the same argument in connection with the Police and Fire Reform (Scotland) Bill.

The figures that I read out provide overwhelming evidence that not enough is being done to ensure balanced gender representation on our public bodies, and I think that this would be a simple and easy way to redress the imbalance in our legal system. I urge the cabinet secretary to reconsider his position and to support amendment 35.

The Convener: The question is, that amendment 35 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 2, Against 6, Abstentions 0.

Amendment 35 disagreed to.

Amendment 36 not moved.

Amendment 5 moved—[Kenny MacAskill]—and agreed to.

Amendment 13 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 13 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 13 disagreed to.

Amendment 37 not moved.

Section 7, as amended, agreed to.

Section 8 agreed to.

Section 9—Disqualification and removal from office

Amendment 38 not moved.

Section 9 agreed to.

Section 10—Expenses and remuneration

Amendment 39 not moved.

Section 10 agreed to.

Section 11—Chairing of meetings

The Convener: Amendment 6, in the name of the cabinet secretary, is grouped with amendments 7 to 10.

Kenny MacAskill: I will begin with amendment 9. Section 11 provides that the Lord President may determine that he, or any Court of Session judge member of the council, is to chair council meetings. It also provides that a deputy chair is to be elected by the council from the judicial members.

Having considered the views that were expressed in evidence regarding the role of lay members on the council, I agree with the committee's view, expressed in its stage 1 report, that lay members should not be precluded from the position of deputy chair. Accordingly, amendment 9 removes the requirement that a deputy chair is to be elected from the judicial members of the council and leaves the selection of the deputy chair to the council.

Amendments 6, 7, 8 and 10 are drafting amendments to remove any doubt about the ability of the deputy chair to chair meetings of the council.

I move amendment 6.

Amendment 6 agreed to.

Amendments 7 to 10 moved—[Kenny MacAskill]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Proceedings

The Convener: Amendment 40, in the name of Jenny Marra, is in a group on its own.

Jenny Marra: Amendment 40 has been taken from a Government-supported amendment to the recent Police and Fire Reform (Scotland) Bill, which was dealt with by this committee. It seeks to add a layer of transparency to the council's proceedings by affording it the ability to hold proceedings in public and to publish details of its proceedings and other related materials. Given the complexity of some rules of court, there would be advantage for the public and lay organisations if council meetings were held in public. Greater understanding of the thinking behind changes to rules of court and our civil justice system would filter down to court users and the wider public.

We should expect the same level of transparency from all the public bodies that we create, to ensure that the Government takes a consistent approach to transparency and accountability. Given that a similar provision made its way into the Police and Fire Reform (Scotland) Act 2012, I expect the approach to make its way into the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

I move amendment 40.

Kenny MacAskill: There are good arguments for certain public bodies holding proceedings in public, but I am not persuaded that the new council, which will be advisory in nature, should be required to do so.

In general, bodies that are required by statute to hold proceedings publicly, such as local police or fire boards, have quite different purposes and functions from those of the proposed council. Such bodies are responsible for service delivery, including the allocation of public funds. It is therefore correct that the public should be given a right of access. The council will consider and advise on important issues, but it will not be responsible for making final decisions.

I appreciate that concerns about the council's accountability and opportunities to scrutinise it are at the root of amendment 40, and I hope that I can allay some of those concerns. The council will be required to lay an annual report and business plan before the Parliament. Under section 5(3),

"The report must include a summary of the recommendations made (if any) by the Council".

The report and plan, and the council's recommendations, will therefore be published. If

the Parliament wants publicly to consider any of the issues that have been raised, it will do so.

Court rules are already laid before the Parliament and published. The Parliament's consideration of the rules is a matter of public record. Also, the existing civil rules councils do not currently operate in secret. Although they do not meet in public, they publish minutes of their proceedings online. The Lord President has assured me that he intends the new council to be more proactive in relation to the material about its work that is published.

There is also the seemingly small matter of the practicability of amendment 40. Requiring council and committee meetings to be held in public would mean that the Scottish Court Service would have to put in place suitable arrangements for public access. That would pose difficulties in finding suitable accommodation, which would add to the costs of the body, especially during civil courts reform, when meetings could take place regularly.

There is nothing in the bill that prevents the council from holding public meetings if it wants to do so. Some of the people who are calling for more robust accountability mechanisms are very much the sort of people who I expect might become members of the council or its committees. I therefore trust that the matter can be left to the council.

That said, I agree with Jenny Marra that the new council should carry out its activities in an open and transparent manner. That is why the bill introduces a new requirement for the laying of plans and reports before the Parliament. It is why I lodged amendment 5 in respect of appointments being made fairly and openly, and it is why the Scottish Government has decided to extend freedom of information coverage to the new council and to the Criminal Courts Rules Council. That will be done by subordinate legislation, which will be laid before the Parliament in the new year. I would be happy to provide a draft order before stage 3, should that be desired.

We are not in disagreement over the principle of amendment 40; the question is the best and most proportionate means of achieving the same end. The arrangements that I described will provide for robust mechanisms for ensuring proper scrutiny and accountability. Freedom of information, in particular, will be more robust, because the council will not have the discretion for which amendment 40 would provide.

I urge Jenny Marra to withdraw amendment 40.

Jenny Marra: The most robust and confident government institutions and arms of government welcome meeting in public and opening themselves to the highest level of scrutiny and accountability. As many as possible of our public organisations should meet in public. The cabinet secretary's argument about cost does not stack up. There are many meeting venues in our court system that would be easily accessible to the public, so I do not think that the argument about practicability is a good reason not to take a robust approach to transparency. I press amendment 40.

The Convener: The question is, that amendment 40 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 40 disagreed to.

Section 12 agreed to.

Sections 13 to 15 agreed to.

Section 16—Interpretation of Part 1

Amendment 11 moved—[Kenny MacAskill]—and agreed to.

Section 16, as amended, agreed to.

Sections 17 and 18 agreed to.

The Convener: I have a little scribble that tells me that, at this point, I need to pause for a short time for a changeover of officials. I therefore suspend the meeting for one minute—which means that everyone should stay put.

10:40

Meeting suspended.

10:41

On resuming—

Section 19—Clients' contributions for criminal assistance by way of representation

The Convener: We are all sitting comfortably, so we will begin. Amendment 41, in the name of Jenny Marra, is grouped with amendments 42 to 44, 19 and 20.

Jenny Marra: Amendment 41, which seeks to remove from the bill the £68 contribution threshold

for assistance by way of representation payments, can be seen as a consequential amendment to facilitate amendment 42, which seeks to have the rates of contribution for ABWOR in relation to disposable income or capital set by regulation instead of primary legislation.

Regulations are easier to amend and indeed are more commonly amended than primary legislation. Despite wage freezes and the increasing cost of living, the contribution rates for civil justice, which are set by altering primary legislation, have not been amended this year. If we keep this £68 figure in primary legislation, it will be out of date within three months, never mind six months, a year or three years, as prices and the cost of living rise in this recession. Given that changes to primary legislation are not common, it would be much better for figures that in the interests of justice need to be regularly reviewed to be set out in regulations. Amendments 43 and 44 seek to have a similar effect for criminal legal aid as amendments 41 and 42 have for ABWOR.

I move amendment 41.

Margaret Mitchell: Amendments 19 and 20 seek to require Scottish ministers to make regulations that explicitly state what the bill means by "disposable income" and "disposable capital". I accept that the definition of disposable income will inevitably be complex, which is why I am not suggesting that it be included in the bill. Nevertheless, it is important to have a legally binding definition and that Parliament be given the opportunity to consider it.

The definition of "disposable income" is central to the working of the legislation, because it determines the point at which an individual is required to contribute to their legal representation. If the threshold is wrong, poor and vulnerable people could be forced to pay when they might be unable to afford to do so. Although the cabinet secretary and the Scottish Legal Aid Board have assured the committee that disposable income would be determined only after a long list of necessary costs were deducted, evidence given to the committee shows that stakeholders disagree on what exactly should be included as disposable income. For example, some witnesses have expressed concern that non-passported benefits will be taken into account, while others have called for the disability living allowance and its replacement to be disregarded.

10:45

The inclusion of the resources of spouses or partners could also cause confusion and I believe that it could be controversial. Does it mean that, if the total household disposable income exceeds the threshold, one member of the household who has been accused of a crime and who earns below the threshold will have to make a contribution?

Equally, there is much confusion over what is to constitute disposable capital. The policy memorandum to the bill states:

"Capital includes savings and anything else of value owned by the client",

with some essential exceptions. That, in turn, could result in elderly individuals who may have significant capital but no disposable income being forced to contribute to legal aid. Such questions cannot be left to interpretation and should be set out in subordinate legislation. In the interests of clarity, the cabinet secretary must come up with a definitive list that can be debated so that those accused of a crime know exactly what will be taken into account as income and capital and what will not.

Amendment 19 would oblige ministers to make regulations about contributions for criminal legal assistance. The bill currently gives ministers that power without requiring regulations. Amendment 20 would ensure that ministers include a definition of both disposable income and disposable capital in the regulations.

I am sympathetic to the intent behind the amendments in Jenny Marra's name, but they would result in uncertainty as to the precise threshold. At this point in time and for that reason, I cannot support them.

Kenny MacAskill: These amendments focus on the threshold above which a person's contribution towards their criminal legal aid fees will be assessed. Many comments have been made during evidence sessions on the proposed threshold, and many of my colleagues raised the subject in the stage 1 debate.

As I stated in my response to the committee's stage 1 report, a number of principles have been applied in reaching the figure of £68: achieving consistency in contribution thresholds between the different aid types used in criminal cases, which are currently ABWOR when someone pleads guilty, and criminal legal aid when someone pleads not guilty; achieving consistency with the level of income support as that is the level at which state support for a person is essential, and £68 is just over the personal allowance level for a single person over 25 at 2011-12 rates; and avoiding sharp differences in contribution based on small differences in income or capital. That has led to the development of the graduated approach that the committee will have seen in the draft regulations that were forwarded recently.

Basing a decision such as this on a set of principles means that those principles will continue

to apply whenever changes to the threshold might be necessary to maintain access to justice for those in need of criminal legal aid. Principles not only provide the impetus for future changes but ensure that any changes are justifiable and timeous. Indeed, the link to income support levels will likely see an increase in that threshold sooner rather than later.

I see that the amendments proposed do not suggest an alteration to the level of threshold but focus on how that is presented, whether in the bill or in regulations. It is interesting and surprising to see amendments 41 and 43, lodged by Jenny Marra, which propose removing the threshold from the face of the bill and placing the determination of disposable income and capital in regulation. Legal aid legislation is complex and much of the detail needs to be set out in regulations. However, where possible, the Legal Aid (Scotland) Act 1986 shows on its face the threshold below which a person may be eligible for a particular legal aid type and the threshold above which a contribution will be due. That is currently done in the 1986 act for advice and assistance, which includes ABWOR, and for civil legal aid.

Sections 19 and 20 of the bill continue that important practice. As a result, it is important that the bill clearly specifies the level of income as the level below which contributions cannot be levied, with the regulations providing the means to alter that level. Amendments 41 and 43 would also remove the direct link in sections 19 and 20 to the provisions of the 1986 act that "passport" those in receipt of specified benefits, ensuring that no contribution is required for them.

Amendments 42 and 44 are related to the removal of the threshold from the bill, which is proposed by amendments 41 and 43, and would not improve what we have in the bill in terms of describing the content of regulations. Substantial amendments would need to be made to the draft regulations that the committee has been forwarded, for example to ensure that those people in receipt of passported benefits would not be required to pay any contribution. As I have said, the consequence of that would be that it would no longer be clear in the bill that some people would not have to pay any contribution.

In my view, the amendments do nothing but remove clarity about the levels at which no contribution is due. Therefore, I urge the committee to retain the threshold as it is in the bill and to reject amendments 41 to 44.

The Convener: Did you address the contributions based on the income and capital of a wife? I think that that issue was raised by Margaret Mitchell, but I cannot remember whether you addressed it.

Kenny MacAskill: It has been made clear that, when there is a conflict, those things will not be taken into account. We have evidence from the Scottish Legal Aid Board that it would also consider whether there was undue hardship. It is clear from paragraph 4(c) of new schedule 2A to the Advice and Assistance (Consolidation and Amendment) (Scotland) Regulations 1996, as proposed in the draft regulations, that

> "the resources of any spouse or civil partner of the person concerned are treated as that spouse's resources unless-
>
> (i) the spouse or civil partner has a contrary interest in the matter in respect of which the person concerned is applying for criminal assistance by way of representation;
>
> (ii) the person concerned and spouse or civil partner are living separate and apart; or
>
> (iii) in all the circumstances of the case it would be inequitable or impractical to do so."

When there is a conflict, such as domestic violence, that will be taken into account. In other circumstances—it is difficult to speculate on what they might be—there will still be the opportunity to approach the board.

Margaret Mitchell: Let us be clear about this, cabinet secretary. If a husband and wife are living together and the wife is earning less than would normally qualify her for a contribution towards legal assistance, will the household income be considered and could she be liable?

Kenny MacAskill: It is the household income that will be considered except when they are living separate and apart, when there is a conflict of interest or when there is some other matter that the board could reflect on. Deductions will be made in respect of the assessment of the disposable income of a spouse just as deductions will be made for children.

The basis of the individual applying for legal aid is that, first, matters will be assessed irrespective of whether there is a contrary interest, with deductions made for the spouse and children and other matters. In a particular case, there may be a conflict—for example, if the person and their spouse are living separate and apart—and the spouse's income will then not be taken into account.

The Convener: I call Jenny Marra to wind up, please. I have forgotten what you are winding up on.

Jenny Marra: Can I address Margaret Mitchell's amendment as well?

The Convener: Well, you really ought to have done that earlier, but I will let you do it now. You can slip it into your winding up. That is just between you and me—nobody heard me say that.

Jenny Marra: Thank you, convener. I will address that point first. I was interested in the cabinet secretary's response to Margaret Mitchell's amendment. He said that there will be a provision for circumstances in which there is a conflict of interests, whereby the board will decide whether a wife or spouse is eligible to make a contribution. I would be interested to know whether such a conflict of interest will be defined in the legislation or whether it will be left to judicial discretion.

I turn to my amendments—where are we?

The Convener: You are winding up and pressing or withdrawing amendment 41. I have kind of lost what we were doing myself, it was such a long time ago.

Jenny Marra: Amendment 41 seeks to take the threshold out of the bill. The cabinet secretary is being slightly mischievous—if I may say so—about the intention of the amendment in saying that people whose disposable income fell below the £68 threshold would have to pay a criminal legal aid contribution. I suggest that taking the figure of £68 out of the bill and putting the figures into regulations would leave no scope for that interpretation. Thresholds would be provided for in legislation, but they would be in the regulations.

Before deciding whether to press the amendment, I have a question for the cabinet secretary. Given that the figure of £68 is going to be in the bill—in primary legislation—how regularly does he expect it to be reviewed?

Kenny MacAskill: That is not a matter on which I can bind my successors. It is a matter that the board will require to consider and Governments will require to address, as has been the case since legal aid was established.

I do not think that it is a question of being mischievous. It is a question of being factual about the position. It is also fair to say that it is not a question of judicial discretion. The discretion would be for the Scottish Legal Aid Board. The only aspect of judicial discretion would be if somebody was to ask for a judicial review of the matter and it came before the appeal court.

As was mentioned in the stage 1 debate, the regulations will provide that war pensions and disability living allowance are not included in the calculation of disposable income. That said, I am happy to work with the committee to reconsider the threshold. My view is that, if people want a higher threshold to apply for criminal legal aid, it would have to be replicated across the board with civil legal aid. There would be a gross disparity if we expected a victim of domestic violence to pay a higher level than the alleged perpetrator of that violence. Also, the caveat has to be that the cost of any increase would have to be met from the current legal aid budget, which would mean that it would have to come out of fees.

I am happy to enter discussions on the matter with the Law Society of Scotland and to see whether it is willing to share the burden across civil and criminal legal aid for parity but, as I said, that would impact on fees. I will return to the committee on the matter in due course.

Amendment 19 presents some technical difficulties that arise from the conversion of "may" into "must". First and most important, if one wants to convert a power to an obligation in legislation, one needs to specify exactly what that obligation is; otherwise, it could be satisfied with minimal effort by Scottish ministers. Such a specific explanation in section 22 on what the regulations must cover would be long—possibly as long and detailed as the regulations themselves.

Secondly, "must" might be complied with only once, and again it would provide a risk of minimal effort by Scottish ministers, whereas "may" will allow Scottish ministers to exercise the power repeatedly, as and when necessary.

Thirdly, regulations would need to be ready at the same time as the obligation to make them came into force. Otherwise, Scottish ministers would be in breach of the obligation as soon as it had effect. In any event, the system will not work without regulations, so there is nothing to fear from the use of the word "may" in the bill.

On amendment 20, which was also lodged by Margaret Mitchell, I see no need to include definitions of disposable income and disposable capital in regulations. There are such definitions in section 42 of the Legal Aid (Scotland) Act 1986, and that provision includes a power to prescribe in regulations what constitutes disposable income and disposable capital. In practice, that power has to be used before the contributions regime or the new test for criminal ABWOR can operate. The section 42 power will be used when the draft regulations that have been shared with the committee are made. Section 42 has been in place since enactment in 1986 and it has been exercised for the advice and assistance regulations and the civil legal aid regulations, which contain long schedules that are similar to the schedules in the draft regulations.

I ask the committee to reject amendments 19 and 20.

The Convener: As we went in a circle back to the cabinet secretary, I will let the other two members come back in if they wish to do so. Margaret, more has been said on your amendments.

Margaret Mitchell: Notwithstanding what the cabinet secretary said, I believe that there is an

overriding requirement to ensure that we establish exactly what is meant by "disposable income" and "disposable capital". I will therefore move both my amendments.

The Convener: We have not reached that point yet. However, you are not persuaded.

Margaret Mitchell: I am not, convener.

Jenny Marra: For clarification, cabinet secretary, did you say that you are prepared to enter discussions on removing the £68 limit from the bill?

Kenny MacAskill: I am prepared to enter discussions with the Law Society of Scotland not about removing the figure from the bill and dealing with the matter through regulations but about increasing it. As I explained, there are good reasons for the inclusion of the £68 limit. I am happy to consider the matter, but the caveats are, one, that there would have to be parity with civil legal aid; two, that the cost would have to be met from the existing budget; and, three, that it would therefore come from the fees that are paid to the profession. However, I will enter discussions on that.

Jenny Marra: You will enter discussions with a view to keeping the figure in the bill but reviewing it regularly.

Kenny MacAskill: It is to be reviewed. As I touched on, these matters will also be dependent on changes to benefits and any increase in the allowances paid there. We think that it is important that the figure is kept in the bill, because it ties in with a whole variety of matters. Any changes that would involve uprating would come about through regulations. I am happy to discuss any increase, but the principle should remain in the bill.

11:00

Jenny Marra: How regularly would such a review take place?

Kenny MacAskill: I cannot address the issue of a review, as that will be for Governments to decide. It will also depend on when benefit changes come through. Given the coalition Government's proposals, that might be a negative thing, so we would have to consider matters in that regard. Some of those factors are not in my control because they are beyond the powers of this Parliament.

Jenny Marra: I thank the cabinet secretary for his clarification. In the meantime, before those discussions, I will press amendment 41.

The Convener: The question is, that amendment 41 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 2, Against 5, Abstentions 1.

Amendment 41 disagreed to.

Amendment 42 moved—[Jenny Marra].

The Convener: The question is, that amendment 42 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 2, Against 5, Abstentions 1.

Amendment 42 disagreed to.

The Convener: Amendment 14, in the name of Margaret Mitchell, is grouped with amendments 15 to 18, 21 and 22.

Margaret Mitchell: Amendments 14 to 18, 21 and 22 seek to alter the way in which the bill deals with the determination and collection of contributions. The amendments will require the Scottish Legal Aid Board to determine and collect any contributions that are payable under the bill.

The amendments will not require SLAB to collect the limited contributions that are currently collected by solicitors, mainly because that amounts to just over 5 per cent of the amount that the bill would require solicitors to collect. SLAB is best placed to determine and collect legal aid contributions. It has a 95 per cent collection rate in civil legal aid cases, and therefore it already has the apparatus and collection procedures that are

required to carry out large-scale collections of contributions.

SLAB was established by statute to administer legal aid funds. It therefore seems frankly preposterous that the Government proposes that private business should determine and collect such a large percentage of legal aid contributions.

I will spell out the risks in the Government's proposal. Criminal legal aid solicitors, who have accepted significant cuts to their fees in recent years, will be required to collect around £2.7 million in summary legal aid and assistance by way of representation contributions in criminal cases.

The Government's proposal will result in criminal legal aid solicitors either being unable to collect contributions in a significant number of cases or having to delay proceedings in order to secure those contributions. There is no doubt that requiring solicitors to collect summary criminal legal aid contributions will almost certainly result in court delays and an increase in cases in which the accused persons represent themselves.

I was a member of the former Justice 1 Committee, which scrutinised and supported reforms to the High Court and summary courts that were intended to address delays. It beggars belief that the Scottish National Party Government is, with its ill-judged proposal, undermining that constructive and effective legislation, which has resulted in significant reductions in trial adjournments in recent years.

In addition, the proposed system could discourage solicitors from taking on legal aid work, which is already low paid in comparison with other legal work. That raises very definite issues around access to justice.

Understandably, the proposal is strongly opposed by the legal profession. The Edinburgh and Glasgow Bar Associations have already indicated that they intend to strike if the plans go ahead. Although I do not condone that strike action, it is a reflection of serious opposition to the Government's proposal.

In its stage 1 report, the Justice Committee invited the Government to reflect further on the issue. The Scottish Government has responded by saying that solicitors already have systems in place for collecting client contributions and that under its plans 82 per cent of clients will not have to make any contributions.

I question both assertions. According to a survey by the Law Society of Scotland, more than 70 per cent of respondent firms stated that they either never or rarely collect ABWOR contributions simply because of the difficulty in doing so. Moreover, the Government's claim that 82 per cent of clients will not have to make any contributions is based on modelling of only four medium-sized firms, which is just not extensive or representative enough to be relied on.

Taking all that into consideration, I believe that there can be only one explanation for these disruptive and damaging proposals: the Government just does not want to foot the bill for the additional resources that SLAB will require to determine and collect contributions. Moreover, it is no surprise that SLAB supports the proposal for some of its work to be carried out by lawyers, particularly given that in 2011-12, the Scottish Government reduced SLAB's budget after freezing it for three years.

In effect, the proposal to introduce contributions amounts to a cut in legal aid fees. Solicitors will be expected to collect contributions to ensure that they are fully paid and if they are unable to do so the Government will simply say, "Tough luck". I accept that requiring SLAB to collect the majority of contributions will have significant resource implications but that is the fairest and most efficient way in which to proceed. Surely the Scottish Government will now accept that fact and provide SLAB will adequate resources to do its job.

Amendment 14 seeks to require SLAB to determine and collect contributions for criminal ABWOR introduced by section 19. As with the other amendments in the group, the amendment has been drafted to cover both the determination and collection of contributions, given that both of those will put unnecessary burdens on lawyers.

Amendment 15 seeks to require SLAB to determine and collect contributions for criminal legal aid introduced by section 20. Amendment 16 seeks to clarify that the fees paid to solicitors are paid by order of the court and the board out of legal aid requirements.

Amendments 17 and 18 are consequential on amendment 16, and amendment 21 seeks to make it clear that regulations on contributions for criminal legal assistance cannot require solicitors to determine or collect contributions. Finally, amendment 22 seeks to remove the subsection that would allow regulations to specify whether it is for the board or solicitors to determine or collect contributions.

I move amendment 14.

John Finnie: As you might expect, cabinet secretary, we have had a lot of last-minute submissions from various people. Indeed, this morning, I met and spoke to the solicitors who are standing in front of this building. One of the submissions that we have received has come from the Scottish Legal Aid Board, which, in a section

about the collection of contributions by the PDSO, says:

"The PDSO will determine the amount of and collect contributions. In the event of non-payment and where the PDSO has taken reasonable steps to collect and it is cost effective to do so, the Board will pursue the outstanding payments."

There seems to have been some confusion around that. I am reassured by your comments about undue hardship, reviewing an increase in the threshold and other issues, but when I was speaking to the solicitors out front the issue of the £600,000 figure given previously for the collection of fees was raised. I realise that this is literally a back-of-a-piece-of-paper calculation, but it was proposed that removing £5 from every solicitor's fee would pay for the cost of collection by SLAB. Given your comments about the overall cost envelope in the earlier discussion about thresholds, would you be prepared to consider such a move?

The Convener: Would it be useful, that question having been posed, to hear from other members before we hear from the cabinet secretary? What does the committee want to do? Should we deal with that question first?

Jenny Marra: Yes.

The Convener: That is fine—whatever suits. I will give the cabinet secretary a moment, because the question has just been put to him. Take your time, cabinet secretary. Do we want to move—

Jenny Marra: He is ready.

The Convener: Ms Marra is taking over. I will have to limit the muffins—I think that members are overwhelmed by them.

Are you prepared, cabinet sectary?

Kenny MacAskill: What I can say—

The Convener: I am sorry—John Finnie has something to add.

John Finnie: I should say that I was asking about the principle of further discussions on the issue; I am not expecting the cabinet secretary to negotiate with the Law Society in public.

Kenny MacAskill: I think that it was suggested by some in the profession that the PDSO would not collect contributions. That is not the case—the PDSO will seek to collect contributions. The PDSO is employed by the Scottish Legal Aid Board. If people were not to pay their contributions, SLAB would seek to recover that money. There is a point of principle, which it will seek to enforce.

It would be fair to say that SLAB is not a collection agency. If it were to seek to become a collection agency for all firms, it would incur increased costs as a result of having to hire in people to pursue contributions. There are probably private firms that are better placed to carry out mass debt recovery—some legal firms do that on an industrial scale. It would be better for them to recover the money.

As I said to Jenny Marra, I have a fixed envelope. If the Law Society has any proposals—so far, it has not had any proposals, other than simply to refuse to accept what is proposed—I will be happy to take them on board. I will offer to vary the thresholds. I am prepared to consider out-of-the-box solutions. There may be an argument that it would be better to pay the levy to an already established private firm that does debt collection for organisations from utility companies through to catalogue companies. Such firms are well known.

However, if it would be preferable, I could put it to the chief executive of SLAB that a contribution should be made to the cost of collection and that we could hire in people to do that work, but it would need to be funded from there, because my principle is that we must preserve the integrity of the legal aid service.

John Finnie: You are amenable to discussions with the board about that.

Kenny MacAskill: Absolutely.

John Finnie: Thank you very much.

Roderick Campbell: I want to discuss the current situation in relation to ABWOR. We heard evidence that the total amount of ABWOR contributions that should have been collected by solicitors was £154,000 and that 6.2 per cent of applications for ABWOR grants involved a contribution, out of a total of 42,853 successful applications. By my calculations, that means that, at present, the average contribution payable for ABWOR would be about £58.

Looking at the proposals, we can see that just under half the people who will have to make a contribution under the new system will be required to pay less than the current maximum of £142, so although we are talking about a significant increase, it is not an overwhelming increase. I suggest that the evidence on the current collection situation is less than satisfactory. Margaret Mitchell referred to the Law Society's survey, but it is based only on the 15 per cent of firms that responded. It is not the case that 75 per cent of those firms said that they collected under no circumstances; they said that they did so rarely.

I have had letters from a number of lawyers in which they have not provided a full explanation of why they do not collect. Some talk about relations with their clients, while others talk about the economics of the situation. However, we had evidence from Dr Lancaster of SLAB that between 5 and 10 per cent of the income from criminal

cases of many firms comes from private clients. That suggests that there are firms that can collect a lower value of contributions than the value of contributions that they currently collect from private clients, so I think that the case in respect of collections is overegged. I sympathise with very small firms, in particular, on which certain demands will be placed that might not be placed on the larger firms. I just wanted to put those thoughts on the record.

11:15

Graeme Pearson: In relation to the case being overegged, with due respect to Roderick Campbell, it is often the case that those who view other people's difficulties do not quite appreciate the impact of such economic restraints.

I will address some of the matters that the cabinet secretary covered. I fully agree with what Margaret Mitchell said about support for the amendments in her name. There is no doubt that the Law Society of Scotland, in its evidence to us at various times, took the view that the consultation process did not enable it to feed into discussions effectively and that developments were something of a moving feast that changed from day to day.

I hope that the Government has fully considered the scale of the economic impact, particularly on the small firms to which Roderick Campbell referred. In rural areas, we rely heavily on small firms to maintain legal aid support for people going to local courts. In the event that firms cannot continue to support work in small courts throughout the country, considerable pressure will be placed on our system and there will be a threat to the fair and equitable delivery of justice in Scotland that we all want. I hope that the cabinet secretary will reconsider his stance. He seems to have decided on his approach and our debate seems to have had no impact on his position.

Jenny Marra: I listened to what Roderick Campbell said about ABWOR. However, I have heard much evidence from defence solicitors in Scotland, and many solicitors do not collect the ABWOR contribution to which they are entitled because their clients cannot afford to make it. Thresholds should not be based on a situation that does not reflect what is really happening in our criminal justice system.

The cabinet secretary said that the Scottish Legal Aid Board is not a debt collector, but under the bill SLAB will collect contributions in solemn matters, and it already has the infrastructure and staff to enable it to do so. Perhaps it is collecting those contributions because, given the fees that are involved, the risk of not doing so is too large. Is not the cabinet secretary simply passing the risk of not collecting in summary matters from SLAB to private defence solicitors?

The Convener: I have a question that was put in many of the submissions that we received. Why is it that civil legal aid contributions are collected by the board and not criminal legal aid contributions? Could the Government pursue the matter in discussions with the Law Society and consider the collection of civil legal aid contributions by firms? The suggestion is controversial, but the approach would create parity between criminal practitioners and civil practitioners.

I am not suggesting that that is the solution. However, I accept that the legal aid budget is tight. I do not want what is happening to legal aid representation in England to happen here. There is an argument that if criminal practitioners are to collect contributions, why should civil practitioners be any different? I am interested to know whether such an approach has ever been discussed with the Law Society.

Kenny MacAskill: There has been some thinking by the Law Society of Scotland and the Scottish Legal Aid Board, I think. I am more than happy to allow those bodies to continue to discuss the issue. There are advantages as well as disadvantages to such an approach. An advantage is that the contribution is immediately treated as a fee and people get access to it. As I said to John Finnie, I am happy to discuss the matter with the Law Society—it might be better if initial discussions were with the Scottish Legal Aid Board, but I am happy to broker discussions.

The Convener: Do you have further comments on the amendments in the group?

Kenny MacAskill: I should put on record, given that Margaret Mitchell talked about cuts, that last year's legal aid costs were the second highest in the history of legal aid, at just under £160 million. Some two thirds of the figure went on criminal legal aid and 14 firms received more than £1 million from the public purse. It is a bit rich of a member of a party that is in government south of the border to talk about cuts, given the contrast between the situation in Scotland and the 8 per cent cut in legal aid that Westminster has imposed south of the border and the 17.5 per cent cuts that will be imposed in 2014-15.

This is about preserving the integrity of the Scottish legal aid service to make sure that we cater for all our people. I see Ms Marra shaking her head as if to say no, but that includes the person who came to my surgery last night who is paying a contribution as she seeks a divorce from a person who has perpetrated violence against her. I do not see people arguing for parity there.

We are seeking to preserve the integrity of a budget that has been cut. Legal aid is now not available south of the border in cases that relate to asylum, clinical negligence, criminal injuries compensation, debt, employment, housing, immigration, family and welfare benefits. It is important in Scotland that access to justice is available to people. More people are now able to access legal aid than ever before and it is important that we recognise that and, within the tight envelope that is foisted on us by Westminster, seek to look after the interests of all.

Amendments 14 and 15 propose changes to another aspect of the bill that has been the subject of some comment. As stated in my response to the committee's stage 1 report, I do not consider it unreasonable to expect a solicitor to collect his or her fees directly from the client who is being provided with legal assistance, nor do I consider the collection of fees to be anything other than a routine part of business for most, if not all, law firms.

I know that solicitors have lobbied hard to have removed from the bill their responsibility to collect from their clients their fees in summary cases and instead to place that responsibility on the Scottish Legal Aid Board. The amendments provide not only for that transfer but for the transfer of responsibility for the determination of contributions to the Scottish Legal Aid Board.

I repeat that the bill proposes evolution, not revolution. Solicitors have been responsible for the assessment and collection of advice and assistance contributions since the Legal Advice and Assistance Act 1972. The Legal Aid (Scotland) Act 1986 added the concept of advice and assistance by way of representation—ABWOR—for which solicitors collect contributions. Of course, in the case of privately paying clients, solicitors collect the entire fee from their clients. There has been no complaint that solicitors have been acting as "unpaid debt collectors" over the 25 years since the 1986 act came into force.

Regulations providing for ABWOR for children will be introduced during 2013 as a result of the Children's Hearings (Scotland) Act 2010. Under those regulations, solicitors will be required to assess and collect contributions in respect of welfare-based and offence-based cases. The assessment and collection of contributions for criminal legal aid in the bill is in line with those other aspects of legal aid.

There are few solicitors whose work comprises solely criminal practice and who do not already have processes in place to collect fees from clients in respect of ABWOR. Indeed, few businesses do not have processes in place to collect fees for services that they provide to a client or customer. Being a solicitor who registers with the Scottish Legal Aid Board should not entitle someone to demand that the public purse funds the collection of fees payable to them for the services provided by them to a client.

I remain firmly of the view that solicitors are much better placed to collect relatively small contributions from their clients. That is also in their client's interest. For example, the draft regulations provide flexibility in collection arrangements, leaving them to be agreed between the solicitor and the client. That gives room for a client's preferences to be accommodated. Perhaps the client would want to pay in cash, in person, or they might ask the solicitor to accept two instalments in one, to allow them to pay for another emergency. If SLAB were to be responsible for collecting all contributions, it is unlikely that it would be able to be as flexible with clients. A more structured and prescribed process would need to be put in place, and the client would have the additional burden of setting up a payment method with SLAB.

I think that it would be unworkable for the board both to assess contributions and collect them. If the board needs more information from the client, is the solicitor to act as an intermediary, passing on requests from SLAB and then returning to SLAB whatever the client provides? How would that be an efficient use of the solicitor's resources?

I realise that there is some misunderstanding around the responsibilities of the PDSO, as I have mentioned. Going back to what John Finnie said, I will be happy to discuss the issue with SLAB and, indeed, solicitors. I think that there is good reason why it is dealt with there, but I do not rule anything out. Getting the board to collect all contributions would substantially reduce the level of savings to the taxpayers' purse. I have made it clear that I am happy to discuss both the threshold and collection, but savings have to be made to avoid the situation that is playing out south of the border. Some actions have to be taken by those responsible for providing criminal legal aid.

During my time in practice—I have not practised for 13 years—I remember one of my partners representing somebody who was buying their council house. My partner took from them my fee for representing them in a criminal matter—a charge on petition. They were perfectly capable of paying the fee. We must be able to look at such scenarios.

The Convener: Just for clarification, I want to ask about whether, in the open discussions with the Law Society and the Scottish Legal Aid Board, the matter of civil contributions will be raised.

Kenny MacAskill: Absolutely. I am happy to give you an assurance to discuss that with them.

The Convener: Thank you. I ask Margaret Mitchell whether she wishes to press or withdraw amendment 14.

Margaret Mitchell: Can I comment on some of the points that have been raised?

The Convener: Of course. I beg your pardon. I got lost in the debate—another senior moment. That is two this fortnight. One a week is not bad.

Margaret Mitchell: On Roderick Campbell's point, there may well be some firms that are able to collect contributions, but the exception does not prove the rule. The vast majority of solicitors have said loudly and clearly that what is proposed will cause them major problems, will lead to inevitable delays in the court system and raises serious issues about access to justice. The concern is that many of the solicitors who currently carry out legal aid work will simply vote with their feet.

On the cabinet secretary's comments, I am advised that there may be a limited number of cases in which collection by solicitors may be necessary—for example, ABWOR cases in which advice is required to be provided relatively quickly—but such cases are rare. I was interested in the cabinet secretary's comments on the PDSO, which seem to me to be a confirmation of double standards in the bill's provisions, in that the PDSO will be expected to seek to collect contributions, but in the event that they do not succeed—if I understood the cabinet secretary correctly—SLAB will collect them. It therefore seems to me that the bill's provisions will afford the PDSO a belt-and-braces approach that will not be afforded to solicitors.

It is a distinct possibility that if SLAB were responsible for all the contributions, that would impact on the savings. Equally, however, that should not deter the Government from doing what is right and ensuring that we have a justice system that is fair.

I press amendment 14.

The Convener: The question is, that amendment 14 be agreed. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 14 disagreed to.

Section 19 agreed to.

The Convener: Cabinet secretary, I am aware that time is pressing, but can you sit there for a couple of minutes longer?

Kenny MacAskill: Certainly.

The Convener: How long have we got?

Kenny MacAskill: I probably need to be away by 12.

The Convener: We might manage to finish all the amendments by then. We have a large one coming up from Graeme Pearson, but the rest have all been debated. It would be kind of you if you could stay.

Section 20—Contributions for criminal legal aid

Amendment 43 moved—[Jenny Marra].

The Convener: The question is, that amendment 43 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is; For 2, Against 5, Abstentions 1.

Amendment 43 disagreed to.

Amendment 44 moved—[Jenny Marra].

The Convener: The question is, that amendment 44 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and

Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 2, Against 5, Abstentions 1.

Amendment 44 disagreed to.

Amendment 15 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 15 disagreed to.

Amendment 16 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 16 be agreed. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 16 disagreed to.

Amendments 17 and 18 not moved.

Section 20 agreed to.

Section 21 agreed to.

After section 21

11:30

The Convener: The next group of amendments is on refund of contributions. Amendment 45, in the name of Graeme Pearson, is grouped with amendment 23.

Graeme Pearson: Amendment 45 is a stand-alone provision on the refund of contributions for criminal legal assistance in certain circumstances. It states:

"At the conclusion of the proceedings, the court in which those proceedings are concluded may order any contribution for criminal legal assistance due or paid by virtue of this Act to be remitted or refunded to the person from or by whom, or in respect of whom, the contribution was due or paid if—

(a) the person has been acquitted of an offence, and

(b) the court considers that it is in the interests of justice for the contribution to be refunded."

In earlier evidence to the committee, particular circumstances were raised in which no remedy is currently offered to a citizen who, having been the subject of a prosecution and having been left with no stain on their character, may still have to bear the cost of having defended themselves against the prosecution.

I and others acknowledge that there are very few cases in which the court would pass criticism of the Crown for a prosecution before it, but there have been cases in which judges have offered views on the nature of the prosecution and whether it should have been mounted in the first place. The amendment seeks to offer judges an opportunity in particular circumstances—very rare circumstances, I believe—in which a remedy could be offered.

I understand that the Government may be reluctant to create such a precedent, but I go back to the notion of a fair and open society and citizens having the opportunity to receive support from the state when it is deemed to have gone a step too far in mounting a prosecution. Such a provision would be helpful and healthy.

I move amendment 45.

Margaret Mitchell: My amendment 23 would allow for refunds of contributions that have been paid in all cases in which an individual has not been found guilty, and it seeks to address the main injustice of the Government's bill.

As the proposals currently stand, they mean that an innocent person who is taken to court will be forced to contribute to their legal aid representation if their disposable income meets the required threshold. People who have been wrongly accused of a crime and suffer the stress

and indignity of criminal proceedings will, to make matters worse, be out of pocket by the Crown's actions.

During the stage 1 debate, the Cabinet Secretary for Justice said that the bill would

"help to maintain a fair, consistent and generous legal aid scheme."—[*Official Report,* 25 October 2012; c 12638.]

A range of witnesses, including those from the Faculty of Advocates and Scottish Women's Aid and Dr Cyrus Tata of the University of Strathclyde, expressed concern about the lack of refunds in the bill. As the committee report says:

"The Faculty also argued that, without a refund system, the Bill would create perverse incentives to plead guilty out of fear of the financial consequences of taking a case to trial."

The Church of Scotland shared that view.

The Scottish Government's position on the matter is unconvincing. I note that the cabinet secretary failed to address the issue during the stage 1 debate. Instead, in his response to the committee's stage 1 report, he said that refunds would be inappropriate because they would mean that legal aid victims were treated more favourably than those who paid privately, who would, of course, not be subject to refunds on acquittal. That argument amounts to two wrongs making a right. More to the point, the overwhelming objective must be to ensure that the vulnerable are protected.

The Government also argues that refunds would reduce the savings that are made under the bill. Although that may well be the case, it is not a sustainable argument for introducing a system that is unfair. Rather, it is yet further evidence that the Government, having decided to cut the legal aid bill by £10 million next year and a further £10 million in 2014-15, has worked back from that to try to come up with a system to fund those savings.

According to the latest custodial statistics, nearly 90 per cent of criminal cases result in a guilty verdict, which means that refunds would apply only to a small minority of cases.

The amendment would allow for refunds of all contributions that are made except where an accused person is found guilty. Refunds will therefore be given in all not guilty and not proven cases, as well as in other cases of acquittal, such as, for example, when the Crown accepts a plea of not guilty.

Amendment 45, in the name of Graeme Pearson, also attempts to introduce refunds of contributions. However, I am unable to support it as it would allow refunds only in cases of acquittal where

"the court considers that it is in the interests of justice for the contribution to be refunded".

My concern is that that could send out the message that those who are refused refunds, despite being acquitted, are somehow considered guilty. Our judicial system is rightly based on the principle that individuals are innocent until proven guilty, with the burden of proof rightly lying with the Crown prosecution. Amendment 45 therefore challenges that basic tenet of Scots law.

I also have concerns about how courts would determine when it would be in the interests of justice to refund. I believe that the amendment would introduce subjectivity, even though the principle applies to all cases of non-guilt verdicts—in which case, refunds should be given in all cases.

The Convener: I was concerned about this issue, too. I would look at the principle that is in operation, which is that, in civil litigation, someone who is successful may or may not get an award of their judicial expenses—again, the court has discretion about how to award those expenses; people do not always get all their judicial costs back. There has to be judicial discretion. I am not attracted by the amendment in Margaret Mitchell's name, as it contains no judicial discretion, which I think is terribly important. To some extent, the situation parallels what happens in civil cases.

The problem for me with Graeme Pearson's amendment concerns the fact that the principle that is in operation is that, in order to apply fairness, we would have to have some system whereby the private client, as well as the legally aided client, would be entitled to a return of some of their costs. We are not talking about a refund; we are talking about something like an award of expenses in criminal proceedings.

As Graeme Pearson's amendment deals only with those on legal aid, I cannot accept it. It is all very well for pragmatic arguments to be made, but we ought to work on principle. If it is appropriate that the court considers that it is in the interests of justice for a contribution—or, to use my word, the costs—to be refunded, that must surely apply to people who, while they are not necessarily rich, happen to be above the level at which they have to pay their own costs and have no legal aid cover. That is the problem for me.

It would be worth the cabinet secretary's time to consider the issue, but I think that, if we were to pass either of the amendments, there could be difficulties and unintended consequences.

I wanted to speak on this point because I think that there is an issue around exceptional circumstances in which the sheriff takes the view that the case ought never to have been brought before them in the first place. That is a really

narrow range of cases, because there are many reasons why evidence might need to be fully tested in order to establish that someone can be acquitted or have the case against them found to be not proven. Frankly, however, some cases should never be placed before the sheriff in the first place.

For those reasons, I think that Margaret Mitchell's amendment is far too broad and that Graeme Pearson's amendment does not serve those who pay privately for their defence, to whom we must also be fair.

Roderick Campbell: I will be brief, convener, because you have put forward most of the arguments that I would have made. I have a great deal of sympathy with Graeme Pearson's amendment, but we must be fair to those who are paying privately, however small those numbers and however few of them are acquitted. However, I do not want the issue to die a death, and it should be kept under debate.

Sandra White (Glasgow Kelvin) (SNP): I also have a great deal of sympathy with Graeme Pearson's amendment, and I have spoken to him about it, but I take on board what Roderick Campbell says with regard to private clients.

Perhaps, as Roderick Campbell implied, the cabinet secretary could look at the issue as he has very generously offered to do on two previous occasions. The issue should not be left to lie—we need to take it a wee bit further.

Margaret Mitchell: In response to some of the comments, it is important to emphasise that amendment 23 would ensure that the most vulnerable would be protected and—crucially—would have access to justice. It is as simple as that.

Kenny MacAskill: With regard to many of the points from the convener and other members, the devil is in the detail. The difficulty with Graeme Pearson's amendment is the question of what happens if the case is deserted. A whole variety of matters are involved, and the issue is not simple.

I understand why the committee has raised those concerns, and I have already discussed those matters informally with the Crown. I accept the convener's logic that, if we are to have a principle, it should apply to those who pay a fee, whether that is paid through a legal aid contribution or as a private client.

We should remember that in Scotland—unlike south of the border—there is no concept that anyone, no matter how guilty or immoral they may be, will ever be asked for court expenses. Whether the case involves a corporate offence or someone who is accused of breaching the peace on a Friday night, court expenses are not added.

I am happy to undertake to engage with the Crown and with defence agents. However, it seems that the convener's logic is correct: if the principle is to be followed, it must apply across the board. Equally, if it applies across the board, the law of unintended consequences will mean that it would apply to someone whose case is deserted by the procurator fiscal halfway through rather continued until they are formally found not guilty. That would raise the question of why we are giving people who get off—perhaps on a technicality—money back, and not seeking expenses.

My discussions with the Crown so far have been based on the principle that the situation is vastly different north and south of the border. There is no question of anyone being asked for expenses following a successful prosecution in Scotland. I am happy to re-engage on that issue.

Graeme Pearson: I acknowledge that amendment 45 is couched in language that, given the overall nature of the bill, relates primarily to legal aid.

I recognise the reservations that the convener and Roderick Campbell have raised, and I am grateful that the cabinet secretary is willing to consider those issues further. No matter what the unintended consequences may be, if the judge makes comments at the conclusion of a case to indicate that, in his or her view, the prosecution was ill advised and ill considered, we have a responsibility to reimburse. I acknowledge that that should be the case whether legal aid or private funding is involved.

In the event that the cabinet secretary is willing to take that matter forward with some energy, I am happy to leave the amendment.

The Convener: Do you want to withdraw the amendment?

Graeme Pearson: Yes.

Amendment 45, by agreement, withdrawn.

Section 22—Regulations about contributions for criminal legal assistance

Amendment 19 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 19 be agreed. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)

Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 19 disagreed to.

Amendment 20 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 20 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 20 disagreed to.

11:45

The Convener: Amendment 22, in the name of Margaret Mitchell, has been debated with amendment 14. I call Margaret Mitchell to move or—I beg your pardon.

Margaret Mitchell: We are on amendment 21.

The Convener: See, I knew I would do that. You are quite right—I am going too fast. I have overtaken myself, which is not an easy thing to do.

Amendment 21 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 21 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 21 disagreed to.

Amendment 22 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 22 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 22 disagreed to.

Amendment 23 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 23 disagreed to.

Section 22 agreed to.

Section 23 agreed to.

Before section 24

The Convener: Amendment 24, in the name of Margaret Mitchell, is in a group on its own. I call Margaret Mitchell to speak to and move the amendment.

Margaret Mitchell: Amendment 24 would insert a review clause into part 2. It would require the Scottish ministers to lay before Parliament a report

on the operation and effect of part 2. It is framed in such a way that the period begins on the day on which the first provision of part 2 comes into force.

The review clause will give Parliament the opportunity to consider the wider implications of the bill. Given the concerns that have been expressed at stage 1 and again today over the introduction of contributions and the way in which those contributions are to be collected, it does not seem unreasonable to require ministers to consider the effect of the change.

In addition, the significance of part 2 should not be underestimated. It will establish the presumption that those who can afford to pay for criminal legal representation should do so. The effect of the bill's provisions on access to justice and the efficiency of our criminal justice system could therefore be profound. Amendment 24 was drafted with the optimistic but, I realise, unrealistic hope that my earlier amendments would be accepted. However, I contend that the fact that they were not accepted makes the review all the more necessary.

The amendment states that "the 3 year period" begins when the first provision of part 2 is implemented, rather than when part 2 is fully implemented. Perhaps the cabinet secretary will take this opportunity to clarify whether he envisages all the provisions in part 2 being implemented simultaneously.

I move amendment 24.

Roderick Campbell: Given the ramifications, I hope that the cabinet secretary and the Government will take a close interest in how the policy develops. I do not disagree massively with Margaret Mitchell, but I do not think that we really need the formality of a review.

The Convener: I, too, am very sympathetic to the amendment, but I do not think that we need a formal report. The committee can, at any time, consider the implementation of any piece of legislation and do post-legislative scrutiny. I have no doubt that, if there are issues with the legislation, our emails will tell us. We will be able to bring the cabinet secretary to the committee to talk to us about anything that has happened as a result of the bill, should it proceed in a certain form.

Kenny MacAskill: That echoes my views. I understand the intention behind the amendment, but I do not necessarily agree that we need a legislative requirement to do the job. There is a risk that what we consider to be the key areas of importance at this stage will not be of concern in three years. It would also be difficult to tie down a timeframe. Some flexibility in timing might be necessary to include developing issues that are unknown at the moment, or because adjustments have been made through regulations that need to bed down.

As we have heard, the board continuously reviews practice and policies to ensure that the legal aid system works as efficiently as possible. I expect the impact of the proposals to be kept under similar and constant review, and swiftly adjusted if necessary. The bill provides the Scottish ministers with the ability to adjust details through regulations, and we expect that Government officials will keep under review how those parts of the bill operate. I have committed to conducting a review of the impact of the proposals within three years, and I will present the outcome of that review to Parliament.

I do not think that the requirement needs to be enshrined in primary legislation. Given all the other checks and balances, and my assurances about what I intend to do, I suggest that amendment 24 is unnecessary, although, like the convener, I see where Margaret Mitchell is coming from.

Margaret Mitchell: Given the cabinet secretary's unwillingness and refusal to accept any of the amendments that would have provided the checks and balances to which he refers, I consider it all the more important that such a review be carried out. I press amendment 24.

The Convener: The question is, that amendment 24 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Marra, Jenny (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Pearson, Graeme (South Scotland) (Lab)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

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

Amendment 24 disagreed to.

Sections 24 to 26 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the cabinet secretary for staying on and the committee for being so good, even if I was trying to go more quickly than usual and making mistakes.

11:51

Meeting continued in private until 12:53.

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