The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 17 September 2013

Session 4

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JUSTICE COMMITTEE
24th Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (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)
*Margaret Mitchell (Central Scotland) (Con)
*John Pentland (Motherwell and Wishaw) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Roseanna Cunningham (Minister for Community Safety and Legal Affairs)
Rt Hon Lord Gill (Lord President of the Court of Session)
Michael Gilmartin (Scottish Government)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 17 September 2013

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

Interests

The Convener (Christine Grahame): I welcome everyone to the Justice Committee's 24th meeting in 2013 and ask everyone to switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system, even when switched to silent.

I welcome to the meeting Margaret Mitchell, who is a new member of the committee, and invite her to declare any interests that are relevant to the committee's remit.

Margaret Mitchell (Central Scotland) (Con): I have no relevant interests to declare, convener.

The Convener: Thank you.

Decisions on Taking Business in Private

10:00

The Convener: Under item 2, I invite members to agree to take items 5 and 6 in private. Item 5 is consideration of a draft report, and item 6 is consideration of correspondence and the committee's engagement strategy. Do members agree to take those items in private?

Members *indicated agreement.*

The Convener: Next week, we will consider our approach to budget scrutiny. Logically, it may be better to take that item first. To give us flexibility, do members agree that we should begin next week in private session to assist with the timetable?

Members *indicated agreement.*

The Convener: We will fit that in before Lord Carloway gives evidence from 11 am.

Tribunals (Scotland) Bill: Stage 1

10:01

The Convener: Item 3 is the second evidence session on the Tribunals (Scotland) Bill. Two panels will give evidence today.

I welcome the first panel to the meeting. The Rt Hon Lord Gill is Lord President of the Court of Session—he is now almost the holder of a season ticket to the Justice Committee, for good or bad; Chris Nicholson is deputy legal secretary to the Lord President; and Innes Fyfe is head of strategy and governance at the Judicial Office for Scotland.

I thank Lord Gill for his written submission. We will go straight to questions from members.

John Finnie (Highlands and Islands) (Ind): Lord Gill, many of the representations that we have received have been about experience that has been gained in individual tribunals. How are issues such as service continuity and succession planning ordinarily dealt with, never mind any changes? People seem to invest a lot of kudos in folk having experience from individual tribunals.

Rt Hon Lord Gill (Lord President of the Court of Session): Currently, the arrangements are pretty haphazard. There are differences among tribunals in relation to recruitment and training. One of the big opportunities is that the Judicial Institute for Scotland will be involved in the training of tribunals, which will introduce a degree of uniformity in training, knowledge and experience. However, the key to the success of all the tribunals is that they have non-legal members who have relevant experience of the particular work of the tribunals. I suppose that the employment tribunal is the best example that I could give members. Representatives of both sides of the employment contract are members of that tribunal.

John Finnie: I am sure that there are generic skills, but there might be concern that that uniformity of training would somehow dilute expertise. How would you address that concern?

Lord Gill: I do not think so. I think that the recruitment process, which will also fall under the Judicial Appointments Board for Scotland's remit, will ensure that people with relevant experience are recruited to specialist tribunals.

John Finnie: Do you have any concerns at all about slippage and the loss of experience as a result of changes?

Lord Gill: I do not think so. Certainly, no particular point has been drawn to my attention in relation to that.

The Convener: If members do not mind, Margaret Mitchell can ask the next question, as this is her inaugural meeting.

Margaret Mitchell: A number of the proposals in the bill are aimed at increasing independence for the judiciary. Lord President, you say in your evidence that

"The Bill is an important step",

but you suggest that

"further reform is needed if the independence of tribunals' judiciary is to be guaranteed."

Will you elaborate on that? Cannot that further reform be contained in the bill?

Lord Gill: There is a statutory commitment in the bill, which I welcome and which acknowledges that the tribunals are independent and judicial. However, in the Judiciary and Courts (Scotland) Act 2008, which governs the judiciary in the Court of Session and in the sheriff courts, there is overall judicial governance in parts 1 and 4. It occurred to me when I was preparing my written submission that, if something of that sort were written into the bill, it would simply consolidate the official recognition of the tribunals as being part of the judiciary. It is not a major point. As the bill stands, it seems quite clear to me that the judicial nature of the tribunals' work is recognised throughout.

Margaret Mitchell: Can I press you on a further point? During the evidence session on 10 September, some concerns were expressed about the scope of the rules envisaged under section 68(5)(a), concerning the ability of the president of tribunals, the chamber presidents, and the vice-presidents of the upper tribunal to issue practice directions for

"the application or interpretation of the law".

The argument was made that that restricts the independence of the judiciary to take their own view of the law, subject to appellate judgments. Is there a possible conflict with independence there?

Lord Gill: There is, and I feel quite strongly about it. That point really matters. Practice directions are exactly that: they give guidance to judges and tribunals as to the way in which certain decisions are gone about, or the way in which certain procedural steps are to be taken. It is quite inappropriate for a practice direction to give guidance as to the interpretation of the law. That is what the individual tribunals must do in each individual case. A big mistake has been made in the current wording, which speaks of

"instruction or guidance on—

(a) the application or interpretation of the law".

That really is an unwarranted intrusion into the independence of the tribunal.

I had a look at the corresponding English provision, which is in the Tribunals, Courts and Enforcement Act 2007. It is made very clear in section 23 that the power to give guidance relates to "practice and procedure" only. It is rather dangerous to summarise legislation, so I shall read it as shortly as I can. Speaking about the directions, section 23(6) states that sections 23(4) and 23(5)(b), which relate to the giving of directions, with or without the approval of the Lord Chancellor or the senior president,

"do not apply to directions to the extent that they consist of guidance about any of the following—

(a) the application or interpretation of the law".

I interpret that to mean that it is recognised that interpretation of the law is not for practice directions.

Margaret Mitchell: For the avoidance of doubt, is it your view that section 68(5)(a) should be removed from the bill?

Lord Gill: Decidedly, yes.

Margaret Mitchell: Thank you for that.

The Convener: I have a supplementary question, having listened to you talking about defining tribunals as part of the judicial system. Some of our witnesses have suggested that there should be a definition of what a tribunal is, as distinct from a court. Is that a worthless pursuit?

Lord Gill: Yes. I do not see the point of that.

The Convener: I like such short answers. That is fine; it is worthless. Some may disagree, but you do not.

Colin Keir (Edinburgh Western) (SNP): I believe that Lady Smith might be appointed as president of tribunals. Is that correct?

Lord Gill: Yes.

Colin Keir: Two questions arise for me. First, does the appointment have to be a Court of Session judge? Secondly, were any other people considered when you were minded to appoint Lady Smith?

The Convener: Colin, I am sure that you will wish to preface those questions by making it clear that you are making no criticisms of the party mentioned.

Colin Keir: Absolutely. I am under no circumstances being critical of Lady Smith's abilities. I am merely asking whether the appointment has to be a Court of Session judge and whether any other people were considered in the process.

Lord Gill: If you give me a moment, I will give you chapter and verse.

The bill contains a provision that the president of the Scottish tribunals, which are what we are talking about here, should be a senator of the College of Justice nominated by me. I think that that deals with the first part of your question.

I found it easy to choose Lady Smith, because she has a wealth of experience in the tribunals system and has been a very effective president of the employment appeals tribunal in Scotland. In doing that work, she has had to liaise closely with her counterpart in the English tribunal system. It just seemed to me that she was the obvious person for the job and I have every confidence that she will be very successful at it.

The Convener: Sandra White and John Pentland wish to ask supplementaries.

Sandra White (Glasgow Kelvin) (SNP): I was going to ask the question that Colin Keir asked but, as a supplementary to that, was there any recruitment process for the post or was Lady Smith simply appointed to the position?

Lord Gill: There was no recruitment process. I had to make the decision and did so using my best judgment.

The Convener: Colin Keir took Sandra White's question and now Sandra seems to have taken John Pentland's question. Everyone is now even.

Roderick Campbell (North East Fife) (SNP): I should perhaps refer to my register of interests as a member of the Faculty of Advocates.

Last week, Jonathan Mitchell of the Faculty of Advocates gave evidence to the committee, and the first issue that I want to draw your attention to is the extent of the sifting procedure under section 45(4). Mr Mitchell indicated that the language was lifted from a provision in England and was somewhat critical of the extent of the sift and the fact that it will restrict appeals unless there is a point of principle. Do you have any thoughts on that provision?

Lord Gill: I have read the Faculty of Advocates' submission on this point and do not agree with it. Section 45 as drafted is the appropriate way of dealing with the matter. We are talking about the procedure for a second appeal and the idea that, when you get to that stage, you should widen the appeal's scope seems to me to be entirely counterproductive. Experience, particularly in the English courts, shows that repetitive appeals cause problems.

I think that the comment in the faculty's submission that the English courts have interpreted the rule with

"a startling lack of liberality"

is an overstatement. All that they have done is to say that this is a stringent test—and so it should be at that stage. The short answer to your question, Mr Campbell, is that I entirely agree with the policy that underlies section 45.

10:15

Roderick Campbell: I will move on to the review provisions under section 38. Again, Mr Mitchell believes that the circumstances in which there might be a review should be spelled out more clearly on the face of the bill. What is your view on that, Lord President?

Lord Gill: I do not think that that is a very wise approach to legislation. A provision of that kind, in which a review jurisdiction is conferred, as opposed to an appellate jurisdiction, should be expressed as generally as possible in order not to narrow the options of the reviewing body. I am quite happy with the wording of section 38.

Roderick Campbell: I will move on to a question about procedural rules. As I understand it, the Scottish Civil Justice Council will concentrate on making rules for courts, rather than tribunals. Again, Mr Mitchell drew attention to concerns about the position in particular of the short-term procedure rules for the upper tribunal and how those would be put together. Do you have any comments on that?

Lord Gill: I am here as Lord President, but I am involved in this also as the chairman of the Civil Justice Council. I do not know whether you have seen the council's written submission, which is quite short. At the moment, the council is just finding its feet. We began our work only in June this year. One of the early priorities will be consideration of a rules rewrite in the civil courts, where the rules of the Court of Session and those of the sheriff court have always gone their separate ways. We are simply not geared up at the moment to consider the drafting of a uniform set of rules for tribunals, but in due course that will unquestionably be part of the Civil Justice Council's work.

We touch on that on the second page of our submission, which we put in last week. What we say there is:

"We are content with the proposed rule-making functions".

We make a point about the "interpretation of the law" in the practice points, but that was covered in an earlier part of the discussion. We note in terms of the financial memorandum that

"it is the Scottish Ministers' intention to retain the tribunal rule-making function until"

we are

"in a position to take over"

the function. I think that that decision makes itself, because we would be in no position to take that on at the moment. Obviously, at the end of the day, all the rule-making functions throughout the entire judicial pyramid will be part of the council's work.

Roderick Campbell: Thank you. Lastly—

The Convener: Can you ask about resourcing for the rule making? That is referred to in the last two paragraphs of the submission, Roddy.

Roderick Campbell: Well, I suppose, but I was not particularly going down that route. Would you not like to ask the questions yourself, convener?

The Convener: I am happy for you to do it. I am delegating.

Roderick Campbell: I do not want you to be shy, convener.

The Convener: I am not shy. I have been accused of being many things, but not that.

It seems to me that there is something about resourcing behind this, whether it is resourcing personnel or funding generally from the Government to deal with rule making, whether judicial or tribunal rules. Is that an issue? The SCJC submission states:

"As to whether the financial provision ... in the Financial Memorandum is accurate, we would refer to the Lord President's response to the Finance Committee. There is likely to be a cost implication ... in implementing the provisions of schedule 9, paragraph 12".

Is this about resources?

Lord Gill: It is not just a question of money, convener. We simply do not have the manpower to take it on at the moment.

The Convener: I meant resources in the broader sense, including manpower and womenpower—or personpower, as I think we have to say nowadays.

Lord Gill: That is right. You will find that the forthcoming courts reform bill and the repercussions of that will occupy the council for at least the next two to three years.

The Convener: At last week's Conveners Group meeting, I asked the First Minister certain questions on behalf of the committee. One of our concerns was, given all the changes that are coming our way, what will be the interlocking impact of this bill, the Criminal Justice (Scotland) Bill, and the proposed civil courts bill on resources?

Lord Gill: Three main issues are occupying our minds. One is the proposal to merge the entire Scottish tribunals service into the Scottish Court Service. The feasibility of that is being considered. No firm or final decision has been made about that proposal, and there is a lot to think about, but it is under active consideration by the justice department.

The second question is the short-term priority of rationalising the rules of court in the aftermath of the proposed courts reform bill. That will be a major drafting project that will be undertaken by the Scottish Civil Justice Council. We have already made preliminary arrangements by appointing a working party and there will be a rules rewrite committee as part of the Scottish Civil Justice Council's structure.

The third issue is that once the tribunals system is rationalised under the Tribunals (Scotland) Bill, we need to consider how its rule-making functions will harmonise with the rule-making functions of the civil courts bill. There is a limit to the extent to which there could be a uniform set of rules, because the nature of tribunal work is so diverse that it is probably impossible to draft a uniform set of rules that would apply throughout the tribunals system. That is my opinion, but there is a lot to think about there and the matter will have to be deferred, simply because the priority is to rationalise the court rules once the new structure comes in.

The Convener: So there really is a resources issue in the broadest sense. We talk about finance, but there are personnel and time pressures to consider.

Lord Gill: Yes, and there is the added problem of draftsmanship; specialist draftsmen are fairly thin on the ground at the moment.

The Convener: What does "at the moment" mean? You cannot throw such things into the pot so casually, Lord Gill.

Lord Gill: We might need a few more draftsmen to be available. That would be the ideal.

Roderick Campbell: Last week, we heard from a number of people who said that the bill would be improved if it contained a provision for the possibility, at least, of permanent salaried posts for tribunal members. What is your view on that?

Lord Gill: I agree with that and I made that point in my written submission to the committee. It is important that there should be full-time salaried judicial posts in the tribunals structure. Having regard to the volume of work that tribunals do and to the importance of that work, I do not see that the tribunals system can be run entirely by part-time judicial officials.

Roderick Campbell: Do you have a view on when would be an appropriate time to merge the tribunals with the Court Service, assuming it is feasible?

Lord Gill: If the merger goes ahead, I would have thought that we were certainly three years away from it.

The Convener: John, do you have another question, given that Roderick Campbell stole one of yours? It is very difficult to deal with children, you know.

John Pentland (Motherwell and Wishaw) (Lab): He did steal one of my questions, but perhaps I can ask another one.

Lord President, given that the new structure will be very dependent on the financial resources being available, do salaried posts need to be part of it? If they are not, will the new structure fail?

Lord Gill: Salaried posts are essential to the success of the legislation; I do not think that there is any doubt about that. You have to have effective, competent administrators who are also able to undertake the judicial side of the work that the tribunals require.

Margaret Mitchell: You are arguing for permanent posts, but the president of tribunals will be a part-time post. How do you rationalise that?

Lord Gill: The president of the tribunals will have a duty of oversight. I would be surprised if the position required the micromanagement of individual tribunals; that can be left to the people who are leading them. What is needed is someone who provides oversight of the whole tribunals system and recognises where resources have to be reallocated if need be and where problems emerge in relation to recruitment, conditions of service and the quality of the output of the tribunals. Those are the sort of general matters that the president will be charged with. I think that that job can be done part time, but who knows what the position may be several years down the line? The position might end up being full time in due course.

Margaret Mitchell: I should probably have asked this earlier. Why do you limit the post of president merely to judges from the Court of Session, given that some of them might not have the relevant experience?

The Convener: I do not think that you should have used the word “merely”. “Exclusively” might have been better.

Margaret Mitchell: Indeed. That might have been a better word.

Lord Gill: The bill does provide for the judiciary sitting in the upper tribunal, as happens at the moment in the reserved tribunals. In fact, it is unlikely that any judge would go through their entire judicial career without having served on one of the upper tribunals on a part-time basis. It is beneficial to the tribunals to have some judicial input and I think it is of benefit to judges to extend their experience in that way. It is highly unlikely that the president of the tribunals would be a person who had no knowledge or experience of how they work. Is that your concern?

Margaret Mitchell: Yes. To turn it around a bit more, I suggest that there might be someone else who was more qualified—heaven forbid. Does restricting the post to judges of the Court of Session not rule out tribunal judges operating in the United Kingdom system who are likely to have equivalent or greater management experience of tribunals than judges coming merely—sorry, exclusively—from the Court of Session?

Lord Gill: I disagree with you about that. Given that we are emphasising the judicial nature of tribunal work, which is after all one of the key features of the legislation, it is entirely right that there be judicial leadership of that kind.

10:30

Margaret Mitchell: On that point about the judicial nature of tribunal work, you are probably aware that the Law Society of Scotland and employment tribunals Scotland have expressed a fear about the judicialisation of Scottish tribunals, referring, I think, to the rule that judicial members may be appointed to the first-tier and upper tribunals so that it begins to sound like the court system as opposed to the tribunal system.

Lord Gill: I know that they have expressed those fears, but I think that they are overstated. All that is happening is that, at long last, a clean break is being made from the days when tribunals were under the aegis of sponsoring departments. They are now free-standing independent judicial bodies, as they should be. I do not see the force of the argument that you could overjudicialise something. The tribunals have clear remits and a clear area of expertise. I do not agree with the fear that the Law Society has expressed.

Margaret Mitchell: Others may want to come in on that point, convener.

The Convener: I think that John Pentland wants to come in.

John Pentland: It is probably a good opportunity to question Lord Gill—

The Convener: Excuse me—I am getting hand signals. What does that signal mean, Sandra? Do you want back in?

Sandra White: No, I will let John Pentland ask his questions, so that we can continue in order.

The Convener: All right. I do not understand hand signals. Sorry, John.

John Pentland: That is okay.

The upper tribunal has been mentioned on a number of occasions. The bill provides the Scottish ministers with powers to organise the upper tribunal, but Lord Gill is quite critical of that in his submission. Will he expand on his comments?

Lord Gill: I do not think that I have been critical of that. To which page of the submission do you refer?

John Pentland: Page 3 of your submission states that you

"consider that it is unnecessary."

Lord Gill: Sorry, Mr Pentland. You are talking about the divisions.

It seemed to me when I was writing my submission that we will be dealing with a fairly small upper tribunal, because this is only for the devolved tribunals. It struck me that it was possibly unnecessary to divide the upper tribunal into divisions, and that doing so could also cause confusion in the nomenclature since the Inner House of the Court of Session is divided into divisions. That is all that I was saying. It is not a big point; it was just a comment.

The Convener: I will take Elaine Murray next, please.

Elaine Murray (Dumfriesshire) (Lab): Thank you, convener. I have already lost two questions.

The Convener: I cannot help that.

Elaine Murray: I know.

The Convener: You must get in early.

Elaine Murray: Lord Gill, I want to ask about your view on the Lands Tribunal for Scotland, because the bill suggests that it will go into the upper tier, but you make the alternative suggestion that it should have a pillar of its own. You draw an analogy with the employment tribunals and employment appeals tribunal in the 2007 act. Do you want to say a little bit more about the proposal and whether it might run slightly contrary to the purposes of the bill?

Lord Gill: I was going to suggest that you ask me about it.

The Convener: Well done.

Lord Gill: This is an important point, which I feel quite strongly about. The Lands Tribunal for Scotland is a court of law in all but name. It does highly specialised work and it deals with important cases involving the law of conveyancing, the law of valuation for rating, and the law of compulsory acquisition and compensation. It operates superbly well.

It has no appellate functions of any kind. There is a direct right of appeal from there to the Court of Session and the system works extremely well. I do not see that a body of that nature fits into the upper tribunal. In paragraph 46 of the policy memorandum, there is a perfunctory and rather unconvincing justification for it. The point to be emphasised here is that the present system is working extremely well. In its memorandum, the Lands Tribunal makes its case very convincingly.

Paragraph 46 of the policy memorandum says:

"The policy intention is for the devolved functions of the Lands Tribunal for Scotland to transfer-in to the Upper Tribunal rather than the First-tier Tribunal."

It goes on to talk about the various types of case with which the Lands Tribunal deals. It then says:

"The Scottish Government considers that it can best preserve and enhance the specialist qualities of the Lands Tribunal for Scotland within the Upper Tribunal by allocating its functions to a single division."

I do not see the point there. It is not a very closely argued case. The Lands Tribunal is not broken and does not require fixing. I would leave it as a separate pillar of its own.

In conjunction with that, I would make the point that the valuation appeal committees, which do important work throughout Scotland, have a direct appeal to the Court of Session, too. That works well and we give fairly expeditious decisions on all of those cases. The committees also have the power to refer cases to the Lands Tribunal. The system is working extremely well and I would leave it alone.

Elaine Murray: If we are changing the tribunals system, do you think that the Lands Tribunal should be renamed, for the avoidance of doubt?

Lord Gill: One could certainly do that. Rather than get hung up about names, though, we should look at the essential nature of the functions of these bodies. It is quite obvious to me that the Lands Tribunal is very much a special case here.

Alison McInnes (North East Scotland) (LD): On the matter of special cases, we have heard some evidence that the Mental Health Tribunal for Scotland has very extensive powers and is quite distinct. The Law Society has argued that the bill should specifically guarantee that the Mental Health Tribunal be given its own chamber under the new structure. What are your views on that, Lord President?

Lord Gill: You are right to say that the Mental Health Tribunal is highly specialised. It does very sensitive work. However, I have no strong views on that. I can see the force of the argument, though.

Sandra White: Convener—

The Convener: Sorry, Sandra. You are not on my list.

Sandra White: I was back on it.

The Convener: Oh, you are back on it again.

Sandra White: Is that okay?

The Convener: I am a mere convener.

Sandra White: The judiciary and membership of the tribunals have been mentioned, but I do not think that the issue of tribunal members being treated as judiciary has been raised. Lord Gill, you commented that if they are not, there may be an

"unfortunate perception that the lawyer members of tribunals are of a lesser status than the ... judiciary."

Will you elaborate on that? Would they be seen not as part of a judicial family—which is a point that was raised—but as something less than judges?

Lord Gill: I was trying to emphasise that legislation can have an educational value and that if the primary legislation made it clear that legal members' function is judicial in nature that would be a strong endorsement of the independence of the tribunals as judicial bodies.

What the tribunals themselves decide to call their legal members would be a matter for them. I am sympathetic to the idea that, in the Mental Health Tribunal for Scotland, it would not be appropriate to refer to the legal member as a judge. People who appear before that tribunal will already have been judged and that would probably be counterproductive. Therefore, I am entirely sympathetic to that argument.

However, I would like to see the role of the legal members being recognised in the bill as being that of judges. As you know, in employment tribunals they are known as judges, and I think that that is also so in England in relation to immigration and asylum.

Sandra White: So, you think that they should be called judges in the bill, apart from those in the Mental Health Tribunal.

Lord Gill: They could be referred to in the bill as judges, and it could then be left to the individual tribunals to decide the nomenclature that they think best for themselves.

The Convener: Sometimes I am called convener and sometimes I am given other names, so I understand the sentiment.

Roderick Campbell: I would like to move on to a different subject—the award of expenses, which is provided for in section 59. We have heard from some witnesses concerns about what expenses would be awarded and the change in the nature of tribunals with the introduction of expenses provisions. Do you have any general thoughts on that, Lord Gill? You mention in your written submission that it is essential to define what wasted expenses are. Do you think that defining that in the bill might have wider implications, for cases generally, rather than just for tribunals?

Lord Gill: I agree that there should be a power to award expenses. No doubt, that power would be exercised sparingly. There are situations in tribunals—just as there are in the courts—in which it is appropriate that someone who has caused a litigation in which they have been unsuccessful should run the risk of being found liable for expenses. I think that we could leave it to the good discretion of the tribunals to evolve their own practices in the matter but, in general, I am in favour of that power being there.

Wasted expenses are a familiar concept in the English courts, but the concept is not one that exists in Scottish practice. I think that I know the idea behind wasted costs, and there may be an argument for having something similar here. However, if there is to be such a provision, we really need to have a definition of exactly what it covers.

Roderick Campbell: My point is that if it is defined, it will have wider implications beyond the bill. It might set a precedent elsewhere, so it is quite an important point.

Lord Gill: There is no provision in the rules of court for wasted cost orders such as there are in England. If there were to be, that would require a fairly long consultation exercise not just with the profession.

The Convener: Are there implications for the availability of legal aid? Once one begins to dip a toe in the waters of expenses in tribunals, that might deter applicants from coming forward if they do not have much in the way of funds.

Lord Gill: That is the obvious danger. That is why I said earlier that, if there is to be a power to award expenses, it will have to be exercised sparingly and only in extreme cases. We do not want a situation in which the tribunals system is seen as a cost-free zone where anyone can litigate to their heart's content with no thought for the consequences.

10:45

The Convener: I will ask a question that nobody else has asked—unless Elaine Murray is about to ask it.

Elaine Murray: I do not know whether it is the same question.

The Convener: Let us find out. I am on tenterhooks.

Elaine Murray: Section 70 also gives ministers the power to enable the charging of fees—

The Convener: That is it; that is good.

Elaine Murray: Might that also deter people from using the tribunals system? There has been concern about the level of fees in the employment tribunals south of the border.

Lord Gill: That is a political question and one that I would not like to get involved in. Fees are charged in the courts, as you know, although we are still some way away from full cost charging. I would not care to express a view on whether tribunal litigants should be subject to that.

Elaine Murray: I will not push you on what you say is a political point, but I wonder whether the power should be subject to the affirmative procedure so that there has to be a degree of consultation before fees are charged.

The Convener: Again, that is probably a political matter. Section 70(3) states:

"the Scottish Ministers must consult the Lord President."

Should the provision be stronger than that?

Lord Gill: I think that the idea behind that provision—I hope that I have understood it correctly—is that the Lord President has various responsibilities in relation to court fees, and the consultation with the Lord President would probably be to ensure that there was some degree of uniformity or that the principles were operating on similar lines. However, I would not like to see the Lord President having to set the fees.

The Convener: I have a couple of sweeping-up questions that have not been asked. First, in your written evidence, you argue that the eligibility requirements for legal members in paragraph 5(1) of schedule 3 are too broad as they also include legally qualified parties from England and Wales and Northern Ireland. You say that that is not appropriate as the devolved tribunals deal with Scottish legislation and may have to consider the common law of Scotland. Will you expand on that, please?

Lord Gill: In the reserved tribunals such as employment tribunals, there is considerable crossover between the Scottish and the English, Welsh and Northern Irish members, but in relation to the devolved tribunals we are dealing with specifically Scottish matters. Certainly in the short term, we should recruit people who are practitioners in Scotland and who are qualified in Scots law. That is my view, anyway. It would also enable us to have some crossover within tribunals among the legal members.

To be honest, I said all that I can really say on the point at the foot of page 2 and the top of page 3 of my submission.

The Convener: That is fine. I have a separate question on cross-ticketing—I think that that is the jargon—whereby tribunal members can be assigned within a unified structure to a different tribunal. It has been argued that one of the strengths of the tribunals is the special knowledge and the culture of the different tribunals. Will you comment on the concern that people might, for reasons of having enough personnel to do things, have to be moved to tribunals where they would be like a fish out of water?

Lord Gill: That is an entirely reasonable fear. The idea behind the provision is to give tribunal members who are experienced in tribunal practice the opportunity to develop their career and extend their work into other subject areas. There could be a case for that. Of course, we have a very good judicial training system, which in future will also apply to tribunal work.

The Convener: This is about not just the process but the culture of the tribunal, the manner in which it is chaired, the experience of being a member and so on. Are you saying that you hope that the president of tribunals will ensure that if members are moved to a different tribunal they will not in the first instance be trained on the job, as it were, but will be allowed to sit in to understand its operation, its culture and so on? After all, the Mental Health Tribunal will be very different from, say, the Lands Tribunal for Scotland.

Lord Gill: That is the point. There is a remarkable diversity among tribunals in Scotland.

The Convener: I think that members have no more questions but, whenever I say that, someone pops up. Margaret Mitchell, I see, is not going to let me down this time.

Margaret Mitchell: I wonder whether Lord Gill can clarify his view on the process in the upper tribunal, particularly the sift. Concern has been expressed about the strictness of the approach and the fact that compelling reasons will have to be given before a second appeal can go ahead, and I believe that you share the view that the review provisions in general need to be clarified more.

Lord Gill: You raise two separate issues, I think. As I have explained to Mr Campbell, I favour the adoption of a stringent test for an appeal to the Court of Session, and there are very good reasons for that.

As for the upper tribunal's review functions, if the upper tribunal is to operate as a review body rather than as an appellate body—in other words, if it is able to look at the whole decision again—the legislation should leave it a broad measure of discretion to develop its own rules and principles on the scope of its review function.

Margaret Mitchell: Under the transitional arrangements, which I do not think anyone has

raised, I believe that ministers will be able to make rules on such matters. Someone wondered whether it was appropriate for ministers to do so given that the upper tribunal deals with very serious cases.

Lord Gill: It is a matter of sheer necessity, for the simple reason that the Scottish Civil Justice Council is not in a position to take on such a function. The plan in the long term is that it will be one of the council's functions but, in the meantime, it is essential that we leave the matter to Scottish ministers.

Margaret Mitchell: It was suggested that, as an alternative, a transitional panel comprising user-friendly members could be formed.

Lord Gill: That might just introduce another element of complexity.

The Convener: Margaret, the minister is giving evidence next and you will be able to ask her about the transitional arrangements.

Margaret Mitchell: I was just interested in hearing the Lord President's position on the matter.

The Convener: I am not going to say what I was going to say because I know what will happen. All I will say is that that seems to be the end of the questions, and I thank Lord Gill, Innes Fyfe and Chris Nicholson for attending.

We will now have a seven-minute suspension.

Lord Gill: Before I leave, convener, I should say that one of the consequences of the bill is that the Scottish committee of the Administrative Justice and Tribunals Council will cease to exist. It has done extremely valuable work over the years and I want to acknowledge its contribution and thank it for everything that it has done.

The Convener: I am sorry that I stopped you, Lord President. Thank you for those comments, which are now on the record.

I now suspend the meeting for seven minutes.

10:54

Meeting suspended.

11:00

On resuming—

The Convener: I welcome the second panel to the meeting. Roseanna Cunningham is the Minister for Community Safety and Legal Affairs; Linda Pollock is head of policy in the tribunals and administrative justice policy branch of the Scottish Government; Sandra Wallace is bill team leader; Delina Cowell is bill team manager; and Michael Gilmartin is a solicitor in the Scottish Government. Good morning to you all.

The minister wants to make a short opening statement. Members will then ask questions.

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): Thank you, convener.

We are discussing a bill whose aim is to create a simplified, flexible framework that will provide coherence across the current disparate tribunals landscape. It will bring improvements to the structure, management and organisation of tribunals; create a simple two-tier structure that will introduce common practices and procedures; and bring judicial leadership under the Lord President.

The case for reform is long overdue. The debates that we had in the chamber in 2010 and 2012 and many independent reports over the years echo that view. The bill is part of the overall vision for justice and is being taken forward under the wider justice strategy through the making justice work programme. It therefore fits into a whole programme of work.

Tribunal reform is being taken forward in a phased programme, which started with the creation of the Scottish tribunals service in 2010 to provide administrative support to some tribunals. The bill is the second stage in the process. We are currently consulting on the next phase, which is on the feasibility of merging the court and tribunal administrations.

Building a structure that is flexible enough to cater for the many different tribunals in Scotland is challenging, but I think that we have achieved the right balance in the bill. It may seem like a lot of work for a few tribunals, but the benefits far outweigh that view.

The current tribunal landscape in Scotland is too complicated. There is no coherence. Some tribunals are not particularly well organised or structured; there is no coherent system of review and appeal; appointment processes vary; and, in some cases, there are no set criteria for appointments. The tribunal users' experiences are therefore different and varied; some are good and some are not so good. The bill will create a structure that will enable a better service to be provided to those who use it and maintain the specialism and ethos of each individual tribunal that transfers into the system. The structure is simple and clear, and it will make it easier for tribunal users to navigate their way through the system.

The new appointment process to be run by the Judicial Appointments Board for Scotland will ensure that tribunal users benefit from the same high standard of judicial decision making,

regardless of the subject matter. That will be further enhanced by bringing overall responsibility for training standards under the Lord President's remit.

The bill will create the new position of the president of the Scottish tribunals to support the Lord President with his new duties, to champion tribunals in the wider civil justice system, and to ensure the proper distinction and separation of tribunals from courts. The president will be assigned from among the senators of the College of Justice. That recognises the scale of the proposed powers of delegation and the substantial leadership and management responsibilities that will come with the role.

The new leadership structure will provide opportunities for tribunal members to share best practice and learn from one another's knowledge and experience. The new upper tribunal will benefit the tribunal user by removing appeals from courts in most cases and providing easier access and a less intimidating process for users. It will also allow specialism and expertise to develop among its members. Bringing tribunal rules under the remit of the Scottish Civil Justice Council will ensure a consistency in approach across the tribunal landscape and protect specialism in individual jurisdictions.

We acknowledge that many of the details will be fleshed out in secondary legislation, but the bill is an enabling one that deals with structure and organisation. It would be difficult to include all the provisions in the bill, given the complexity of the various tribunals that are involved.

I am aware that it has been suggested that the bill should make particular provision for the Mental Health Tribunal for Scotland and the Lands Tribunal for Scotland: specifically that it should state on the face of the bill that the Mental Health Tribunal should be in its own chamber and that the Lands Tribunal should be in a separate pillar, completely outwith the structure. I have committed to the Mental Health Tribunal being in a chamber on its own in the first instance. We have already made very specific provisions that commit to consultation and a high level of parliamentary scrutiny each time the chamber structure is changed. That will ensure that the system is as flexible as possible, while maintaining the committee's oversight.

As for the Lands Tribunal, we acknowledge the complexity of that jurisdiction and feel that we have made adequate provision in stating our intention to situate that body in the upper tribunal. Positioning tribunals outwith the structure only complicates the system and is contrary to what we seek to address in the bill.

This is a technical bill that provides a framework for the creation of a cohesive system of tribunals as a whole. It is designed to be a manageable process, as it will take time to bring in each of the individual tribunals. That is partly due to the complexity of the tribunals involved and partly to the amount of detail that will be required to ensure that the system works effectively. We have ensured that there will be a high level of parliamentary scrutiny for the majority of secondary legislation attached to the bill. A cohesive tribunal structure with strong leadership, defined common aims and an independent and robust appointment process is what all tribunal users in Scotland deserve.

The Convener: Thank you, minister. We might dispute that it is merely a technical bill, as various issues have arisen in evidence.

Roderick Campbell: Good morning, minister. I will begin with a general question. The bill and the policy memorandum were published in May. Subsequent to that, the UK Government has made it clear that it has no plans for the foreseeable future to transfer reserved tribunals into a new Scottish structure. Can you share with us any discussions that you have had with the UK Government about any possible timetable for that? Has that impacted in any way on the Scottish Government's view of the bill at this time?

Roseanna Cunningham: There are a couple of questions there. We did have prior discussions with the UK Government. There was correspondence between us and the Ministry of Justice when the suggestion was first mooted that the administration and organisation of reserved tribunals would transfer into our system. There were some delays in that, but the impact on the bill was more about its timing than anything else. For obvious reasons, if we were going to have an imminent transfer, we might have thought about the bill's timing. However, a transfer was obviously not going to happen. It was clear that we were not going to be proceeding with that original proposal, which I think came from the Ministry of Justice. We did not make the proposal to the Ministry of Justice; it suggested it first.

There are no on-going discussions of any moment on the issue. We understand that it is still an idea with the Ministry of Justice, which raised it in the first place. However, clearly, it is not going to proceed with the idea in the near future. I was not willing to hold back on reform of the tribunal structure in Scotland on the basis of the completely uncertain future of the reserved tribunals.

Elaine Murray: Some witnesses, including those from Citizens Advice Scotland and the Law Society of Scotland, suggested that, because tribunals have particular characteristics, they

should be included on the face of the bill. Indeed, Citizens Advice Scotland suggested some amendments based on the 2007 act that would place such characteristics in the bill. What is your reaction to that suggestion?

Roseanna Cunningham: We are listening to the evidence. Obviously, the stage 1 process is useful for us. We are open to the suggestion and will consider it in the light of any other recommendations that the committee might make. It is not something that we would be absolutely opposed to. By their very nature, overarching principles must be quite general, because each tribunal will have its own specific culture and principles. I guess that we just wanted to be clear that it would be very overarching, but we have not set our face against that, so if it was felt that it was a useful thing to add to the bill, we would be prepared to consider it.

Elaine Murray: I will push you just a little further on the Lands Tribunal, because Lord Gill was quite forceful on that point. Indeed, his proposal is that it should be in a separate pillar, and he says that that would involve bringing the judiciary in the LTS under his leadership with the support of the STS administration but positioning it separately. His argument is that the Lands Tribunal works well at the moment and is not an appellate body, so it is a bit different from the other tribunals—he also made a similar argument about the valuation appeal committee—and he suggested that maybe it should be renamed and not be a tribunal. How would you react to that?

Roseanna Cunningham: The Lands Tribunal is one of our oldest tribunals. It has been around for a long time, so it has a settled way of proceeding, but that does not mean that it is not a tribunal. Each tribunal is different, and the whole rationale behind the bill is not about interfering with individual tribunals, because each tribunal is set up under a specific parenting piece of legislation that arises out of the policy area, so any changes to the specifics of the tribunal would have to emanate from the policy direction.

What we are about is simply addressing the structure of administration and overall organisation and management. Although I acknowledge the complexity of the cases at the Lands Tribunal, I feel that we are starting to hear some of the same arguments being made for each of the tribunals. If we start making exceptions, saying that we will leave this one or that one outside the system, the point about bringing things together as a coherent organisational and administrative whole is lost, so I would resist the suggestion that the Lands Tribunal be left outside the system entirely.

Sandra White: I want to ask the minister the same question that I asked Lord Gill, about tribunal members being treated as judiciary. A number of concerns have been raised about that, and Lord Gill referred to the "unfortunate perception" that legal members of the tribunals are of a lesser status than the judiciary. Representatives of employment tribunals and other witnesses have said that they thought that the bill would create what they called a "judicial family", but that will not happen as a result of the bill as it is drafted. What are your thoughts on that? Would those people be called judges, apart from in the Mental Health Tribunal, and would that be in the bill, or will it be left to individual tribunals?

Roseanna Cunningham: That is part of striking the balance in the bill between bringing the tribunals together in a coherent structure, as we are doing, and understanding the concerns about—I am not sure whether this is really a word, but it is the only word that I have heard used in connection with this—the courtification of the tribunals.

The Convener: Crumbs, that is a nice word—courtification.

Roseanna Cunningham: People understand the concern about that, because tribunals are structured in a much more informal way. There are concerns that, if you begin to use terminology such as "judges", you create a sense in which tribunals are seen as courts rather than as tribunals. In tribunals, and particularly in the devolved tribunals, we do not usually call the judicial members or the legally qualified members judges. In some reserved tribunals, that is the case, and some of the pressure is coming from areas where they have been accustomed to being called judges and are concerned about a perceived lack of status in no longer being called judges.

However, my concern has to be about maintaining people's understanding of and feeling for what the tribunals in general are delivering, and what they are delivering is not courts; they are doing something quite different. I am concerned that, if we began routinely to use the terminology of the courts in tribunal systems, people would behave as if tribunals were courts, and that is something that I want to resist.

11:15

The Convener: I think that Lord Gill's observation was that, although one might call them judges, it was really up to them, in their particular tribunals, to give themselves different nomenclature if that was relevant to what they were doing.

Roseanna Cunningham: This is one of those areas where we have to strike a balance in setting up new administrative structures and ensuring that people do not begin to get the wrong perception of

what is meant. I think that we have struck a balance there.

Margaret Mitchell: Aside from the term "judges", what about the provision that allows the Lord President to appoint certain members of court judiciary? There is a feeling that that by itself might lead to what you call "courtification"—I have not come across that term before.

Roseanna Cunningham: If I could find a better phrase, I would use it.

Margaret Mitchell: Judicialisation is slightly different.

Roseanna Cunningham: Is it any better?

Margaret Mitchell: Well, we are talking about judges.

You said that the system would be more court based and less informal. A valid point that was raised by the employment tribunals Scotland, which we did not raise with Lord Gill, was that what is proposed could affect diversity by propagating the gender or other imbalances that exist in the judiciary. If more judges were appointed, that imbalance might continue into the new tribunals system.

Roseanna Cunningham: I do not agree with that point. The reserved tribunals are commenting because their own particular culture has been slightly different. I suspect that they are making expressions on the basis that they thought that they might be getting transferred in in early course. I understand that some consultees have questioned the proposal to have court judiciary sitting in the first-tier tribunal, but it needs to be understood that that already happens in some cases, so it is not a new thing. This is an example of why you have to consider the individual tribunals. The Mental Health Tribunal requires a sheriff to sit in forensic cases, so in some circumstances judges, sheriffs or part-time sheriffs have to be called in in any case. The bill has to allow for that to happen, because we cannot go against what is already contained in the rules for the Mental Health Tribunal. The bill has to be flexible in allowing for and covering the variety of practice that already exists in tribunals. That is what we intend to do.

I could go into a more detailed discussion of composition orders, but I am not sure that the committee really wants to hear about them. It is more about accepting that not every tribunal is currently the same and that, given that sheriffs are required by law to take part in some of the cases in the Mental Health Tribunal, our legislation has to allow for that to happen as a very minimum.

Margaret Mitchell: That is helpful. I understand that the legislation has to be all-encompassing, but I think that the fear was that, given that you could appoint other members of the judiciary, that might be the first port of call and there might be an imbalance there. We will see what happens as the bill progresses.

Roseanna Cunningham: That is not what is expected. There is a discussion to be had about composition orders, but perhaps it is premature to have that now. I can certainly write to the committee to give you a bit of background on the orders, rather than discussing them here. What you have described is not our intention; it is more that we have to allow for the existing situation in certain tribunals, such as the Mental Health Tribunal.

Margaret Mitchell: I understand. I turn your attention to practice directions and the independence of the judiciary. We put it to the Lord President that concerns had been expressed about the scope of the rules. Section 68(5)(a) provides for the ability of the president of the tribunals, chamber presidents or vice-presidents of the upper tribunal to issue practice directions, for the purpose of the application and interpretation of law.

Roseanna Cunningham: We have listened to that point. There has been a bit of a drafting issue there and we will introduce a stage 2 amendment to fix that. The section that we mirrored in the 2007 act refers to "guidance" only and not "instruction or guidance". We just need to tidy up the wording, which we will do at stage 2.

Margaret Mitchell: That is very welcome. Thank you, minister.

The Convener: That is why we knew that the bill was not just procedural, because that would be a matter of substance in the legislation.

Colin, did you have a question?

Colin Keir: I am trying to find another one, as somebody else asked my question.

The Convener: Do not complain. They are always complaining. I am deleting you.

Roseanna Cunningham: I remember that, convener.

The Convener: You cannot satisfy them.

Roseanna Cunningham: Nothing changes.

The Convener: Even if I promise them sweeties afterwards.

John Pentland: Good morning, minister. In your opening remarks, you mentioned the benefits that the new structure would bring. Given that the new structure will cover only devolved tribunals, what distinct benefits will accrue to the public using the new structure?

Roseanna Cunningham: It will be as much about the organisation and training of tribunal members. As I indicated in my opening remarks, some of the tribunals are rather less well organised and set up than others. Those who access those tribunals do not get the same very good experience that people accessing some of the other tribunals are getting. That is not a particularly helpful situation.

An enormous number of people go through the tribunal system throughout Scotland in any one year. Arguably, it is at least as important to users as the process of going to court. We want to ensure that, throughout the system, people get the same standard of organisation and administration and the same well-trained people sitting in judgment of their argument, and that we do not have gaps in the system. That is partly what this is about—it is to bring the system into a coherent whole that maintains standards throughout the system and does not allow some of the smaller and perhaps less frequently heard tribunals to lose the expertise that we really still need in a tribunal system.

John Pentland: Can I ask another question, convener?

The Convener: Of course.

John Pentland: It is in case somebody steals it.

The Convener: We are going to park that. Think it, but do not say it.

John Pentland: The bill does not currently envisage permanent or salaried posts. Lord Gill's view is that salaried posts would attract people with sufficient experience and calibre. Do you support what Lord Gill has said or are you still of the view that salaried posts are not needed?

Roseanna Cunningham: The difficulty with the proposal is that it would be difficult to justify the need for full-time permanent judiciary, which is in effect what you would require to show was necessary if you were going to have salaried posts; otherwise, you would be paying salaries to people who would not necessarily be doing an enormous amount.

What we have here is a better balance. We have security of tenure for devolved tribunal members because they will be reappointed automatically every five years until they reach 70. The bill allows for salaried and fee-paid positions that meet the needs of the landscape. Again, this is about allowing as much flexibility as possible. If we were to include in the bill a provision that says that we should have full-time salaried individuals, we would, of necessity, sometimes be paying out salaries for not a great deal of work. That would not be particularly cost effective in terms of governance.

The Convener: Colin Keir has a supplementary question.

Colin Keir: It relates to something that John Pentland raised. Is there any danger that the reforms will mean that tribunals are costed out of the reach of those who currently use them?

Roseanna Cunningham: In what sense?

Colin Keir: The existence of the tribunals has always meant that people have avoided having to go to court. With the judicialisation—I think that that is the current buzz word—under the reforms, is there any danger that costs will rise for the people who use the tribunals?

Roseanna Cunningham: The vast majority of tribunals do not charge fees. I am sorry, but I am not entirely certain what you mean by "costed out". It is always open to people to take along an advocate. That is sometimes a solicitor whom the person has paid, but that is their choice. Often it is not such a person because they have opted for a different form of advocacy.

Colin Keir: That is along the lines of where I was going—

Roseanna Cunningham: You mean that people might feel—

Colin Keir: There are concerns about the advocacy that is required. I heard outside the committee a complaint about what was meant to be the simple act of going to a tribunal. In the instance that I was told about, the person felt that the advocacy that was required was more than they had expected. They went to a third party and ended up having to go to somebody who is pretty seriously legally trained.

Roseanna Cunningham: Without knowing the detail of the specific concern, it is difficult for me to judge.

Colin Keir: Yes. I did not want to bring the actual—

Roseanna Cunningham: I know that with some tribunals—I am thinking particularly of some of the reserved tribunals—there can be a bit of an imbalance, in that one side is usually legally represented and the other side is not. However, that is not necessarily the case with all tribunals. Without knowing the individual circumstances that you are talking about, it is hard for me to make a judgment on whether that is—

Colin Keir: I apologise for being so vague, but I felt that the generalisation was important because of the nature of the question that I was asked.

Roseanna Cunningham: In the Mental Health Tribunal for Scotland, advocacy tends not to be legal but is provided by an independent advocacy service or something similar. People can take

somebody along to help them. However, each tribunal system has developed a different practice. That is the difficulty.

The Convener: I want to raise the issue of expenses. We appreciate that Lord Gill has said that the winner would get expenses only in extremis and in special circumstances, and that that will not happen in run-of-the-mill cases. Will you comment on that? There is also a power on fees. We do not want to interfere with the discretion of the chair or the judge, of course, but given the imbalance that individuals—punters or whatever—sometimes feel at various tribunals, will there be an impact on legal aid?

Roseanna Cunningham: No. You are straying into the policy imperatives that set up the individual tribunals. Some tribunals already charge fees. I go back to the issue about sheriffs or part-time sheriffs sitting in the Mental Health Tribunal for Scotland. The bill has to allow for such scenarios—and it had to allow for scenarios in which it was decided in the founding legislation that fees are appropriate. For example, the Lands Tribunal for Scotland charges fees and has done so since its inception—in 1949, I think it was. We have to allow that to continue because it is part of that founding legislation. The home owner housing panel has the ability to charge fees, but it has not done so.

Each issue to do with fees is contained within a tribunal's parent legislation, and the bill does not interfere with that. It simply has to allow for the variation across those pieces of legislation.

The same applies to expenses. I think that I am right in saying that, in most tribunals, people do not get expenses one way or the other.

I have indicated the two tribunals in the current set-up where fees are an issue in one case, and where they could theoretically be an issue in another case but are not at the moment.

That is to do with the nature of the tribunal. Some tribunals are party versus state, and some are party versus party, and the party versus party tribunals are a different animal. They are tribunals but the party is not acting against the state, so there is not that imbalance of the state versus the party.

11:30

The Convener: We appreciate that.

Did John Finnie want to come in here?

John Finnie: I did and then I did not, but I will come back in, in light of what the minister said.

I accept that employment tribunals are a reserved matter. During the earlier witness session, my colleague Elaine Murray alluded to the charging of fees, about which Lord Gill thought that it would be inappropriate to comment. A lot of people have viewed fees as a punitive measure that will deter participation. Section 70 allows for charging, and the minister has explained that that is a continuation of procedure for some. If there is a suggestion of standardisation, are we that far away from saying that if a couple of tribunals charge fees, why do the rest not do it? Again, that could be seen as restricting access.

Roseanna Cunningham: No, because that is not what the legislation is about. It is not about equalising—

John Finnie: But section 70 would facilitate that.

Roseanna Cunningham: No. We have to allow for the charging of fees because one of the tribunals has charged fees from the outset. If we do not allow for the charging of fees, we will cause a major problem for the Lands Tribunal for Scotland. That is really what section 70 is about. In addition, the Homeowner Housing Panel was set up with the discretion to charge fees.

Unless we go back and change the founding legislation for each tribunal, we will have to make the bill allow for the possibility of tribunals charging fees. In the cases of the Lands Tribunal and the Homeowner Housing Panel, Parliament decided that it would be appropriate to give that capacity. It is, of course, ultimately for Government to look at the individual pieces of legislation and amend them to remove the capacity to charge fees, but we did not think that such amendments were appropriate for the Tribunals (Scotland) Bill. The bill has to allow, in the new structure, those tribunals that charge fees to go on doing what they have always done. The Lands Tribunal has always done that, but the practice has not leaked into other tribunals, other than through the decision that was made when the Homeowner Housing Panel was set up.

It depends on the nature of the tribunal, but who knows whether, in future, a tribunal might want that discretionary power to charge fees? Section 70 is just about administration and setting up a structure that will allow tribunals to go on doing what they do. If I change that, I am interfering with individual tribunals.

The Convener: But you are doing that, minister. Section 70(1) says:

> "The Scottish Ministers may by regulations make provision for the reasonable fees that are to be payable in respect of any matter that may be dealt with by the Scottish Tribunals."

It does not say "existing matter" but "any matter".

Roseanna Cunningham: That is because of the system that will develop when we have some

tribunals that charge fees and some that do not. That is the reality of the system that we will have.

John Finnie: The convener made the point that I was going to make. Is it your position that if any of the other tribunals were to consider charging fees, section 70 would not facilitate that?

Roseanna Cunningham: I do not know what is in the founding legislation. We would need to look at those pieces of legislation to see whether they allowed those tribunals to charge fees, and then we would need to consult. It could not be done just by fiat. That is not what section 70 is about.

John Finnie: So that is a no, is it?

Roseanna Cunningham: No Parliament can bind the future. We are saying that, at the moment, we have to accommodate the Lands Tribunal, which charges fees, and another tribunal that has the discretion to charge fees. If there are changes to be made in future, they can be made only through a whole process of proper consultation, and would probably have to be made to the founding legislation for the individual tribunal.

I do not want to interfere with individual tribunals' founding legislation, unless that is felt to be appropriate.

John Finnie: I understand.

The Convener: You have clarified that point, minister, but I wonder whether there is a clash between the bill and the parent legislation that you mentioned. Does section 70(1) conflict with any provision in the parent legislation that says that fees can or indeed cannot be charged? Does the bill have to deal with, refer to or amend the parent legislation in some way to ensure that this does not look like some broad-brush provision?

Michael Gilmartin (Scottish Government): When the tribunals transfer across and assume their functions, regulations will be made under section 27(2) to fix any issue with the parent legislation. We need a new system that allows fees that had previously been charged to continue to be charged; as framed, section 70 would allow fees to be charged but only at Parliament's say-so. In other words, no fee can be charged on any matter without Parliament's approval, and the provision is completely dependent on the powers being exercised sensibly.

The Convener: Section 70(3) says:

"Before making regulations under subsection (1), the Scottish Ministers must consult the Lord President".

I take it, then, that after that requirement is met, an instrument will come before Parliament to impose fees where there were no fees before.

Michael Gilmartin: Yes. Even where fees are charged, regulations must be made under section 70 and will come before Parliament. At the moment, such regulations are subject to the negative procedure.

The Convener: That helps to explain the interaction between the pieces of legislation. This is simply a broad power.

Michael Gilmartin: The Government does not have the authority to charge fees without the Parliament's approval.

The Convener: So the power covers tribunals that charge fees already but makes room, subject to the approval of regulations under the negative procedure, for additional fees to be charged by other tribunals.

Michael Gilmartin: Any fees charged under the new system would require regulations to be made under section 70.

The Convener: Does that explain things for the committee? I see members' heads nodding. We understand it now.

Roderick Campbell: Minister, I do not know whether you have had the opportunity to consider Lord Gill's comments on wasted expenses.

Roseanna Cunningham: On what?

Roderick Campbell: Wasted expenses. Lord Gill pointed to the lack of a definition of "wasted expenses" in section 59.

Roseanna Cunningham: I think that we will need to look into that. I am not quite sure what is meant by wasted expenses.

The Convener: He was referring to section 59(4).

Michael Gilmartin: What was the question again?

Roderick Campbell: Basically, Lord Gill pointed out that the phrase "wasted expenses" has been imported from England but the bill itself does not define it. He thinks that it should be clearly spelled out.

Michael Gilmartin: The provision enables expenses to be awarded by a tribunal, again to accommodate the diverse range of tribunals that will transfer into the system. We have made provision with regard to wasted expenses and, although no such definition has been set out in the bill itself, one can be set out in the procedural rules. As a result, the matter will be given further thought and consideration in relation to each jurisdiction that is transferring in.

Roderick Campbell: Has the Scottish Government considered the implications of February's Supreme Court judgment on the

O'Brien v Ministry of Justice case, which suggests that part-time members of the judiciary might be entitled to a pension scheme? Have, for example, those participating as members of tribunals been taken fully into account in the financial memorandum?

Roseanna Cunningham: We will have to look very carefully at the implications of that case. However, I point out that nothing in the bill prevents or inhibits the payment of pensions if there is such a requirement; indeed, that already happens in some cases. The bill does not look at the detail of pensions and any changes to pensions policy would require to be dealt with separately and perhaps through the Cabinet Secretary for Finance, Employment and Sustainable Growth's department rather than mine. In short, the implications of the case are being considered and if there is a need for any change it will be made.

Margaret Mitchell: I seek some clarification on the transitional arrangements, particularly the provision whereby Scottish ministers can make rules for upper tribunals at an early stage. Will that be subject to the negative procedure?

Roseanna Cunningham: No. We currently do that, but it is done within different policy portfolios, depending on the tribunal. For example, the current situation is that if there are to be changes—

Are you talking about the upper tribunal?

Margaret Mitchell: Yes.

Roseanna Cunningham: Sorry. I thought that you were talking about the first tier.

Margaret Mitchell: The question is about the transitional arrangements for the rules until they can be dealt with by the SCJC, which is not likely to happen for three or four years. I ask the question because concern was raised about ministers having that power. It was suggested that perhaps it would be preferable to have a transitional panel, with user-friendly members deciding the rules.

Roseanna Cunningham: We currently write the rules. In that sense, we would go on ad interim doing what we already do. However, I need to make clear what I started to say earlier, which is that that is already done with expert input. For example, if we were going to consider changing the rules of the Mental Health Tribunal, it would be for Joe Morrow to consult the people whom he thought were the most appropriate. That would then go to the health minister, who would consider and agree to the rules. That is how it is currently done and we would probably continue doing that rather than set up a separate body. If we did that, we would have the issue of there being different tribunals, and we would probably want to consult very closely with people from the various tribunals.

As I said, we currently write the rules and we would use the current expertise. At the moment, it is expected that that would be done in the future by a negative instrument.

Michael Gilmartin: Yes; it is the negative procedure.

Roseanna Cunningham: At the moment, and while we continue to do it, we would use the negative procedure.

Michael Gilmartin: Yes.

Margaret Mitchell: So there would be scrutiny of the difficult cases.

Roseanna Cunningham: That is what happens at the moment. From time to time, each tribunal makes changes in its rules, but that arises from the tribunal's own practice. The change then goes to the minister of the particular parent portfolio to consider. I do not sit there signing off on rules across all the tribunals, because that would clearly not be appropriate.

Margaret Mitchell: Thank you for the clarification.

John Pentland: The financial memorandum identified a figure for delivering the new system. Are you confident that the figure will do that?

Roseanna Cunningham: Yes. We have no reason to suspect that it would not. We are not changing the way in which individual tribunals work, so we are not making that different. We hope that we will get a benefit over a period of time from bringing together some of the structures and training. In the longer term, we therefore hope to make a saving, but we believe that the financial figures are robust into the longer term. Obviously, with changes such as those that will be made, there will be a small additional cost at the outset from going through the process of making the changes. However, they will provide better value in the long term.

John Pentland: Does that answer mean that salaried posts will not be given consideration?

Roseanna Cunningham: We have the capacity to do it in the bill, but it is a question at any point as to whether it is considered to be appropriate. As I said, if we pay salaries to people who do not have enough work to justify those salaries, there would be a question mark over that, and those salaries would have to be contained within the overall costs. At present, we are talking about a continuation of the current situation. However, it is difficult for me to answer for five, 10, 15 or 20 years down the line because, in future, changes might be decided to be appropriate.

11:45

The Convener: I will not be here then, I think.

I want to ask about cross-ticketing, which is the colloquial term that relates to the powers in schedules 4 and 6 and part 2 for the president of tribunals to assign members from one tribunal to another. The minister has rightly pointed out the differences between the cultures and specialisms of the tribunals, which members all appreciate. I hate to paraphrase Lord Gill, but he seemed relatively relaxed about the issue, because he feels that it will be good for people to get expertise. He said that people would not just do training on the job, as there would be advance training. Are you content that the provision will not contaminate the different cultures of the tribunals?

Roseanna Cunningham: If that was a problem, there would be contamination now, because cross-ticketing already happens under the current structure, in which people sit on more than one tribunal. In effect, we will not be changing what currently happens.

The Convener: The current cross-ticketing might involve experienced people, but I am concerned that somebody might be plucked out of one tribunal and put on another without expertise of being on diverse tribunals. However, you share the Lord President's views.

Roseanna Cunningham: Some tribunals, such as the Mental Health Tribunal, are so specialised that I would be astonished if there was a suggestion that somebody with absolutely no background in the subject would be plucked out of nowhere and plonked down there. That is not what is envisaged, and it does not happen at the moment. Therefore, I do not see that there is an issue.

The Convener: I would not want you to be astonished.

Roseanna Cunningham: Cross-ticketing happens now. It does not contaminate tribunals and it will not do so in future. In any case, the chamber president would have to agree to a member sitting on the tribunal.

The Convener: I believe that that will have to be agreed with other parties, and not just the chamber president.

Roseanna Cunningham: Yes. The aim is to ensure that we do not lose the possibility of using good experienced people who happen to be somewhere else. We do not want to rule out cross-ticketing, because there might be experienced people who just happen not to sit on a particular tribunal. In that case, everybody will know them, and it is unlikely that there will be much dispute about the issue.

The Convener: Are there any other questions?

Members: No.

The Convener: That is a miracle, because usually when I say that somebody puts up their hand. I am not looking now—I am blinkered.

I thank the minister for her evidence. I suspend the meeting for a minute to allow the witnesses to pick up their paperwork.

11:48

Meeting suspended.

11:48

On resuming—

Subordinate Legislation

Sale of Alcohol to Children and Young People (Scotland) Amendment Regulations 2013 (SSI 2013/199)

The Convener: Agenda item 4 is consideration of six negative instruments, the first of which is SSI 2013/199. The regulations add a number of documents that can be accepted as proof of age by retailers that sell alcohol. The Delegated Powers and Law Reform Committee—that is the only time that I will use the entire expression—is content with the regulations. Do members have any comments?

Margaret Mitchell: Will additional training perhaps be required for retailers to recognise these rather remote and not-very-often-used forms of identification?

The Convener: Once retailers have seen the regulations, they will know what they have to look out for. It is for each individual retailer to know the law, so I hope that they are listening to the committee as they tend their tills.

Margaret Mitchell: Is there a cost implication to that?

The Convener: There will be no financial effects on the Scottish Government—

Margaret Mitchell: There will be financial effects just on retailers.

The Convener: The retailers will just be checking. If they are women, they will be able to multitask.

Vulnerable Witnesses (Giving evidence in relation to the determination of Children's Hearing grounds: Authentication of Prior Statements) (Scotland) Regulations 2013 (SSI 2013/215)

The Convener: The second instrument is SSI 2013/215, which affects how the special measure of a prior statement is authenticated in children's hearings proceedings in a sheriff court. The DPLR committee is content with the instrument. Do members have any comments? Are we content to make no recommendation?

Members *indicated agreement.*

Football Banning Orders (Regulated Football Matches) (Scotland) Order 2013 (SSI 2013/228)

Sports Grounds and Sporting Events (Designation) (Scotland) Amendment (No 2) Order 2013 (SSI 2013/229)

The Convener: The third and fourth instruments are SSI 2013/228 and SSI 2013/229, which were brought forward as a consequence of the reconstruction of the professional football league structure, with which I am extremely familiar.

The DPLR committee has drawn the instruments to the Parliament's attention on the grounds that they were not laid within the required timescale of at least 28 days before the coming-into-force date. The DPLR committee was content with the explanation that was given in letters from the Government to the Presiding Officer, but the Justice Committee is required under standing orders to consider any letters to the Presiding Officer on the breach of laying requirements. The letters are on pages 9 and 14 of paper 2.

Do members have any comments on the instruments or on the letters to the Presiding Officer on the breach of laying requirements?

Margaret Mitchell: There is mitigation.

The Convener: Right.

Are members content to make no recommendation in relation to the instruments?

Members *indicated agreement.*

Civil Contingencies Act 2004 (Contingency Planning) (Scotland) Amendment Regulations 2013 (SSI 2013/247)

The Convener: The fifth instrument is SSI 2013/247, which amends the names of the strategic co-ordinating groups and reduces their number from eight—there were eight to mirror the number of police forces that previously existed—to three. The DPLR committee is content with the instrument. Do members have any comments on it?

Margaret Mitchell: Was it only the strategic co-ordinating groups that were consulted on the change? A reduction in their number from eight to three seems quite a reduction, given the importance of the issue.

The Convener: I have no further information to provide, except to say that the reduction reflects the current police structure. If Margaret Mitchell wants to pursue the matter, she could lodge a parliamentary question.

Alison McInnes: The accompanying cover note says that there was no public consultation with anyone.

The Convener: Now that members have put their comments on the record, is it the case that we wish to make no recommendation in relation to the instrument?

Margaret Mitchell: That is fine.

However, I wondered whether the convener might have a comment on the fact that the north, east and west of Scotland will have a group, but the south will not.

The Convener: I no longer speak for the whole of the south of Scotland, so it would be most improper of me to make such a comment.

Margaret Mitchell: I have no further comments.

The Convener: As a member of the Justice Sub-Committee on Policing—which is a star chamber of its own—the member knows that there are now three policing divisions. I think that the change to the number of strategic co-ordinating groups simply reflects that.

We will not make any recommendation on the instrument. Members are making this very hard for me, but never mind.

Legal Aid and Advice and Assistance (Photocopying Fees and Welfare Reform) (Miscellaneous Amendments) (Scotland) Regulations 2013 (SSI 2013/250)

The Convener: The sixth and final instrument is SSI 2013/250, which—this will cheer you up—reduces the fees that are allowable to solicitors for photocopying and makes changes to the reference to personal independence payment in the legal aid scheme. The DPLR committee is content with the instrument.

Anything that reduces the amount of money that solicitors get must be a good sign. You are not going to say that it is not, are you, Roddy?

Roderick Campbell: I think that we should note for the record the comments of the Law Society of Scotland and its appreciation of the pressure on the public finances.

The Convener: Yes, in fairness, the Law Society thinks that this is “a good idea”, to paraphrase my old history teacher.

Are members content to make no recommendation in relation to the instrument?

Members *indicated agreement.*

The Convener: Good. We move into private session.

11:54

Meeting continued in private until 12:07.

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e-format first available
ISBN 978-1-78351-678-0

Revised e-format available
ISBN 978-1-78351-694-0

Printed in Scotland by APS Group Scotland