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Pàrlamaid na h-Alba

Official Report

FINANCE COMMITTEE

Wednesday 26 March 2014

Session 4

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FINANCE COMMITTEE
10th Meeting 2014, Session 4

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Gavin Brown (Lothian) (Con)
*Malcolm Chisholm (Edinburgh Northern and Leith) (Lab)
*Jamie Hepburn (Cumbernauld and Kilsyth) (SNP)
Michael McMahon (Uddingston and Bellshill) (Lab)
*Jean Urquhart (Highlands and Islands) (Ind)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ronnie Conway (Association of Personal Injury Lawyers)
Jan Marshall (Scottish Government)
Dr Heidi Poon (University of Edinburgh)
Justine Riccomini
Cameron Stewart (Scottish Government)
James Wolffe QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Sir Alexander Fleming Room (CR3)

Scottish Parliament

Finance Committee

Wednesday 26 March 2014

[The Convener *opened the meeting at 09:30*]

Revenue Scotland and Tax Powers Bill: Stage 1

The Convener (Kenneth Gibson): Good morning and welcome to the Finance Committee's 10th meeting in 2014. I remind everyone present to turn off mobile phones and other electronic devices. We have received apologies from Michael McMahon. I had understood that Iain Gray would attend as his substitute, but he is not here, unfortunately.

Agenda item 1 is continuation of our stage 1 consideration of the Revenue Scotland and Tax Powers Bill. I welcome Dr Heidi Poon, who is a First-tier Tribunal (Tax) member and a tax law lecturer at the University of Edinburgh, and Justine Riccomini, who is an independent human resources and employment taxes consultant.

I understand that the witnesses have no statements. As is normal, I will open up with a few questions, and then other committee members will ask questions. My first questions are to Dr Poon and are on the general anti-avoidance rule, but Ms Riccomini can comment, too—when I ask a question of one person, the other person should feel free to come in, as appropriate.

Paragraph 7 of Dr Poon's submission says:

"It is not immediately obvious how a narrowly focused GAAR will necessarily confer greater certainty ... 'What is clear is that, once a GAAR is introduced, the players (government and taxpayers alike) are still at the mercy of the courts.'"

Your thinking on that is different from that of other witnesses, and our tax adviser said that he found your views on the issue refreshing, so I would like to hear a wee bit more about your thinking on the GAAR.

Dr Heidi Poon (University of Edinburgh): I did not read other submissions before I produced mine.

The Convener: That is fine.

Dr Poon: I do not know, therefore, what other tax advisers said. The summary of consultation responses is that people's view is that a more widely drawn GAAR would create more uncertainty. My experience from sitting on the tax tribunal—in particular from a long case that I have been involved in concerning a tax avoidance scheme—is that however widely or narrowly drawn a GAAR is, the process of constructing what the law is trying to say and applying it to the facts of the case must still be gone through.

A higher or lower degree of certainty is not conferred by whether the GAAR is widely or narrowly drawn—certainty is not created at that level. A more principles-based approach would give more certainty than drawing a GAAR widely or narrowly. Is that clear?

The Convener: That is pretty clear. Ms Riccomini is nodding.

Justine Riccomini: I am nodding because I think that what Heidi Poon has said is sensible. More focus needs to be placed on what happens when a problem arises rather than on drafting GAARs. The main problem is the practicalities when it comes to attending tribunals and so on.

The Convener: Dr Poon pointed out that

"a more widely drawn GAAR may result in a reduction in the number of Targeted Anti-Avoidance Rules",

of which the United Kingdom has 300. She said that the tax code

"has grown considerably in complexity and volume in the period of the recent Labour Government ... There is a correlation between the growth in complexity and the increased number of TAARs."

How would a more widely drawn GAAR prevent the need to produce all those targeted anti-avoidance rules?

Dr Poon: Current United Kingdom legislation is based on rules, so we try to legislate according to a set of rules or conditions that, if fulfilled, mean that one can apply for an extension or relief. Legislation that is based on rules allows people to find loopholes so that they can tick all the boxes, although they might be going against the spirit of the legislation. Because they are ticking all the boxes, they can get away legally with avoiding tax, which means TAARs are needed.

Inheritance tax is an example. The current legislation was brought in in 1984 and very soon after than we had what is called the gift with reservation, which resulted in a kind of TAAR. People were making gifts during their lifetimes but were retaining the benefits of the assets that they were legally giving away. The gift with reservation suites of legislation came in, so people started doing other things, which led to the pre-owned asset tax charge, which is an income tax charge that was superimposed on inheritance tax. That is how the legislation has grown in complexity from the original Inheritance Tax Act 1984.

If legislative design is based more on principles, it will allow the court wider powers to interpret the legislation and to bring things within the scope of

what is chargeable, rather than having to circumnavigate schemes that get around the rules and defeat the spirit of the law. It is about architecture or design. If you start with rules, you end up with more rules in order to close the loopholes, but a more principles-based approach allows more scope for a GAAR to interpret the legislation on the basis of the principles that are its starting point. That will impinge on how other areas of tax are going to be legislated on.

I think that I read in the Chartered Institute of Taxation submission that this is an opportunity to consider the basis on which Scotland might find a new way of drafting tax legislation, instead of cutting and pasting from the UK's tax legislation.

The Convener: Yes. I will avoid some of the high-profile cases that I understand you were involved in recently. What you have said is quite important and, in some ways, quite different from what other people have said. It gives the committee food for thought.

Ms Riccomini—do you have anything to add to that?

Justine Riccomini: I completely agree with what Heidi Poon has just said. If you have the opportunity to create a new set of legislation in Scotland, it should be fit for purpose for Scotland and not just copied and pasted from UK legislation, because there are so many instances of its not working. It is just not practical, in reality.

As a tax practitioner and having attended tax tribunals and so on, I know that in many cases there are many hurdles to get over. I have been practising tax for 25 years, and I started off with three or four books that were quite thick, and now I find myself, as a specialist employment taxation practitioner, with books that are at least three times bigger. It has gone beyond a joke. If you can keep things simple and principled, that will be a more intelligent approach.

The Convener: That also makes the system much easier for the public to understand.

Dr Poon: Yes.

Justine Riccomini: Yes.

The Convener: We sometimes wonder how decisions are arrived at. The law might strictly say one thing, but the clear meaning behind it might be something else.

Dr Poon, you state in your submission that an

"omission noted is s212 FA2013 regarding 'Relationship between the [UK] GAAR and priority rules'",

and you go on to discuss that specific point. What do you consider the importance of that omission to be?

Dr Poon: I compared the Scottish and UK GAARs, and I noticed that the Scottish GAAR in the bill follows the UK GAAR very closely in its format; the section headings just follow it, albeit that the Scottish GAAR substitutes the term "abuse" with "avoidance".

If Scotland is going to follow the same format, there is an obvious question with regard to priority rules. The UK GAAR includes priority rules, which means that the GAAR will take precedence over other provisions in the corpus of legislation. Every year the Chartered Institute of Taxation produces an annotated copy of the Finance Act 2009 for its members and associates, which provides an interpretation of the priority rules. That is a fairly new piece of legislation, so it is a good guide to what we can rely on.

In applying the law, one has to decide, when two provisions come into conflict, which one will take priority. In this case, the bill specifically says that the UK GAAR will take precedence over other priority rules in other areas of legislation. For example, if a scheme has managed to deploy a priority rule in income tax but the GAAR has judged it to be abusive, the GAAR can override the priority rule that has allowed the scope of the scheme to be legal. If the Scottish GAAR does not have that priority rule, and a similar situation arises, how will you resolve it? That is the question behind the omission that I highlight in my submission; I query why there is not a priority rule in the Scottish GAAR.

On another level, with regard to double tax agreements, one can get into an agreement with a contracting state, and domestic law then has to adopt the agreement to ensure that there is harmony. If there is conflict, it must be resolved. The GAAR includes the treaties, and if there is conflict on the international front—if someone has managed, through a double taxation agreement, to do something that is abusive under the GAAR's interpretation—the GAAR can overrule it. In that context, why is there no priority rule in the Scottish GAAR?

The Convener: We will raise that point with the bill team.

I will switch to Ms Riccomini's submission. You say at paragraph 3 that you

"have concerns about the proportionate ability to pay in terms of the penalty levies and the timescale for payment of penalties."

Other people have raised the same issue. Can you share some more of your thoughts on that?

Dr Poon: Did you say paragraph 3?

The Convener: I am sorry: I was referring to Ms Riccomini's paper.

Justine Riccomini: It is to do with the timescale for payment.

The Convener: Yes.

Justine Riccomini: My main concern is that current experience in the recession shows that people are having difficulty paying, so 30 days is quite a short timeframe in which to arrange the administrative side and to sort out what the assets and liabilities are if someone needs to pay a penalty. A person's being in a penalty situation sometimes indicates that there are wider problems in the business, so they may not be able to afford to pay the penalties, especially within that timeframe, if there is no cash flow in the business. Businesses have gone from expecting immediate payment to arranging for people to pay over 90 or 120 days because no one has good cash flow.

09:45

I would not want revenue Scotland to be entrenched in the huge administrative burden of pursuing debts after 30 days when there would be very few people on the ground to put such a penalty regime into effect. Dealing with penalties requires human input as well as automated handling. One can issue automated penalties like billy-oh, but when people start to appeal against them or to submit reasons why they cannot pay, a human being is needed at the other end to decide whether the reason that has been given is valid or justifiable.

The Convener: A company in my constituency was, because of difficulties that were created under a previous administration, given 48 hours to pay a huge tax bill. I was able to speak to someone and negotiate a timescale of six months. The company, which employs almost 100 people, would otherwise have gone into liquidation, but it has managed to survive and is thriving, so I sympathise with your point.

Are you saying that there should not be a 30-day penalty? Should the timescale be flexible according to individual circumstances? What would the parameters be?

Justine Riccomini: The time period should be extended to 60 or 90 days. We are talking about the payment of a penalty rather than payment of the tax itself. Let us assume that revenue Scotland wants to pursue the actual tax that is due. What do penalties mean with regard to the actual tax take? Is the penalty just a frippery? Are we talking about pursuing people in a particular way?

I will compare the situation with collection of the BBC licence fee. A person who does not pay their licence fee is awarded a criminal record, which is a case of using a sledgehammer to crack a nut. You might want to think about a penalty regime that would encourage people to pay on a timely basis, but would not end up dragging the entire revenue Scotland organisation through the mud and making the task of administration like wading through treacle. Perhaps the timescale should be delayed, or the penalties should be structured slightly differently.

The Convener: You said in your submission—as you have just repeated—that revenue Scotland may become

"entrenched in a quagmire of bureaucracy as a result of issuing penalty notices which remain unpaid".

Justine Riccomini: Yes.

The Convener: That assumes that there will be a high level of non-payment. Is there anything to suggest that there will be?

Justine Riccomini: My point assumes that there is a high level of non-payment, because we have to think about what would happen with a high level. We are not talking about income tax, capital gains tax or anything like that, and whether there will be a high level of non-payment remains to be seen.

Dr Poon: From my tribunal experience, I am aware that quite a number of the cases listed since the new penalty regime came in under the Finance Act 2009 have related to penalties.

When there is an appeal about penalties, it takes up a lot of administration time. In a way, the whole collection process is stalled when there is a dispute. Quite often, penalties are listed and that takes up tribunal time as well. Such cases are also likely to be withdrawn close to the time they are to be heard. I agree with Justine Riccomini that the administrative cost of penalties can be disproportionate to the amount that might end up being collected, when we consider the time and human effort that would be needed.

There is scope for thought around whether it can be made more possible for people to meet the penalty payment. It will also have to be made very clear how the penalties are being applied because, for a business person, the escalation if the payment is not made by a specified time puts great pressure on them in terms of cash flow.

You want the tax to be collected and the penalties are there to encourage compliance. I think someone said that penalties are not another avenue for collecting more money, but they are quite often seen that way just because the escalation can be quite aggressive—very quickly, a businesses can find itself paying 100 per cent of the tax that is due. I have heard cases in which the business has said that if that is required of it, it will go out of business. Such arguments do not have much weight in law, in respect of applying

penalties, so they do not really help businesses in bringing cases to tribunal.

There are issues to go through on the policy-setting level, so that the penalty is commensurate with the cost of collection and so that penalties are seen as a means to encourage compliance rather than as another means to get more tax out of people.

The Convener: So, to extend the time period to 60 or 90 days would mean a smaller burden on revenue Scotland and on the taxpayers.

Dr Poon: Yes. There is also an issue about communication; some cases have been brought to tribunal in which the taxpayers were in penalty but they had not heard about it for four months and so they said, "This is not fair—you didn't tell me." The administration must be in place to get notice out to the taxpayer in good time in order to make a fair assessment.

The Convener: Thank you very much. I open up the questioning to colleagues around the table.

Jamie Hepburn (Cumbernauld and Kilsyth) (SNP): Ms Riccomini, in your submission you say that you agree with the establishment of revenue Scotland as

"a non-ministerial department and with its proposed membership".

A few folk have come to the committee and said that the chief executive and other executives should sit on the board, but you do not seem to think that that is a big issue. Is that right?

Justine Riccomini: If I have not commented on it, then no, I do not think it is a big issue.

Jamie Hepburn: Okay. That is helpful. You also say in relation to the charter that the bill mentions that revenue Scotland should "adhere" to the charter, not simply "aspire" to it. Again, a number of people have commented on the seeming discrepancy between what is required of the tax authority as opposed to what is required of the taxpayer. I am not sure whether you are aware of this but the bill team has, I think, accepted that that wording is not particularly suitable and will look at it again. I presume that you welcome that.

Justine Riccomini: I definitely welcome that. I do not think that there should be any discretion as to how it works.

Jamie Hepburn: Presumably the charter should place both parties on some form of equivalence?

Justine Riccomini: Yes.

Jamie Hepburn: You mentioned earlier that this is a chance to get legislation that is fit for purpose and that we should not just copy the UK legislation. You say in your submission:

"I do not believe that any part of Revenue Scotland's activities should be exempted from the Freedom of Information Act as currently applies to some of HMRC's activity."

I confess that I am not particularly aware of what that relates to. Could you set out for the record what HMRC activities are exempt from FOI?

Justine Riccomini: Let us suppose that an adviser is looking for something in the revenue manuals—perhaps to answer a question from a taxpayer. They want to give the taxpayer some advice, and they search through everything from HM Revenue and Customs that is available online. I am aware that that is currently being changed, as it is being moved over to gov.uk. I am part of the team that is helping out with that.

Lots of bits of information have been redacted, because of the Freedom of Information Act 2000. It is quite frustrating when we are reading something and we suddenly come across a big bit of it that has been taken out—we are not allowed to see it. Even when I worked for HMRC, I could never really understand why that was the case. We were talking about tax, not Government Communications Headquarters. Why does anybody see fit to redact anything at all? There should be complete openness and freedom of information in all aspects of revenue Scotland's work, and HMRC's work, for that matter. I cannot see that there is anything that presents some sort of national security issue. If we are asking people to comply, they need every bit of information at their fingertips.

It might be said that some material has been redacted because people could use it to find a way to create loopholes or tax avoidance schemes, but I honestly cannot see that that is the case. They have all been thought of already.

Jamie Hepburn: I am inclined to agree with you. Clearly, I cannot ask you what the redacted bits say—they are redacted, after all—but do you know what areas they relate to?

Justine Riccomini: Many areas have redacted bits—not just one area in particular. If you look at HMRC's website and consult the manuals, you will see that quite a lot has been redacted. The site says, "This information is not available because of the Freedom of Information Act," or whatever. We might wonder why. It is rather condescending and irritating, frankly.

Jamie Hepburn: I admit that I am also wondering why, although we have not explored the matter as far as we can.

Justine Riccomini: I am sure that somebody out there with a much bigger brain than I have knows the answer to that question, but I am afraid that I do not understand it.

Jamie Hepburn: In your submission, you talk about

"the power granted to take samples of material from premises if they are reasonably required to verify a person's"—

The Convener: Jamie, remember that the other witness sometimes wishes to come in.

Jamie Hepburn: I beg your pardon—I apologise.

Dr Poon: First, on the point about information and website manuals, one possible reason why there are constant changes and things are blocked out is the constant change of practice and legislation. With every finance act, part of the existing corpus of legislation is repealed. We are in constant flux and the manuals cannot keep up in good time. When I do not see something appearing, that is my first thought.

Secondly, we should be careful about the status in law of HMRC guidance or manuals. Taxpayers who have relied on the guidance often come to court having found themselves in trouble. They might argue that they had grounds for legitimately expecting that they could rely on the accuracy of the manual. It is a matter of how the authority and the taxpayers use the manual, and of its accuracy. At the time when it is used, does it reflect the legislation in force? It is quite a tricky area to get right. When it comes to an argument in court about legitimate expectations, that takes the case to a different level that is not about the tax that is being disputed but about whether the taxpayer has the right to rely on the manuals for the interpretation of their situation.

10:00

I know that revenue Scotland is developing a website to feed information in. The background to what will be created in terms of the relationship between the taxpayer and the authority must be very clear and must be managed. I often think that the less that is said in the manuals, the better. If you are still developing and changing, you do not want reliance to be placed on manuals to the extent that you will create trouble for yourself in the future.

Jamie Hepburn: So the less said, the better—but if you are saying it, do not redact it, because we want to see what you are saying.

Dr Poon: I am talking about having something more permanent, rather than something that is so detailed that you have to keep updating it in order to get it right. Do you see what I mean?

Jamie Hepburn: You mean a default position.

Dr Poon: Yes. It goes back to what we were saying earlier. If you have a more principles-based approach in your design for tax law, you can end up having something that is much simpler to communicate to the public and it means that what you put in the manual does not have the kind of transience that we are experiencing.

Jamie Hepburn: Okay. Thank you.

My next question is on a reference in Ms Riccomini's submission to

"the power to take samples of material from ... premises if"

that

"is reasonably required ... to verify a person's tax position."

You suggest that a short list of examples of the samples that might be anticipated should be included in the bill. I am not clear whether you mean a list of circumstances for which such samples might be required or whether you mean the material itself. Which do you mean?

Justine Riccomini: I mean the material. As an ex-inspector of taxes, I am very aware of people in HMRC abusing their powers in certain circumstances and having their own interpretation of what can and cannot be removed from business premises and what they have a right to see. Generally speaking, HMRC people who visit premises have sometimes taken things that, strictly speaking, they are not allowed to take, which is not in the spirit of the legislation.

My suggestion is that the bill could prescribe what kind of records could be taken by revenue officers so that they would be aware of the limit of what they could take. For example, they would know whether they could take only records that had something to do with the issue at hand or whether they could take anything. Like it or not, that has happened in the past.

Jamie Hepburn: Is there not a danger that the short list of examples that you propose could be interpreted as an exhaustive list? That would mean that if something was not on the list, it could not be taken.

Justine Riccomini: It was a thought and a suggestion. I do not really know whether I have any particular solutions to that suggestion at the moment, although I might think of some.

Jamie Hepburn: But you take my point that what you propose could be a problem, because people could assume that anything that was not on the list could not be taken.

Justine Riccomini: Yes, but the suggestion has the same context as what I said about the taxpayers charter, in that we do not want people abusing their power. I wanted to highlight by my suggestion that we do not want revenue officers abusing their power; we need them to stick to the

guidelines so that taxpayers and their advisers know where they stand.

Jamie Hepburn: Thank you.

Gavin Brown (Lothian) (Con): My first question is for Justine Riccomini. At paragraph 9 of your submission, you say that all ministerial guidance "should be fully publicised." Your comment refers to section 8 of the bill; there is an exemption under section 8(4). Can you expand on your thoughts in that regard?

Justine Riccomini: What is the title of it? Which paragraph did you mention? I do not have numbered paragraphs on my sheet.

Gavin Brown: It is paragraph 9 in our copy—it refers to section 8 of the bill, which is on ministerial guidance.

Justine Riccomini: Is it the paragraph entitled, "The independence of Revenue Scotland"?

Gavin Brown: That is the paragraph title, but in the text you make the point with regard to section 8(3) that

"all interactions with Ministers ... should be fully publicised in the spirit of open government.

Justine Riccomini: Yes. That relates to my belief that we need to facilitate a culture in which people should not need tax advisers, although I may well be doing myself out of a job. People should be able to understand and be completely clear about all aspects of what they do. To my mind, technically speaking, the idea behind employing a tax adviser is that the taxpayer does not have time to deal with their tax situation rather than that they do not understand it. That should apply to all aspects of taxation.

The point that I make at paragraph 9—which runs throughout my comments—is that we need a spirit of completely open government. All interactions with ministers on the running of revenue Scotland should be there for everybody to see. There is nothing wrong with that, and it is the way that revenue Scotland should go in terms of how it functions.

Gavin Brown: Dr Poon, you commented earlier that, if the GAAR in the bill makes future TAARs unnecessary, that would be a positive thing. There is probably a degree of consensus on that.

Would anything need to change in the GAAR as it is drafted to ensure that that end—namely, having fewer TAARs—actually happens? Do any amendments need to be made in that respect?

Dr Poon: I welcome that question, and I would like to take some time to consider it. My first thought is that the GAAR is, in itself, a piece of legislation that interacts with other tax law. It does not exist on its own; it is there only to apply to other areas of tax law.

Instead of thinking about how you draft the GAAR to reduce the number of TAARs in future, you could think about how you draft the next piece of legislation to allow the GAAR to be more effective in addressing schemes or arrangements that end up not fulfilling the spirit of the law in the new legislation. The GAAR can come in at that point, if you see what I mean. The GAAR is there to apply to other pieces of tax law and, in order to make it more effective at doing what it is supposed to do, you need to look at the design of your other legislation. That will make the difference.

Gavin Brown: That is helpful, thank you. As you will appreciate, the committee has to produce a report at the end of our evidence taking, so we would welcome any obvious examples, but your answer explains your position quite well.

Dr Poon: Thank you. I can perhaps think of some good examples—I am doing some research that involves comparing GAARs in different jurisdictions, and when that piece of work is done I can pass it on to the committee as further information.

Gavin Brown: Thank you. I want to explore briefly—again with regard to Dr Poon's submission—the disclosure of tax avoidance schemes. You suggested that you would welcome the introduction of such a provision to the bill either at stage 2 or thereafter. For the record, can you outline your position on the matter?

Dr Poon: I have just produced a case note for an academic journal on a tax case that was brought to the tribunal as a result of the penalties that were imposed on a taxpayer who was using a DOTAS mechanism. The tribunal decided in that case that the penalties were correctly applied because the taxpayer, even in relying on a DOTAS, did not discharge their obligation to make an accurate return. They claimed capital losses when there was no transaction to create that loss in the first place. The use of a DOTAS did not exonerate the taxpayer from a degree of culpability, but it helped in terms of openness. The relevant legislation is schedule 24 to the Finance Act 2007.

That case involved considering the three degrees of culpability. One category of culpability covers a taxpayer being careless and not taking reasonable care; the second includes deliberate error that is not concealed; and the third concerns error that is deliberate and concealed. By concealment we are talking about creating evidence to mislead the tax authority.

Given the three degrees of culpability, a taxpayer would, without using a DOTAS, easily end up being culpable of the most severe offence.

However, if taxpayers make use of a DOTAS, it will allow the dispute to rest at the level of carelessness, which would help to mitigate the penalty imposed.

The use of a DOTAS will also allow the authority to know at an early stage what is around. If they know that something is there, they can take a look at it. If they do that sooner, less time is spent on it, and it is better for the authority because, if the scheme is discovered years later, time bars may apply.

For multiple reasons, the GAAR and DOTA schemes should go hand-in-hand.

Gavin Brown: That is helpful, thank you.

John Mason (Glasgow Shettleston) (SNP): I will go back over some of the points that were raised, particularly in the interaction between the convener and the witnesses. On the issue of principles and legislation, you both suggested that you quite like the idea that legislation should be principles based rather than containing incredibly detailed rules.

Some witnesses have suggested that UK legislation is moving in that direction. Do you feel that that is the case? I believe that countries such as the Netherlands take a more principles-based approach.

Dr Poon: There is a piece of legislation—I cannot remember which it is—that started going in that direction but ended up going down the rules-based route again. It is to do with employment schemes or something similar to disguise remuneration; I am not exactly sure.

John Mason: That is okay; I do not need the exact case. However, you are hinting that you are not convinced that the UK has moved very far.

10:15

Dr Poon: Correct. I think that an attempt was made, but it was not carried through. There is a problem when something that involves more of a principles-based approach is being grafted on to the bigger corpus of legislation that is not designed in that way. How can you allow that grafting to be successful? That is what leads to failure.

During his time as chairman of the International Accounting Standards Board, David Tweedie encouraged an approach that would allow international financial reporting standards to be more principles based. That was a decade's work. The merit of that approach is that it allows the international financial reporting standards to be more manageable in size, because people do not have to try to work in the US way, which involves thinking of all possibilities, scenarios and contingencies and making a complete set of rules. It also allows more of an element of comparability. That is important for the global economy because, if an accountant or an investor is trying to make a decision about two companies in different jurisdictions that do not have comparable standards in their accounting reporting, how are they to know whether one company is doing better in one area than the other? The principles-based approach, when it has the adherence of more countries, will allow people to compare two sets of accounts. Given that each country has its own set of rules, taking a rules-based approach makes life incredibly difficult.

John Mason: I take that point. The argument around principles applies to countries as well as companies. How does the bill that we are discussing fit into that? Is it more principles based? It is claimed to be.

Dr Poon: I think that the bill is quite similar to what we are getting in UK tax legislation.

Justine Riccomini: I think that it is a reasonable place to start. However, as we have said, it might need to look at things in a slightly different way—almost in a philosophical way. As Heidi Poon has said, if you try to think of every scenario in which someone could possibly avoid paying tax, you will be on a losing streak, because you cannot think of everything that everybody will ever do. People will always find a way around things. That is what tax advisers are employed to do, generally.

If the regulations were more principles based rather than trying to be more prescriptive, that would be a much better place to start. It would probably be a good idea for the Scottish Parliament to consult people such as the gentleman whom Heidi Poon mentioned, and the Office of Tax Simplification in England. I have a lot of dealings with a guy called John Whiting who works there. I am on a committee of national employment tax experts that works with the Office of Tax Simplification to change employment taxation completely so that it is easier to administer. At the moment, with all the share schemes, the expats and everything else, it is exceptionally complicated. Such an approach would also introduce some consistency of reporting with companies and individuals. Making things simpler would make it easier for everyone.

To add to the point that you made at the beginning, I am not sure that the simplification of the tax regime in the UK is necessarily working. In trying to simplify everything, we seem to be making the system more complicated—it is growing arms and legs. We need to be chopping off its arms and legs and trying to contain it. I think that that is happening because we are still trying to

tax everything that moves instead of looking at things from a more philosophical point of view.

John Mason: I have a huge amount of sympathy with what both of you are saying, although other witnesses have said that they like the slight move that is being made towards principles but that they do not want what we do to be too different from what the UK is doing, because some taxpayers operate in both systems and they might get confused if the two systems were too different. Is that a danger?

Dr Poon: It is about having a system that is simple enough to understand. Quite a radical rethink is necessary. I will give an example of what I am talking about.

I might not be right, as I left Hong Kong many years ago, but I think that the tax system there, in what is a small country in land miles, is based on territorial ties. When it comes to international tax law, either a country gets the nexus to tax a source of income because it happens to be in that jurisdiction—it arises in that country—or it taxes according to the residency of the person. Most jurisdictions have a mixture of both, which means that they end up having double taxation relief, because a source of income can be taxed in one country when it is owned by a person who is resident in another country.

As a small place, Hong Kong operates a territorial, source-based tax. The approach there does not involve thinking about where someone is resident. That takes away a suite of legislation for determining where a person is resident. Just the source of the income that arises in the territory—whether it arises from employment, a corporation or consumption—is taxed. That is a simpler system to administer, because it involves dealing with just one nexus and it avoids the complication of another nexus coming in and a decision having to be made about source and residency and who has the right to tax. When there is a competing interest, it is necessary to have another set of rules in order to decide how to give relief and which country to give the primary right to.

That could be a highly effective model for a smaller jurisdiction such as Scotland. It would eliminate all the questions about how to tax a person who is resident in Scotland as well as England, which opens the floodgates on determinations. Would we have the resources to deal with what is an extremely common occurrence? People could just change their residency to suit their tax bill.

John Mason: You raise some big issues, which should probably have been raised before the bill was written.

Dr Poon: I think that we are at the second stage. I have talked about the GAAR and so on. The issue is how we apply it to other tax legislation.

The committee is thinking about the new law that will bring in a new tax regime for Scotland. That is the time to think about how to use the principles-based approach.

John Mason: I do not want to go on for too long, but Ms Riccomini mentioned the idea of openness. You said that there should be more openness and that you are not happy with the present system. We have heard about other countries where everyone's tax return is published. I believe that some countries even give their top 10 taxpayers a prize at the end of the year. Would you want to go down that route of having complete openness? There is an argument that says that every taxpayer pays money to the state, so every taxpayer should have all their tax returns published.

Justine Riccomini: I am not sure about the human rights or privacy side of that. That would need to be thought about before we went to that level of openness.

If Scotland had the opportunity to raise its own taxes, have its own tax jurisdiction and make its own legislation, it could do something revolutionary rather than just following what everybody else is doing. You have the ability to draft legislation differently because it has not been done yet. You are only at the tip of the iceberg. That gives Scotland's Government the opportunity to present itself as exceptionally open, honest and absolutely transparent, which is very important these days. That is what people want. It is half the reason that people do not turn out to vote and that companies think twice about whether they want to invest in a country or employ people there. They need to understand what a country is all about and how it functions. If the people who live in Scotland's jurisdiction can see that, it could attract new business to Scotland, attract a different level of compliance from its people and create a new culture that does not exist in the UK because everybody is so disenfranchised.

John Mason: That is helpful and interesting. Thank you very much.

The Convener: Paragraph 16 of Dr Poon's submission says:

"There is little in the Bill to suggest what the criteria for selecting a mediator are."

I ask her to give us some suggestions for what those criteria could be.

Dr Poon: Competence in the technical aspects will be one important criterion. The mediator must understand the tax that is in dispute and be able to understand both sides of the argument. I am thinking about something that is a little lower than

the tribunal but which has the same kind of robustness in technical judgment. The mediator needs to be conversant with the tax law, which gives credibility to the decision.

The mediator must also be independent. They should not be appointed by revenue Scotland. They should also have experience in adjudicating.

The Convener: Are there any further points that the witnesses want to bring to the committee's attention?

Dr Poon: I have a point on the simplification of tax law. When John Whiting came to speak to the tribunal judges conference, he mentioned that 100 pages of tax legislation had been removed in two years but, in those two years, Parliament added back 1,000 pages.

The Convener: Your submission includes details about the size of the orange and yellow handbooks. You say:

"The publisher Lexis Nexis states the 2012/13 Tolley's Orange and Yellow Handbooks at 18,634 pages".

You go on to say how many pages there are excluding the non-statutory and other material. Going through that is complex enough in itself. It is quite mind-numbing. Clearly, it is almost impossible for anyone to have a full grasp of that—if, indeed, it is possible at all, which I doubt. Simplification is an issue that the committee has grasped.

Dr Poon: That takes us back to the question of how successful tax simplification has been. It is hard to work with and simplify something that has grown to that size because it is not possible to work on the foundation. In Scotland, we have a chance to work on the foundation and create a different structure that will not grow in that shape.

The Convener: Thank you very much for that. On that note, we end the evidence-taking session.

I will allow a brief suspension for a change of witnesses and to give members a natural break.

10:31

Meeting suspended.

10:43

On resuming—

Courts Reform (Scotland): Financial Memorandum

The Convener: Agenda item 2 is an evidence-taking session with the Association of Personal Injury Lawyers and the Faculty of Advocates as part of our scrutiny of the financial memorandum to the Courts Reform (Scotland) Bill.

I welcome to the meeting Ronnie Conway of the Association of Personal Injury Lawyers and James Wolffe QC of the Faculty of Advocates. Members will remember that a short time ago Mr Wolffe gave evidence to the committee in a slightly different capacity.

There will be no opening speeches. I am sure that both witnesses know how the committee works: after I ask some opening questions, I will widen the session to include committee colleagues, one of whom already has their name down for the first question. The witnesses should feel free to respond to any question that is asked; Mr Wolffe might or might not wish to come in on a question for Mr Conway, and vice versa.

Without further ado, I will ask Mr Conway the first question. Paragraph 3 of APIL's submission, which refers to the proposed exclusive competence threshold of the sheriff court, says:

"APIL has recommended a limit of £30,000 based on evidence collected, and arguments outlined in the evidence to the justice committee. We refute absolutely the assumption at paragraph 75 of the financial memorandum that only 80 per cent of personal injury cases will move to the sheriff court as a result of this Bill".

Can you give us a wee bit of information on your estimate of what the figure should be?

Ronnie Conway (Association of Personal Injury Lawyers): Yes. With the committee's permission, I will begin by talking about the figures that the Government has used.

This matter goes back to the civil courts review. The critical figure is not the sum that is sued for but the settlement figure. Lawyers routinely inflate or—if you wish to use the word—exaggerate the sum that is sued for, because the court cannot award more than has been asked for. A nightmare for practitioners such as James Wolffe and myself is a judge saying, "I would have awarded such and such, but because the sum sued for was such and such, I cannot award that much." As a result, the sum that is sued for is routinely around a third higher than the real value of the case. If the profession had known that civil servants were going to place such an emphasis on that, we might have adopted a different approach.

Originally, there were two sets of data. In the first set, which related to cases over a two-week period, only the sum that was sued for was looked at. After a certain scoping, it was found that around a third of those cases would have downshifted to the sheriff court under the proposed system.

The second set of data was produced by an insurer, whose response was based on its own files. It is fair to say that everyone who has looked at that data has done so with considerable reservations and caution. As the Scottish Parliament information centre briefing suggests, it is not clear whether that cohort is truly representative. Although the bill's proponents seemed to want that data to be interrogated further, the Government told them that that was not possible because of confidentiality. Confidentiality might well attach to the names of the parties, but they could easily be redacted, and it is difficult to see on what other basis confidentiality could operate.

APIL commissioned its own research from Alex Quinn & Partners, which, as a firm of law accountants that routinely acts for both pursuers and defenders, does not hold the ring for any particular constituency. It looked at five or six firms that specialise in Court of Session work; they were told to submit all their cases over a period of a month, and those 53 cases formed a cohort and were followed through to their outcome. The details of that research have been sent to the Government and were attached to our submission to the Justice Committee, which took evidence yesterday.

Those figures are far more robust and reliable and can be interrogated. The only confidential aspect is the clients' names, but other than those, we are quite happy to make the full details of those 53 cases available. Given that only two resulted in a settlement of over £150,000, we are looking at a downshift not of 80 but of 95 or 96 per cent.

It appears that a fear in the civil courts review is that pursuers' firms will somehow subvert whatever legislation is made by simply exaggerating the sum that is sued for and thereby getting a ticket into the Court of Session. That is why—it is said—the limit should be as high as £150,000, which is much higher than that in any other jurisdiction in the United Kingdom and that in the Republic of Ireland.

The suggestion also seems to be that a pursuer's firm could do that sort of thing with impunity. That is a misconception and a misrepresentation of the current situation, because, at the end of the day, the basis on which costs are awarded depends on the settlement figure.

I will give an example from the present system. In the case Brown v Sabre, which was heard last week in the Court of Session, the sum that was sued for was something like £15,000 and the case settled at £6,500. Lord Boyd's decision was that the settlement figure indicated that the case should never have been brought in the Court of Session; he then reduced costs on the basis that it should have been raised in the sheriff court, and said that there would be no sanction for counsel. I do not directly know the personnel involved, but we can take it that the firm in question will not behave in that way again.

There is no doubt that there must be behavioural change. The proponents of the legislation are absolutely right to say that cases must be shifted out of the Court of Session because there are too many low-value cases in it. However, the limit is too high, and it means that the cases go straight from low value to high value. As I said yesterday to the Justice Committee, modesty is relative in every walk of life, but I suggest that, if you were to ask your constituents, "Is £50,000 a modest sum of money? Is £150,000 a modest sum of money?", they would look at you as if you were mad. Our scoping suggests that the Government has consistently underestimated the downshift of cases.

We also think that the Government has overestimated the settlement rate of cases. When the settlement figure in the Court of Session was last checked in research carried out in 2008, it was found that 98 per cent of cases were settled, mainly at the door of the court. Certain procedural drivers for that settlement process just do not exist in the sheriff court. The first is the availability of counsel. Our position is not that there should be automatic sanction for counsel, but we feel that counsel should be sanctioned in appropriate cases. The fact is that they are a driver to settlement. In the Court of Session, there is a compulsory face-to-face meeting and a no-excuses, no-adjournment culture in which four days are allocated and people must be prepared and ready to turn up.

Our written submission to the Justice Committee highlights an analogous case—a low-value case in Hamilton sheriff court—that bounces around. Only one day was allocated to the case at the start of the process—the time is allocated about six months in advance—but when the case began, it became clear that a further two or three days were required. The day before those two or three days were due to commence, the parties were told that a criminal jury trial had run over and that the sheriff was obliged to deal with that, and the case had to call twice as a procedural hearing to get further dates allocated. The whole evidence-taking and submission procedure took over a year.

Every practitioner in the sheriff court knows that it is creaking under tremendous pressure, but the proposal is to pass the best part of 2,600 or 2,700 cases down to those courts without additional resources—and I wish to make it plain that this is about funding and resources. Our concern about the Government's projections is that it appears to be throwing sixes at every point of the process. It is looking at the most optimistic downshift numbers—it appears to have ignored the April figures—and the most optimistic settlement figures. We think that the Government's 80 per cent figure is an underestimate, but even if we were talking about 85 or 90 rather than 98 out of 100 cases, we would still need at least another five or six sheriffs.

I realise that I am speaking without written material, convener. Since we first saw the financial memorandum, we have been working on scopings and projections, which we would be happy to make available to the committee, if it would find that of interest.

The Convener: Thank you for that detailed answer, Mr Conway.

I am sure that Mr Wolffe will wish to comment. On the basis of the evidence that has been collected, APIL has suggested a limit of £30,000. What is the view of the Faculty of Advocates?

James Wolffe QC (Faculty of Advocates): I will pick up one or two of the points that Ronnie Conway made.

First, on the data on which the bill is based, the discussion of the statistics on page 19 of the SPICe briefing reflects the fact that the bill is based on one respondent's comparison of 93 Court of Session cases and 94 sheriff court cases over a three-year period. To be fair, in a footnote that is quoted in the SPICe briefing, the civil courts review itself recognised the data's statistical limitations—that is perhaps an understatement. I do not know what the numbers are, but over a period of three years thousands of cases must have gone through the system. We should therefore appreciate the limitations of the data.

On the £30,000 figure that has been suggested and the impact that it would have, one should, as Ronnie Conway observed, really look at the settlement figure rather than the sum that is being sued for. Our response to the Justice Committee includes data that was made available to us on a cohort of just over 1,000 cases that were raised in 2011 and 2012. According to that data, 70 per cent of those cases settled for £20,000 or less, which means that, if the settlement value was the relevant figure and was set at £20,000, 70 per cent of the cases in that cohort would have been shifted from the Court of Session to the sheriff court. That gives the committee a sense of the scale of what could be achieved with a significantly lower limit than the proposed £150,000.

I amplify Ronnie Conway's observation about how the court deals with the reality that, for perfectly proper and good reasons, the sum that is sued for will often—and sometimes by some margin—exceed the settlement figure. The bill contains an obligation on the Court of Session to remit to the sheriff courts any case in which at any point it appears to the court that its value—assuming liability and no contributing negligence—is lower than whatever limit is fixed. As I understand it, it is envisaged that such cases will be called before and considered by a judge at an early stage, and if they feel that, on the most optimistic view, the case is not worth a figure that is over the Court of Session's exclusive competence limit, it will be sent to the sheriff court. Pressure will also be brought to bear in the way expenses are dealt with.

As for personal injury cases, the £150,000 limit seems way beyond what is necessary. However, I want to make a point about non-personal injury cases. The driver for this part of the bill is very much the phenomenon that the Court of Session's efficiency and effectiveness in its handling of personal injury cases has led to a significant volume of cases in the personal injury field that are at the lower end of the value scale being raised in the Court of Session.

11:00

The proposal is to apply the same £150,000 limit in the non-personal injury field. I am not aware of any evidence that makes the case that non-personal injury cases, particularly commercial ones, are being brought inappropriately to the Court of Session. One of our concerns is that in the non-personal injury field, particularly on the commercial side, there is a real risk of compelling commercial and other litigants who for good reasons choose to come to the Court of Session to bring their cases to their local sheriff courts instead.

Like APIL, we recognise that it is appropriate to increase the limit and, again like APIL, we suggest that it would be appropriate to have a figure that equates to the £30,000 limit that they have in Northern Ireland. That limit was increased from £15,000 only in February 2013. The Northern Ireland comparison is an interesting one, because the system there operates in a different way. In Northern Ireland, if a case is worth more than £30,000, it has to go to the High Court.

Ronnie Conway: Listening to Mr Wolffe, I am aware that I might not have answered your question properly. We started off considering the

shape of the Court of Session as described in the civil courts review. Lord Gill, the review's prime author, said that after the reforms 65 per cent of cases would be heard in the sheriff courts and 35 per cent in the Court of Session, and we felt, as a result, the Court of Session would be retained as a court of first instance. I will not repeat what was said to the Justice Committee yesterday about why that is so important.

We looked for a figure that, first, would commend itself to the public and secondly, and perhaps more important, would meet that projection and leave the Court of Session with about a third of cases at first instance. A histogram—I am told that it should, in fact, be described as a scattergram—that is based on settlement figures and which was attached to the submission to the Justice Committee makes it perfectly clear that a £30,000 limit would do the trick.

The Convener: I am glad that there is some unanimity on that. That is clear evidence for the committee.

The financial memorandum notes that the number of cases heard at first instance at sheriff court level has decreased by 36 per cent since 2008-09. Mr Conway, you have spoken about the sheriff courts. In your submission, you used the phrase "creaking at the seams", and you emphasised just a few minutes ago that that is the situation that the system is in. With a 30 per cent reduction, there is perhaps greater scope for such cases to be dealt with in the sheriff court. That is why neither you nor Mr Wolffe disputes the fact that some of the cases should move to the sheriff court; the question is about the level of cases that should go to the sheriff court.

Ronnie Conway: I practise in the sheriff court and the Court of Session. I appreciate that this is only anecdotal, but the sheriff court is under huge time constraints. The analysis in the civil courts review was that the current legal system is "slow, inefficient and expensive"—too expensive. Only the first two aspects of that analysis—slowness and inefficiency—applied to the sheriff court. There is no dispute about the fact that the Court of Session is too expensive for low-value cases. It is a Rolls-Royce system.

The problem with the 30 per cent reduction is that we have to consider the make-up of the cohort of cases. It seems to us, from considering the civil judicial statistics, that probably around 50,000 of the cases in the sheriff court are debt or repossession cases. Those cases consume administrative resources, but they do not really consume judicial resources. Anything substantive, such as personal injury work, will involve a significant input of judicial resources.

I saw a comment in which one of the Government officials asked how the proposed shift in cases could possibly make any difference, given that it represents only 3 per cent of the overall case load. In relation to the number of cases that will come down to the sheriff court—2,500—I will not repeat what has already been said about the figures, but the cases that do not settle will require procedural input, as motions for sanction for counsel will become a matter of routine. Those do not appear to me to have been factored into the figures anywhere. There will be four days of proof allocated. All that would need to happen would be for a clinical negligence case to be brought—such cases routinely run to eight or 12 days—or a long-running personal injury matter involving some disease, and the system would be completely overwhelmed.

I have seen what the statistics say, and there is a reduction in litigation generally. However, concentrating on the top figures does not do justice to what is happening on the ground.

James Wolffe: We unequivocally support the need for improvement in the way in which the sheriff court operates, particularly for contested and more complex litigation. Given the information that I have received from my members, I endorse what Ronnie Conway has said.

One general concern about the context of the bill that is before us—much of which I unequivocally support for the reason that I have just stated—is that the ultimate vision for improving the way in which the court operates involves a shift to what is described as active case management. That is described on pages 8 and 9 of the SPICe briefing, and it involves more active judicial engagement with cases. I have a general concern about how that will be achieved in the context of a financial memorandum that does not suggest that any more resource is to be put into the system.

In thinking about the sheriff court dealing with additional cases and the 3 per cent figure, it is important that we distinguish between personal injury cases and the others, because the expectation is that personal injury cases will go to a new national personal injury sheriff court. We can consider the proposed resourcing of that court—I suspect that Ronnie Conway is better placed than I am to speak about whether the anticipated resourcing of that court will be adequate.

Let us consider the non-personal injury cases, in particular the commercial cases. According to the civil courts review figures, about a quarter of the cases that were brought to the commercial court at the time of the review would be below the £150,000 limit. Those are cases that were brought to the commercial court, one anticipates, because

the pursuer or, in some cases, both parties may have taken the view, on advice, that the nature of the case, the issues involved and the likely complexity of the dispute made the case suitable for bringing to the commercial court.

The bill implies that those litigants will be compelled to take the case to whatever local sheriff court happens to be the right one for it. One can assume that those cases are likely to be more complex and difficult, and one suspects that they are likely to be contested. They are precisely the sort of cases that, as I understand it, the sheriff court does not handle terribly well. By no means do I want to tar the whole sheriff court system with the same brush, but there are problems and they are not going to be helped by moving the cases in question to individual sheriff courts.

Ultimately, though, I am concerned about the litigants who currently choose, for good reasons, to go to the Court of Session for the particular service that that court can provide. At a time when everyone accepts that the sheriff court reform process will take 10 years and investment if it is to realise its aims, those litigants will be compelled from the outset to take their cases to the sheriff court.

The Convener: Time is marching on and I want to allow committee colleagues to come in, so although I have a number of further questions, I will restrict myself to asking one.

Mr Wolffe, with regard to the financial memorandum, the submission from the Faculty of Advocates states:

"The estimated impact on the Legal Aid board (paras 94-97) is unlikely to be accurate."

What do you believe that the impact will be?

James Wolffe: The first point to make is that the overwhelming majority of personal injury cases are not funded out of public funds. Essentially, in the Court of Session—at least, as I understand it—the pursuer's representatives act on the speculative basis of no win, no fee. Such cases are not supported by public funds. It is fair to say that Ronnie Conway is probably better placed to speak to this matter but, as I understand it, the cases that are funded by the Scottish Legal Aid Board tend to be the clinical negligence cases, the ones that are more complicated and the ones that, for one reason or another, are not supported through the speculative mechanism.

The Legal Aid Board is rightly quite cautious about the way in which it puts the estimate. If I recall correctly, it says that the saving could be up to £1.2 million, but it rightly observes that that is likely to kick in only over a period of time. The issue for me is that, if the board is currently supporting the more complex and difficult cases, they are the very cases in which one would have thought it likely to be true that the involvement of counsel will continue to be justified. I therefore think that there must be a question mark, at the very least, about the validity of the assumption that there will be a 50 per cent saving.

The Convener: Mr Conway, APIL said in its written submission:

"The costs in the financial memorandum are barely penetrable".

Can you respond to the question that I have asked about the Legal Aid Board?

Ronnie Conway: Indeed. I am very grateful to you, because APIL has a constant problem with the figures. I am reluctant to be too dogmatic about matters, because we do not appear to have access to the back-story research, so to speak. However, the idea that £1.2 million will be saved to the public purse is complete smoke and mirrors. If a substantial saving is to be made, it will be made to the insurance industry. With regard to the figures in paragraphs 94 to 97 of the financial memorandum, the Legal Aid Board does not pay £2.4 million to the Faculty of Advocates, except in an accounting sense—it is an accounting protocol.

As Mr Wolffe indicated and as the figures show, at least nine out of 10 of the cases in question are successful. The Legal Aid Board says that the figure is 85 per cent. It complains that it gets dumped with the hardest cases, so if 85 per cent of the hardest cases are successful, we can imagine what is happening with the rest of them.

11:15

As an accounting protocol, let us say that I sue Mr Wolffe in his capacity as an insurer and I get £100,000. I am legally aided and I get £25,000 of costs. I will have to send that £25,000 of costs to the Legal Aid Board, which will pay it back to me as fees. Again, the caveats are in the submission. According to the figures in the financial memorandum, £4.9 million in total was paid out by the Legal Aid Board. That is not a net figure. The true cost of the whole reparation budget is 15 per cent of that, or £735,000.

Of course, the Legal Aid Board has a stringent list of occasions on which legal aid might be available. First, in the Court of Session, legal aid is available only if someone meets the quite stringent requirement that the case is worth more than £50,000. The Legal Aid Board is the gatekeeper as far as that is concerned.

In the sheriff court, the test is much tougher, both in theory and in practice. The idea that savings will be made to the public purse even out of that £735,000 is illusory. In my view, it is completely wrong. It is not acceptable for the

Legal Aid Board to suggest to members of this committee, the Justice Committee and the wider body of MSPs that there will be a saving to the public purse. There might be savings in the sense that counsel will be excluded in some low-value or modest cases, but the saving will be made by the insurance industry, not the public.

The Convener: Thank you for that clear response. I open up the questioning to members.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): I was going to structure my questions around costs first and then savings, but as we are on legal aid, which I have asked about, let us do it the other way around and see what savings we can establish from the bill. Clearly, Mr Conway is saying that the legal aid savings will not materialise, and I understand that there are two reasons for that: a recovery of costs issue; and the fact that counsel will still be required.

Perhaps this question is for Mr Wolffe. To what extent do you think that there will be less use of counsel as a result of the changes, or do you not see a significant change in that regard?

James Wolffe: It is difficult because, as Mr Conway has said, one does not know precisely how the figures have been reached. As I understand it, legal aid in the personal injury world is supporting the more complex cases that are likely to be the ones in which counsel will continue to be required if they are to be conducted properly.

In its submission to the committee, the Legal Aid Board recognises that there will be an issue with the recovery of costs and is quite cautious about the savings. It says that

"the savings in a full year could range from £800,000 to £1.2m"

and

"the savings may be lower in the first few years".

I just question how robust any of these numbers are, given the nature of the cases that the board is supporting.

Malcolm Chisholm: This is going to put more pressure on the sheriff courts, which Mr Conway has suggested are already under pressure, in terms of costs and staff. Mr Conway, is it your assumption that there will be additional costs for the sheriff courts? Are you assuming that more staff will be required?

Ronnie Conway: My understanding from the financial memorandum is that existing administrative staff will be deployed. There seems to be some suggestion that Court of Session clerical staff might be downshifted to the sheriff court—and be paid a bit less. I am not sure what they think of that, but that is what the assumption appears to be. From an admin support point of view, we do not have major concerns.

We do, however, have major concerns about the information technology support. The civil law review was scathing about the technological situation in the sheriff court. If any of you ever visit your own local sheriff court, you will see that we are barely in the analogue age, never mind the digital age. One of the big advantages in the Court of Session is what are called the e-motions. There are electronic communications with the court and between parties; procedural decisions are sent out immediately to the parties electronically; and there is electronic recording of evidence. We are dismayed, to put it no higher, to find that the whole IT budget for the new specialist personal injury court and 16 specialist personal injury centres in various sheriffdoms is £10,000. There is no back story to that. On the face of it, it seems an extremely economical estimate.

James Wolffe: The very short submission that you have from the Sheriffs Association expresses concern that the pressure of increased business in the sheriff court has been underestimated. It points to other pressures that might be coming sheriffs' way arising from the abolition of corroboration. One does not want to get into other areas of controversy, but it is worth looking at the very short submission that you have from the Sheriffs Association.

I want to pick up Mr Chisholm's question about the use of counsel, which I took to be directed specifically to the legal aid number. There is of course the much broader issue of the impact that the shift of business into the sheriff court might have on counsel more generally and, ultimately, of the loss to pursuers, who currently have the benefit of counsel acting on a speculative basis, of the ability to instruct counsel in personal injury work. I thought that your question went more to the legal aid number than to that issue.

Malcolm Chisholm: Is it your assumption that there will be a requirement for additional sheriffs in the sheriff court, Mr Conway?

Ronnie Conway: Yes, Mr Chisholm—I should have said that to you the first time round. On our scoping figures, we will need between four and six additional sheriffs, depending on what the downshift is and what the settlement figures are. Our suggestion is that there should be a specialist personal injury court in Edinburgh and one in Glasgow, which would need to be funded. The Government would need to take into account additional judicial salaries at the sheriff rate. We have no argument with the idea that summary sheriffs would result in a saving to the Government. At present, it appears that it would work on a one-person-in, one-person-out basis. There would be no significant short-term saving,

but the scoping over 10 years appears to us to be right.

In many respects, I have to say that the idea of a third judicial tier is a masterstroke and it should be implemented even as a stand-alone measure. However, to start with the civil courts review, which identifies precisely the problems with the legal system that exist in the sheriff court, and then say, "Here are another 3,000 cases with no new resources and no IT funding," is counterintuitive, to put it at its mildest.

Malcolm Chisholm: Are you saying that you will need summary sheriffs plus extra sheriffs?

Ronnie Conway: Yes, plus extra sheriffs to deal with the ordinary cases.

Malcolm Chisholm: Paragraph 83 of the financial memorandum suggests that using personal injury sheriffs, as against judges, would save money, but is there any proposal to reduce the number of judges in the Court of Session as a result of the bill?

Ronnie Conway: That is an excellent question. The financial memorandum seems to scope in some kind of judicial saving but, as you pointed out, no judicial savings will be made while the number of judges is the same. Some scoping has been done on the introduction of summary sheriffs over 10 years. Given that all judges have a specific retirement age, it would not be difficult to spell out the intentions for the Court of Session. If the same number of judges sit in the Court of Session, no savings will be made there.

It would interest members of the legal profession and the public to know what the proponents of the legislation have in mind for the Court of Session. Is it to have 35 judges in the next 10 years or so? The policy memorandum and the financial memorandum are silent on that, although it is something that we should know.

Malcolm Chisholm: You say in your submission that the Court of Session will lose fee income from personal injury cases, which I presume could be a financial problem, too.

Ronnie Conway: That is the major black hole in the financial proposals. The figures that APIL has obtained under freedom of information rules show that the total fees fund income—that is, the amount that parties pay; it is the price of admission into court, so to speak—in 2011-12, which provides more or less representative figures, was £4.6 million. Of that, personal injury cases contributed something like £2.3 million, which is 50 per cent of the fees fund dues.

The analogous figure in the sheriff court, for a similar number of cases, is £804,000. I would be happy to send details on that. On average, a Court of Session case generates about £750 for the Scottish Court Service, while a sheriff court case generates about £238. If that is multiplied by 2,000 or so cases, the difference is huge.

We have calculated that the fees fund loss to the Scottish Court Service will be just short of £1 million, which appears nowhere in the financial memorandum. There is a hint of a suggestion that the reforms will be financed by fee income. Am I being unduly cynical in thinking that the sheriff court fees will have to be more than doubled to make up for the lost fee income? They will have to be doubled for a product that I suggest is of markedly inferior quality. Whether or not that is right, we should know what is in mind.

The Convener: It is a good job that we have the bill team to follow. We will ask it all these questions.

John Mason: I do not know whether Mr Conway's copy of his submission has numbered paragraphs. Do you have paragraph 10, under "Savings to the Scottish Legal Aid Board"?

Ronnie Conway: Yes.

John Mason: I think that this is just a typographical error, but some of the millions in that paragraph might not be the right figures. The fifth line of that paragraph refers to "£6,337 million", which I suspect is meant to be £6.337 million.

Ronnie Conway: You are right.

John Mason: There are a few figures like that. Perhaps we can correct that for the record.

Ronnie Conway: Thank you for reading that into the record.

John Mason: We are talking about dots and commas and things like that.

Ronnie Conway: Yes.

11:30

John Mason: It has been suggested that we should invest quite a lot more in IT and that, compared with other areas of life, £10,000 seems small. Could some of that be self-funding? I presume that shorthand writers come at quite a cost and that, over time, there would not be an extra cost but a saving if we invested in IT?

Ronnie Conway: Yes, we want investment in IT. You are absolutely right to make that point. At present, in the sheriff court, on all matters with a value of more than £5,000, the parties have to employ and pay for a shorthand writer.

John Mason: Who would make the decision to change that and put in a lot of investment? Would it be Government money? Would the Government have to take the initiative or could the situation be changed in another way?

Ronnie Conway: It has to be the Government that takes the initiative. It has already done so in the Court of Session. A few years back, the Government spent a considerable amount on upgrading the Court of Session. Electronic recording equipment needs to be provided. At present, parties pay for a shorthand writer, but I do not think that it would be workable for parties to pay for electronic recording of evidence. I go back to my original point that we cannot be too dogmatic about the issue. It might be decided just to transfer the existing case management system in the Court of Session to the specialist personal injury court, and there will be no further cost. That is a possibility, but the financial memorandum does not say that, and nor does it deal with the equipment problems and the other 16 specialist centres.

John Mason: We have heard that the court system as a whole is slow, inefficient and expensive and that the sheriff courts are the slow and inefficient bit. We have also heard that a clinical negligence case can take eight to 12 days, although I am not sure whether that is in all types of court. Has that changed over time? Those in other professions, along with cleaners and everybody else, have to do things more quickly than they did 20 years ago. We are told that the sheriff courts are under considerable pressure, but are things done more quickly than they were 20 years ago, or is it just the same?

Ronnie Conway: That is a big question. I have been in practice for more than 20 years. Are things exactly the same? A personal injury case involves fact-based work. There has to be an interrogation of the factual questions through examination and cross-examination of witnesses. I am speaking on the hoof here, but there has certainly been an injection of expert evidence into the area at all levels. We now have experts talking about health and safety and medical situations. The process is now much more complicated, which is of course why the civil courts review talked about specialisation. The answer is that things are not done any more quickly.

John Mason: There is pressure on costs right across the board. For example, people are in hospital less than they used to be, so someone might stay in hospital for one night, whereas previously it would have been four. I am not from a legal background, so I speak as an outsider but, before I recommended spending more money on the system, I would want to be convinced that costs are being pushed down and that things are being done more efficiently than they were in the past and are being speeded up. Everybody else is speeding up, and I wonder whether the courts and the legal profession have been left behind.

Ronnie Conway: It is certainly an interesting point. I am not trying to dodge it, but I take refuge in the analysis in the civil courts review, which did not see any basis for the kind of speeding up of process that you describe. I have to say that it does not really exist in any other jurisdiction.

John Mason: I am certainly not supporting Portuguese lawyers against Scottish ones, for instance.

Ronnie Conway: No, I am sorry—I should have said “in any other UK jurisdiction.”

As I say, that is an interesting point, and I have not really given it a great deal of thought. I take refuge in the fact that better minds than mine have spent a lot of time analysing the system and have failed to find the kind of savings that you have described.

James Wolffe: There have been substantial changes in certain parts of the system, which illustrates that a great deal can sometimes be achieved by reform to the way in which we go about things.

In the personal injury field, the chapter 43 procedure, which is the specialist personal injury procedure in the Court of Session, works extremely efficiently, as I understand it. One of the reasons for that is that a timetable is fixed right at the outset of the case. Included in that timetable is a compulsory meeting ahead of any hearing of evidence, at which the parties are expected to come along and discuss the case. Mr Conway can speak about the practicalities of that, but my understanding is that that has been a very effective way to encourage cases to settle at an earlier point.

One of the proposals that are currently on the table for personal injury work is the introduction of what is called a pre-action protocol. In effect, that is a compulsory procedure that parties need to go through before they raise an action. The aim is to encourage cases to settle at as early a stage as possible. The pre-action protocol could create an environment in which one would hope and expect that defenders would settle a case promptly if they saw that there was merit in it and if that is what they wanted to do, thus avoiding the expense of litigation.

Under the inner house appeal court procedure, there was a time not all that long ago when practitioners would have to say to clients that, once a case was in the inner house, it would take far too long before getting to a hearing. It is the perception of the profession that the inner house has substantially improved the system, through a series of practical procedural reforms that front-load the work. It is not necessarily cheaper for the litigant, but a lot of work is now done earlier in the process of an appeal—for example, drafting notes

of argument and preparing the papers. The aim of that is to save time in court, ultimately. My impression is that those reforms have been very effective.

There are things that can be done, have been done and are being done to make the court part of the process work more efficiently. As I have said, that does not always save costs to the litigants. The inner house reforms are a good example of saving time in court and loading the cost in at a different stage in the process.

John Mason: That sounds extremely positive to me.

James Wolffe: Absolutely.

John Mason: We are being told that it is the court time that is clogged up in the sheriff courts so, if you could repeat the process in the sheriff courts, you might make some progress.

James Wolffe: It would be wrong for the committee to get the impression that the courts operate in an antediluvian or Victorian way in which nothing has been done or can be done. Things have been done and are being done. The civil courts review has a vision of a sheriff court working much more effectively, using specialist sheriffs and case management. The third judicial tier, as Ronnie Conway says, is a masterstroke of dividing up the specialisation of the business. The question that one has to ask, particularly in considering active judicial case management, which will necessarily involve more judge time in examining a case at an earlier stage, is whether that can really be achieved within a budget that remains constant.

John Mason: It seems from what you were saying earlier that the practicalities are such that, because the sheriff courts are dealing with a mixture of cases, a criminal one can go over time and throw the whole system.

James Wolffe: A very important point, which relates to what to some degree is the elephant in the room for the civil courts proposals, is that our courts deal with both criminal business and civil business and, for very good reasons, criminal business has to be given priority in the system. We are proud of our time limits for the swift dispatch of criminal business and one would hate to see those change. That has an impact on the ability of the system to deal with the civil business. It is a difficult management exercise, which those within the system handle well. It is part of the system that, if a sheriff is sitting doing a criminal trial, he is not available to do anything else until that is finished.

Ronnie Conway: I am grateful to my friend, because he has reminded me of what I should have known already. Since antediluvian days, there has been, first of all, a pre-action protocol. At present, that is a voluntary scheme that parties have to opt into, but most insurers and almost all claimant lawyers are in favour of it. It involves, before any court action is raised, a cards-on-the-table approach being taken to what the case is about. It is extremely successful. The civil courts review's recommendation is that it should be compulsory and my understanding is that the Scottish Civil Justice Council will take steps to make it compulsory. APIL is absolutely in favour of that. That first sift seeks to prevent cases from ever getting near a court.

Once cases get to the court, the technical answer is that the process that is followed is what is known as chapter 43 procedure, which was introduced in the Court of Session seven or eight years ago, I think. There is no judicial case management; it is what is known as a case-flow model. Parties have to put their full case on the table. There is no trial by ambush and there are no surprises. There has to be a face-to-face settlement meeting. That is what has achieved a 98 per cent settlement rate in cases in the Court of Session. Elaine Samuel carried out an evaluation of chapter 43 procedure for the Scottish Government. I appreciate that I have given a technical answer, but we do things much better than we did 20 years ago.

James Wolffe: It is perhaps important to note that the Government has established the Scottish Civil Justice Council precisely to drive all of that through. We are always supportive of these sorts of reforms.

Gavin Brown: Most of my issues have been covered. The one that has not is that paragraph 12 of the Faculty of Advocates submission states:

> "the involvement of counsel can facilitate settlement of cases; and it is possible that more cases will, in fact, run to proof if counsel are less frequently used."

Is there any empirical evidence that backs that up? Can you point the committee towards anything that backs up the suggestion that that may happen if counsel are used less frequently?

James Wolffe: I should say that I do not personally practise in the field of personal injury, but it is reported to me that in the sheriff court we now have what is in effect the equivalent of chapter 43. It is reported to me by my members that that has not replicated the same level of efficiency as has been achieved in the Court of Session. It is reported to me that part of it is to do with the culture of the way in which counsel deal with cases. If counsel are involved at an early stage, they will identify the key issues and the evidence that is required and they will advise what investigations are required. If skilled counsel who are experienced in the field are talking to one another, they all know exactly what the law is and

where the issues are. That process of experts who understand exactly how the system works talking to one another facilitates settlement. Ronnie Conway is probably better placed than I am to comment on the matter.

Ronnie Conway: It is a very good question to ask whether there is empirical evidence. There is no empirical evidence one way or another. Interestingly, the author of the research that I just mentioned, Elaine Samuel, suggested that, for reasons outlined by Mr Wolffe, the sheriff courts would not achieve the same settlement levels. My feeling is that they do not, but I do not have empirical evidence. No one has.

11:45

The Convener: That concludes questions from the committee. Are there any final brief points that you would like to make before we wind up the evidence-taking session?

James Wolffe: I have one point to make. I appreciate that the committee has been focusing on the costs and savings to the public purse. Another issue is the cost to litigants.

I ask you to note table 3 in the SPICe briefing, which sets out figures on the ratio of total expenses to value of settlement in the Court of Session. If one looks not to the sum sued for but to the average value of the settlement as the relevant figure, for the reasons that we have already discussed, the costs involved start to exceed the value of the settlement below £20,000. When looking at those figures, one always has to appreciate that, to an extent, there is a fixed cost in running a case at all, which one has to factor in. Therefore, inevitably, as one gets to the lower-value end of cases, the ratio of what the case costs to its value will be greater.

Ronnie Conway: The only point that I wish to make relates to the sheriff appeal court. It is partly a policy point, but it is also a finance point.

At the time of the civil courts review, the suggestion was that there would be an appeal court that would have a bench of three sheriffs principal to deal with appeals from the sheriff court. It would be a national appeal court and it would be very difficult to take a further appeal from that court to the inner house of the Court of Session. The civil courts review said that that would provide a quality appellate structure that would involve a body of persons—three minds being better than one—at minimal cost and expense.

However, the appeal court of three sheriffs principal has disappeared from the proposals. We are now talking about an appeal to a single person who does not even have to be a sheriff principal but may be a sheriff of one year's standing; an onward appeal from there to the Court of Session being granted only in exceptional circumstances; and, further, business operations or business exigencies in the Court of Session being a factor in whether the appeal will be allowed to go forward.

It seems to me that someone has crunched the numbers on the proposals somewhere. They do not add up and we are looking at cheese paring right across the board. You will take it that I do not think that that is acceptable as a matter of policy, but it is also an illustration of the difficulties that the proponents of the bill have in finding a financial basis for it.

I am very grateful to you.

The Convener: Thank you. The committee is very grateful to both of you for your comprehensive evidence.

I will now call another short break for members before we start our final evidence-taking session of the meeting.

11:49

Meeting suspended.

11:54

On resuming—

The Convener: We continue our consideration of the financial memorandum to the Courts Reform (Scotland) Bill by taking evidence from the Scottish Government bill team. I welcome to the meeting Cameron Stewart, bill team leader; Jan Marshall, deputy director, civil law and legal system division; and Ewan Bruce, finance directorate.

As there will be no statement from the bill team, we will go straight to questions. As usual, I will ask the opening questions and then open out the session to colleagues. The witnesses will have heard much, if not all, of what was said in the previous evidence session, so I will first ask some questions that are based on that.

My first question relates to the additional burden—if I can put it that way—on the sheriff court system. The very brief submission from the Sheriffs Association, which was referred to, says:

"the abolition of corroboration and the move toward a reduction in level discretion afforded to the crown in relation to marking cases is likely to result in a significantly greater increase in the number of prosecutions than is currently estimated."

We know that the financial memorandum talks about a 36 per cent reduction in cases over the past five years. Notwithstanding that, additional cases will almost certainly arise through the

abolition of the requirement for corroboration and the Courts Reform (Scotland) Bill. How will the sheriff court system be able to cope? What will be the bill's cost implications in that regard?

Cameron Stewart (Scottish Government): First, the 36 per cent reduction that we talk about is to do with the civil case load in the sheriff court. Obviously, the provisions on corroboration in the Criminal Justice (Scotland) Bill affect the criminal case load.

The Convener: But there is still an impact on the sheriff courts.

Cameron Stewart: There is still an impact on the sheriff court system as a whole, of course. Obviously, because we deal with civil court reform, we focused on the civil case load. That is why we put that information in the financial memorandum.

We have had discussions on the Criminal Justice (Scotland) Bill—on which I know that the committee also took evidence—and the increase in criminal cases that we saw was not fundamental: I think that there was a 6 per cent increase in solemn cases and around a 1 per cent increase in summary cases. Taking into account the reductions in the civil case load that have been discussed, we would not see that increase really having an effect on the management of business in the sheriff court.

The Convener: Okay. APIL says that, in order to transfer work effectively from the Court of Session to the sheriff court, another half a dozen or so sheriffs would really be needed, but you do not accept that.

Cameron Stewart: No, we do not. We expect the vast majority of cases that come out of the Court of Session to be heard at the new specialised personal injury sheriff court, so they will not really be affected by criminal business. That will be a separate court that deals only with that personal injury business, so we do not accept that further resource will be required.

Jan Marshall (Scottish Government): May I pick up on a point, convener?

The Convener: Of course.

Jan Marshall: We heard the evidence from APIL and the Faculty of Advocates, and there was a lot of discussion about settlement. It is important to have a sense of perspective on the volume of cases that are likely to have to be processed through the sheriff court and, in particular, the volume of cases that are likely to come to proof. We have heard this morning that approximately 98 per cent of cases that are raised in the sheriff court settle and do not come to proof.

I refer to the financial memorandum. It is expected that, with the reforms, around 2,700 cases may be passed on to the sheriff court, of which I believe around 2,000 will be personal injury cases. The vast majority of those cases are likely to settle. Currently, around 30 cases proceed to proof in the Court of Session—I think that that information is in the financial memorandum. Given the statistics from the Scottish Court Service, we believe that less than 4 per cent of cases that go through the sheriff court proceed to proof. It is important to keep a sense of proportion on the volume. A substantial volume will transfer from the Court of Session, but that does not represent a substantial volume going to proof, given the statistics on cases that are already in the sheriff courts. It is also worth mentioning that 67 per cent of all personal injury cases are already heard in the sheriff court.

There is another point that I want to make about the ability of the sheriff court to cope with an increase in volume. Again, that has to be put into context. It is not the case that the reforms are transferring a substantial volume of cases out of the Court of Session for no good reason, because the reforms will drive efficiencies.

12:00

For example, there are proposals to introduce a case management system, and I anticipate that we will hear more about what is proposed for IT systems. There is the idea that we will also increase efficiencies by having judicial continuity. The sheriff court rules will be changed to accommodate those efficiencies and the better management of cases. There is also the proposal to introduce the summary sheriff system, which will allow cases to be dealt with at the tier of the judiciary that is appropriate to the value and complexity of the case.

It is important that we do not look at only one aspect of the proposed reforms in isolation, because all the proposed reforms will have an impact and help to deliver the objectives of the overall court reform agenda.

The Convener: Thanks very much for that helpful response.

The bill will increase the limit for the sheriff court's privative jurisdiction—to be retitled "exclusive competence"—from £5,000 to £150,000. The financial memorandum describes that as

"a pragmatic driver to shift business from the Court of Session to the sheriff courts."

You heard the evidence from the Faculty of Advocates and APIL, which both believe, for reasons that they explained, that £30,000 would be a better parameter for that. Why did you pick the specific sum of £150,000? What is your

response to the earlier evidence that you heard on that issue?

Jan Marshall: One of the main drivers of Lord Gill's review was the proposal to transfer a substantial part of the business from the Court of Session. The key aim was to remove lower-value cases, because the Court of Session is not thought to be the appropriate forum for such cases. Table 12 in the financial memorandum shows different models based on where the privative jurisdiction limit is set. It was felt that if, as part of the reform, the Court of Session dealt only with cases with a value in excess of £150,000, that would remove a substantial part of the Court of Session's business. That is the intention of the reform.

The Convener: Okay.

Cameron Stewart: I think that Jan Marshall touched on this in her previous answer, but the £30,000 figure used by APIL and the Faculty of Advocates is based on the settlement figure at the end of a case, whereas we based our figures on the sum sued for at the start of a case. We did so because the pursuer's suggestion for how much the case is worth makes the jurisdiction to which the case should go obvious right at the start. In comparing the sum sued for and the settlement figure, we are comparing two slightly different things. We based exclusive competence and our reforms on the sum sued for figure of £150,000.

The Convener: Why did you pick that route?

Cameron Stewart: We picked it because it is not known at the start of a case what the case will settle for, so the forum to which the case should go could not be chosen on that basis. The only figure that we have at that point is the sum sued for, which is why that figure was picked as the basis for making that choice.

The Convener: Okay.

You will have heard in the earlier evidence that £1 million in fees could be lost if cases are transferred from the Court of Session, where the fee is £750, to the sheriff court, where, according to Mr Conway, the fee is £238. According to my arithmetic, that gap could be bridged only if the sheriff court fee were trebled. If 67 per cent of personal injury cases are already dealt with in the sheriff court, perhaps we are not talking about an overall trebling, but we could still be talking about a significant increase across the board in sheriff court fees, which would obviously impact on the two thirds of personal injury cases that go to the sheriff court at the moment. What is your view on that impact?

Cameron Stewart: Court fees in general, including sheriff court fees, are set in Scottish statutory instruments. The most recent SSIs, which set fees for the following three years, went through in 2012. The fees are based on historical decisions taken on fee levels that are recommended by the SCS; ultimately, they are agreed by the Scottish Parliament. The SCS is looking at court fees post reform and at the three-year cycle for fees. The SCS will consult at some point next year on the next fee levels, so it will take the issue into account in its decisions post reform.

Fees are set on the basis of the SCS's modelling work and decisions, put to public consultation and then brought to Parliament to be voted on. That will continue to be the process. We do not know what effect changes to different business levels might have on future court fees, but the SCS will fully consult on the matter at an appropriate time.

The Convener: The point that Mr Conway made, and which I will raise, is that if business is being transferred from the Court of Session to the sheriff court, which means that the fees are being lost to the public purse, how will a saving to the public purse be made? As things stand, the transfer would have the effect of reducing fees by a seven-figure sum.

Cameron Stewart: I have not looked at the APIL figures in detail, so I will not comment on them.

The Convener: In general, surely it will have an impact on the public purse if people do not pay fees to the Court of Session because their cases are transferred to the sheriff court, where the fee is less than a third of that in the Court of Session. In each instance, the fee will be £500 or so less. When that is multiplied by the number of cases that are transferred, surely that will have an impact on the public purse.

Cameron Stewart: The fees are used to cover the costs of cases. The assumption is that, when cases go down to the sheriff court, the costs are lower, so the fees are lower, although fees must cover some static costs, such as estate costs. In a future fee round, that might have to be looked at. However, we do not expect a substantial effect.

The Convener: Fair enough.

I will raise another point that was made in evidence this morning. This is my final question before I open out the session to colleagues, who probably have lots of questions and will want to follow up in depth on things that I have mentioned.

APIL's submission says:

"There seems no correlation anywhere with the figures in the financial memorandum which say that the Board paid out a total of £4.9 million, of which £2.4 million was paid to counsel".

That refers to paragraph 97 of the financial memorandum. Mr Conway suggested that the real figure that was paid to counsel was about £735,000. How did you come to your figures? We want to reconcile the different viewpoints.

Jan Marshall: We must make the point clearly that the figures were provided to the Scottish Government by the Scottish Legal Aid Board. In working on the reforms and preparing the accompanying documents, we worked with our justice delivery partners. The information on the legal aid contribution came from the Legal Aid Board.

The fair point was made in this morning's evidence that the figures that the board provided are set out tentatively. In its submission to the committee, the board made it clear that a range of savings could be made.

As I said, the figures came from the Legal Aid Board. If the committee wishes to have further information on the specifics, we could arrange for the board to write to it, or the committee could write direct to the board.

Gavin Brown: Were our previous witnesses correct when they said that court fee income is not covered at all in the financial memorandum?

Cameron Stewart: In the financial memorandum, we covered how the reforms would be funded, but we did not go into great detail on the level of fee income. The section on court fees, which starts in paragraph 26, outlines how the reforms will be funded. The most recent court fee orders were passed in 2012. As part of that process, the Parliament agreed to an increase of 1 per cent on top of the inflation rate. That increase is being used to fund the reforms.

Gavin Brown: Does what the earlier witnesses said about the bill's impact on court fee income have resonance? They contend that approximately £1 million per annum in fees would be lost to the Court Service if fee levels were unchanged. Have you looked at that? Does that figure sound accurate? Is it miles off the mark? What is the bill team's official position on the £1 million figure that was cited to the committee?

Cameron Stewart: We have looked at the effect that the level of court fees would have on the parties, but the witnesses are correct that we have not looked at the overall effect on the public purse. Therefore, I cannot say right now whether that £1 million figure is correct, but I am happy to get back to the committee on that.

Gavin Brown: Is that a commitment?

Cameron Stewart: Yes—definitely.

Gavin Brown: From table 2 in the financial memorandum, which is on potential recurring costs and savings, it seems that pretty much everything is a saving, apart from the cost of £8,000 for the initial judicial structures and £29,000 for the Crown Office and Procurator Fiscal Service. A £1 million loss per annum would be pretty significant in relation to the potential recurring costs and savings.

Cameron Stewart: Obviously, the fee income reflects the court cases that take place at the time. The fees are charged to recover the costs of cases. I do not think that the position would be as stark as suggested.

Jan Marshall: We are reliant on a third party—the Scottish Court Service, which is another of our justice delivery partners—to provide us with the information on fee income and its funding. Paragraph 31 in the financial memorandum, which was prepared in collaboration with our partners, makes it clear that the Court Service has told us that

"the current fee income is on track to ensure that the costs of the reforms can be met."

If additional information is required about the impact of the reduction in overall fee income on the delivery of the reforms, we would have to go back to the Scottish Court Service for that.

Gavin Brown: For clarity, will the bill team provide that information to the committee?

Cameron Stewart: Yes.

Gavin Brown: Thank you.

The IT set-up costs for the personal injury court have been set in the financial memorandum at £10,000, but earlier witnesses suggested that that figure is low. Can you explain how it was reached?

Cameron Stewart: That £10,000 is just to update the current database to ensure that it can be used. However, the SCS has a separate project to totally revamp civil IT systems across the sheriff court estate. That is separate from the bill, so it is not covered in the financial memorandum. It is a separate part of the reforms that are being taken forward through the making justice work programme.

Gavin Brown: So the only IT costs relating to the personal injury court and resulting directly from the changes that will be brought about by the bill will be £10,000.

Cameron Stewart: That is for minor upgrades to the current IT system, before the new one comes on stream at a later date.

Jan Marshall: As Cameron Stewart said, the reforms in the bill are part of a wider reform agenda that the Scottish Government is participating in, along with our justice delivery partners. As Cameron mentioned, the overall

programme is called making justice work. As part of that programme, there is a digital strategy workstream. The Scottish Court Service has ambitious aims and objectives for introducing IT and reforming and refreshing its IT system, which I understand involves a multimillion pound investment. That takes me back to my original point that we cannot look at a particular aspect of the reform in isolation and have to look at things in the round. As I say, the reason why we will be able to deliver efficiencies is that other things are happening elsewhere as part of the overall reform package.

Gavin Brown: The convener asked why the threshold below which cases will go to the sheriff court has been set at £150,000, rather than the £30,000 that other witnesses have suggested. If the threshold was set at £30,000 rather than £150,000, what impact would that have on the financial memorandum?

Cameron Stewart: We did not consider the effect of a £30,000 threshold. Table 12 in the financial memorandum sets out that, with a £50,000 threshold, only 960 cases would be affected, which would be a huge difference from the more than 2,000 cases that will be affected by a £150,000 threshold.

Jan Marshall: Again, as Cameron Stewart said earlier, the Scottish Government is proceeding on the basis of considering the value of the claim as raised in the court action. The evidence that was given this morning proceeded on the basis of the settlement value of the claim. That means that we are not dealing with similar things.

12:15

Cameron Stewart: If not as many cases were being taken out of the Court of Session, there might not be a business driver for having a specialist personal injury court. If there were not enough cases for that court to work with, the savings from that level of business would not come through. Moving that substantial amount of business from the Court of Session to the sheriff courts is one of the major reforms.

Gavin Brown: I have a question about the costs of sheriffs or judicial deployment within sheriff courts, which relates to table 5 of the financial memorandum. You give a figure of 29,135 for the number of sitting days, based on 2011-12 deployments. You have various scenarios on the split between sheriffs and summary sheriffs but, regardless of how that is split, the number of sitting days will be 29,135. What is your central scenario for the number of additional cases going to the sheriff court?

Cameron Stewart: Again, that must be considered in relation to the declining civil case load. We are moving 2,700 cases down. Last year, there were just under 8,000 fewer cases in the sheriff courts. It is a small number of the majority of sheriff court cases that are heard.

Also, on sitting days, as you have already heard from the previous panel, a lot of the cases will not get to the stage of going to court, so I think that the financial memorandum suggests that we should expect a figure of 30. On the modelling that we have done with the Scottish Court Service, we do not expect there to be any requirement for an increase in sitting days to deal with that level of transfer of work.

Gavin Brown: In terms of your central scenario, how many cases do you think will be transferred to sheriff courts?

Cameron Stewart: From the Court of Session?

Gavin Brown: Yes. You have various models but, under your central scenario, how many do you think will be transferred?

Cameron Stewart: About 2,500.

Gavin Brown: So your position is that you can transfer 2,500 cases to the sheriff courts, but the overall number of sitting days will remain the same, at 29,135.

Cameron Stewart: Yes.

Gavin Brown: There would be no impact on the number of sitting days.

Cameron Stewart: The level of business is going down anyway, and the number of cases that get to court is very small. The modelling that we have considered does not suggest a requirement for an increase in sitting days. SCS will be able to give you more information on this in terms of business planning, but the number of sitting days is not generally driven by the total number of cases; it is more to do with the number of cases that get to proof stage and so on. The modelling work suggested that that level of business could be handled within those sitting days.

Gavin Brown: I just wanted clarity around that. I am not an expert on the matter at all. It just struck me as counterintuitive that that number of cases could be transferred without increasing the number of sitting days by even one day. However, that is your position.

Jan Marshall: Again, it must be borne in mind that things will be done differently. The anticipation is that the personal injury cases that come out of the Court of Session will go to the new personal injury court and there will be increased efficiency. It is not that we are drawing down 2,500 cases from the Court of Session and putting them into the existing structure in the sheriff courts.

The Convener: In response to my questions and those of Gavin Brown, you have said that information has come from third-party partners. However, obviously, the bill team has to come here and answer the Finance Committee's questions and the third-party partners do not. What steps have you taken to interrogate the figures that have been given to you by those third-party partners? On fees, there is clearly a gap in the sums that we have been discussing. Is it the case that you have asked your partners a question and they have come back with an answer and you have said, "That's fine"? How have you ensured that the figures that have been given to you are robust?

Cameron Stewart: Throughout the past year, we have worked with our partners to build up business cases for different parts of the reforms—we have worked with the SCS and the Scottish Legal Aid Board over a long period of time. Those business cases are what fed into the Government's position.

I agree that the fee income is one part on which we need to get more information, but we are happy to answer any questions on the rest of it. We would probably have to go back to the partners for any extra bit of detail or background work, but we worked with them to draw up the information. We have not simply received the information and included it without involving them.

The Convener: It is just that fees seem to be a significant part of the overall finances in the financial memorandum—not a few thousand pounds but a huge chunk of the potential saving to the public purse. That is why I am particularly concerned about that area.

Cameron Stewart: As I say, we are happy to look into that in more detail and get back to the committee as soon as possible on it.

Jan Marshall: I emphasise yet again that the driver of the reforms is not the savings to the public purse but improving efficiencies and access to justice for court users.

Malcolm Chisholm: I accept that last point, but the committee's job is to try to work out the financial implications of the proposals. Am I summarising your position correctly if I say that in spite of the extra work going to the sheriff court—quite a lot of which the previous witnesses said would be complex—you are saying that you can have the same number of staff and can substitute sheriffs with summary sheriffs over the next few years? Is that your basic position?

Cameron Stewart: That is the position, yes.

Malcolm Chisholm: Therefore, the significant savings in table 5 in the financial memorandum, at page 58, are because of summary sheriffs taking over from sheriffs. Is that right?

Cameron Stewart: That is right. The salary is different.

Malcolm Chisholm: So that is £2.4 million.

Cameron Stewart: If we went to a 50/50 split.

Malcolm Chisholm: Are you absolutely confident that, under equal pay legislation, you will be able to pay summary sheriffs significantly less than sheriffs?

Cameron Stewart: We have set out that the limit will be set by an independent body—the Senior Salaries Review Body. We have looked at what an equivalent judge in England gets and it is the lowest grade on the scale. We expect that, given the jurisdiction and competence of a summary sheriff, that is where the SSRB would place that role, which is a tier below the sheriffs. That is what we have based our planning assumptions on.

Malcolm Chisholm: Have you taken legal advice on that?

Cameron Stewart: We are comfortable that the SSRB will propose a salary that is sensible for summary sheriffs. Once that happens, we will consider it in detail.

Malcolm Chisholm: One of the major critiques of the financial memorandum from the previous witnesses concerned the assumptions on legal aid. Those were questioned on two grounds: that they did not seem to take account of recovery of costs, which covered a large part of it; and that there was an assumption that half of the legal aid payments to counsel would disappear, which was questioned in terms of what would happen in the sheriff court. What is your response to those points?

Cameron Stewart: As you know, the Scottish Legal Aid Board submitted evidence to the committee as well. It is confident—as are we—that the assumptions on legal aid include recovery of costs and the other issues that were raised. It took all those into account when building up the figure of between £800,000 and £1.2 million to which it came.

Malcolm Chisholm: So you just accepted the Scottish Legal Aid Board's figures.

Cameron Stewart: We worked with it, but it holds the data and, therefore, is able to find that out for us.

Malcolm Chisholm: Has it taken account of the recovery of costs in giving you those figures?

Cameron Stewart: Yes, it has.

Jan Marshall: Yes, in its evidence, it has said that it has taken into account contributions, recoveries and judicial expenses. It has explained that it has to make assumptions when forecasting and that that can be particularly complex in legal aid cases. It makes the point that it does not always make a recovery.

Malcolm Chisholm: However, it usually does.

What about the assumptions about half of the legal aid payments to counsel disappearing? What are they based on?

Cameron Stewart: SLAB examined the cases that it would expect to be in the tranche that would be transferred and considered the difference in what the counsel costs might be. As it admits in its submission, the latter is fairly complex and SLAB has to make a lot of assumptions. However, it has tried to examine the cases that would be affected, examine how much they cost it and consider how much of a saving would be made.

Malcolm Chisholm: What about the future of the Court of Session, which is obviously part of the costs? I raised that with the previous witnesses. Are those 34 judges still going to be there but not doing quite as much as they do now?

Cameron Stewart: The level of judges will be reviewed over time. There is no policy incentive to reduce the number of Court of Session judges but that will be under constant review.

Malcolm Chisholm: Will the reduction in fee income from the loss of personal injury fee income be a problem for the Court of Session?

Cameron Stewart: We will get back to you with more detail on fee income, but obviously that relates to recovery of the costs of a case. If there are fewer cases, there will be less need to raise that income.

Malcolm Chisholm: Yes, but we will still have the costs of the Court of Session.

Cameron Stewart: Yes, there are still static costs. As I say, we will get back to you with more detail.

Malcolm Chisholm: Gavin Brown covered quite extensively the issue of fee income but I want to be clear in my own head and I am not quite sure what your final position is. There is going to be a loss of £1 million of fee income. Do you believe that it will cost less to do all of this in the sheriff court or, if the fees stay the same, is there going to be some cost to the public purse? Is your assumption that it is going to cost £1 million less in the sheriff court than in the Court of Session?

Cameron Stewart: Yes, our general line is that it costs less to take cases through the sheriff courts than to take them through the Court of Session. That is why the sheriff court fees are lower than those for the Court of Session.

Malcolm Chisholm: Okay. I will let others take over.

The Convener: I am tempted to jump in but I want to make sure that everyone else has an opportunity.

John Mason: I just have one point because we have covered quite a lot of ground already. In its submission, the Faculty of Advocates questions the general principle

"that parties should bear the cost of civil actions through the setting of court fees at a level which recovers the costs to public funds".

Is it the case that the parties should cover 100 per cent of the costs? With the railways, for example, we say that the public purse will pay 50 per cent and the user will pay 50 per cent.

Cameron Stewart: It is not currently the case that full cost recovery has been reached. It is the policy that that will be the case in future. Currently, about 80 per cent of costs are recovered through fees. That is looked at every time that the fee orders are consulted on and put before Parliament. We are always moving towards the full cost recovery stage.

John Mason: What about the argument of the Faculty of Advocates and others that this is a public service and so it should have a subsidy? Has that been discounted?

Cameron Stewart: That is not an issue for this bill; it is a wider policy issue.

John Mason: But it is an assumption in this bill.

Cameron Stewart: It is an assumption in the bill because it is current policy.

Jean Urquhart (Highlands and Islands) (Ind): Ronnie Conway used the word "disappearance" about the appeal court, where there were three sheriffs principal and now there is one. I just wanted to ask about that.

Also, looking at the level of business going into sheriff courts, he first of all said that there would require to be an extra five or six sheriffs, but later he said that the figure would be four or five. Could you just explain the reasoning behind those changes and the declaration that you need more staff, not less?

Cameron Stewart: Mr Conway was correct in saying that Lord Gill suggested that there should be three sheriffs principal in the sheriff appeal court. The Scottish Government did not agree with that. We thought that one appeal sheriff would be sufficient because it replicates the current situation with civil appeals, which are generally heard by a sheriff principal on their own.

We put the Scottish Government's position out to consultation and the majority of respondents agreed that they like the benefits of a quick appeals system through a sheriff principal. The point of the sheriff appeal court in the bill is to replicate in the civil structure the benefits of having one appeal sheriff. The decision was not driven by costs, although obviously there will be an effect.

I have forgotten the second part of your question.

Jean Urquhart: Well, I was really asking you to explain someone else's statement. Ronnie Conway made the point that we require five or six, or four or five new sheriffs.

Cameron Stewart: We do not agree. Mr Conway's point was a general one, and we have covered that issue in response to Mr Brown's questions. We think that the current level of sheriffs is enough to handle the level of business.

The sheriff appeal court will be staffed by sheriffs principal and some experienced sheriffs of five years, working as a kind of pool and being used as and when necessary. We do not see a need to recruit any extra sheriffs.

12:30

Jean Urquhart: You have both said that refreshing the IT is important. The budget of £10,000 seems very small. Presumably, there is a bigger game plan to introduce new IT.

Cameron Stewart: The SCS has undertaken a separate project for its IT systems. It is doing a multimillion-pound project to introduce a brand-new civil IT system across sheriff courts. The £10,000 is only to update what it is currently using until the new system is ready to come on stream—it is only for really minor modifications to the current system. The full IT system is a multimillion-pound project—it is a lot bigger.

The Convener: That concludes questions from committee members, I think, but I have some more brief questions to ask myself.

The Law Society of Scotland states in paragraph 16 of its submission:

"The financial memorandum suggests 'one off' costs of £10,000 and £20,000, for instance, for the design and set up of the personal injury court and the sheriff appeal court respectively, developing the process, creating the training programme for appeal sheriffs and staff and confirming the operating model (paragraphs 138, 139). We believe that there will be significant 'one off' costs in creating a new training programme for specialist sheriffs, and continuing costs to train specialist sheriffs in their areas of expertise."

On how you came up with those sums, there must surely be on-going training costs, rather than just one-off costs. Sheriffs must be replaced, and surely new sheriffs have to be trained.

Cameron Stewart: Yes, that is true. Sheriffs obviously get a lot of training. We do not expect there to be a need for that training to increase. The planning assumption is that a summary sheriff will be recruited as a sheriff retires or leaves the bench. If it was not for the reforms, that sheriff would be replaced by another sheriff, not by a summary sheriff, and that sheriff would go through training as a summary sheriff will. We do not expect there to be an increase in the requirement for training; those concerned will need the same level of training as a sheriff currently gets.

The Convener: How were the sums of £10,000 and £20,000 arrived at?

Cameron Stewart: They took account of all the various factors that have been pointed out—designing a training programme and so on. They are ballpark figures for what would be required to do all the work.

The Convener: Fair enough.

I quote from the submission from the Faculty of Advocates:

"Paragraphs 18 and 155 of the Financial Memorandum are inaccurate and misleading. These state:

'In addition, the Faculty of Advocates have also expressed concern due to the reduction in cases in the Court of Session and the High Court as a result of these reforms, as advocates have exclusive rights of audience in these courts.'"

It continues:

"This statement is inaccurate and misleading in at least two respects:-

Advocates do not have exclusive rights of audience in the Court of Session and the High Court. Solicitors with higher court rights of audience also have rights of audience in those courts.

The Faculty of Advocates has expressed concern about two features of the Bill: the increase in the exclusive competence of the sheriff court and the creation of a sheriff appeal court. Although those features of the Bill will have a direct impact on the Faculty of Advocates"—

blah-blah-blah. Do you agree with the faculty that there are inaccuracies in the financial memorandum in those respects? If so, have you identified other inaccuracies in the financial memorandum since it was published?

Cameron Stewart: On those specific sentences, we would agree with the first point about "exclusive rights of audience". The faculty is right: solicitor advocates also have rights in the Court of Session.

Jan Marshall: That is clear from other paragraphs in the policy memorandum. That was simply an error.

Cameron Stewart: In paragraphs 85 and 132 of the financial memorandum, we make it clear that

solicitor advocates also have those rights. That was an error on our part.

On your second point, we believe that the rest of the financial memorandum is accurate.

The Convener: That is reassuring. There might be disagreement on whether it is, but it is interesting that you are of the view that everything else is correct.

Do you wish to point out anything else to the committee before we wind up this evidence session?

Jan Marshall: I will make one point regarding the policy intention and what the Government is trying to achieve. This does have a bearing on the financial impact, although it concerns the users of court services.

Part of the driver for the reforms is that, as Lord Gill identified in his review, parties who litigate in the Court of Session incur disproportionate costs. We picked that up in paragraph 83 of the policy memorandum, which says:

"At present, the amount paid to the lawyers on both sides of a low value claim in the Court of Session almost invariably exceeds the settlement figure of a claim or the amount awarded by the Court."

We have not really heard anything today about the benefits to court users. I would like to make the point—

The Convener: I am sorry to interrupt, but that was touched on at the beginning of the previous evidence session. That is why both previous witnesses suggested that the limit should be £30,000. Below that, the criteria are satisfied. I think that Mr Conway talked about that just before you came into the room. The Faculty of Advocates and APIL agree that there should be a transfer to the sheriff court; their point is about the level at which the transfer should take place.

Jan Marshall: It is fair to say that all respondents to the consultation supported the proposed reforms, but there was disagreement about the level. I have discussed the different approaches to fixing the level—whether it is based on the settlement figure or the sum that was sued for. I simply wanted to put a marker down that the initiatives are being taken forward to benefit efficiency generally and access to justice for court users.

Mr Wolffe questioned whether there would be a financial benefit in transferring non-PI cases from the Court of Session. I put on the record the point that we have had quite a bit of support from consumers and small businesses for the changes and for bringing such cases in the sheriff court.

The Convener: Thank you—that is helpful.

Meeting closed at 12:37.

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